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## RULE OF LAW IN THE EUROPEAN UNION

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## **INTRODUCTION: OBSERVING THE RULE OF LAW IN THE EUROPEAN UNION - SELECTED ISSUES**

With the ratification of the founding Treaties of the European Communities and the subsequent Treaties which define today's European Union, a new legal order has been created which is distinct both from national law and public international law. In one of its most celebrated early judgments the Court of Justice of the European Communities (ECJ) pointed out that by contrast with ordinary international treaties, the EEC Treaty [now EC Treaty] has created its own legal system which has become an integral part of the legal systems of the Member States and which their courts are bound to apply. A central characteristic of this autonomous legal order is that not only Member States are its subjects, but also their nationals. European law imposes obligations on individuals and confers upon them rights which become, as the ECJ has put it, part of their legal heritage. Mainly through the development of the doctrines of supremacy and direct effect of Community law, arguably the two most important constitutional cornerstones of today's supranational legal order, a complex multidimensional system of governance has emerged, in which both Member States and the European Union act in a law-making and executive capacity. Ensuring the democratic legitimacy and legality of the exercise of power, as well as the protection of the rights of individuals, in such a system is much more complex than in a state context.

The concept of the 'rule of law' is anything but well-defined, despite its wide acceptance and application. Indeed, while practicing lawyers, judges and legal scholars make regular reference to the concept, its actual scope and implications in today's legal systems is rather vague. Different approaches have been identified in the relevant literature which categorize the several and sometimes rather diverse elements into formal, substantive and functional definitions of the rule of law.<sup>1</sup> In search of a quantification of the phrase 'rule of law' Lord Bingham, former Lord Chief Justice of England and Wales, has suggested that the core of the rule of law should be

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<sup>1</sup> For a short but informative overview see e.g., World Bank, 'The Rule of Law as a Goal of Development Policy' at <<http://go.worldbank.org/DZETJ85MD0>> (accessed 7 December 2008).

... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.<sup>2</sup>

He identifies a number of elements which are useful in further defining the scope of the rule of law: accessibility, intelligibility and predictability of the law; limiting the exercise of discretion in questions of legal right and liability in favor of the application of law; non-discriminatory contents and application of the law; adequate protection of fundamental rights; right of unimpeded access to a court; exercise of state power within boundaries of law and possibility of effective judicial review; fair and transparent adjudicative procedures; observance of obligations in international law. Summarizing these elements it may be observed that the rule of law amounts to ‘... a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.’<sup>3</sup>

These elements of a legal system combine a formal with a functional approach to the rule of law, in that they do not only describe certain characteristics of the law or the legal system, whose presence or absence can be objectively observed and whose presence is considered desirable, but also allows for an assessment of how well a legal system performs certain functions which are believed to form a prerequisite for the rule of law. Prominently absent from Lord Bingham’s definition are elements more closely linked to the notion of democratic government. Indeed, the question whether democracy or democratic government forms an essential element of the theoretical concept of the rule of law remains subject of debates. However, in the constitutional reality of the European Union and its Member States, the exercise of power is closely linked to the concepts of parliamentary democracy, the separation of powers, as well as responsible government. In this context the judiciary plays a particularly important role. As was observed by Lord Hope of Craighead in the famous opinion of the House of the Lords of Appeal in the cause *Jackson and others (Appellants) v. Her Majesty’s Attorney General* concerning the legal validity of the British Fox Hunting Act 2004: ‘The rule of law enforced by the courts is the

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<sup>2</sup> The Rt. Hon Lord Bingham of Cornhill KG, House of Lords, *Sixth Sir David Williams Lecture: The Rule of Law* (2006) *University of Cambridge, Centre for Public Law* available at <[http://www.cpl.law.cam.ac.uk/past\\_activities/the\\_rt\\_hon\\_lord\\_bingham\\_the\\_rule\\_of\\_law.php](http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php)> (accessed 7 December 2008).

<sup>3</sup> H. Yu and A. Guernsey, ‘What is the Rule of Law’ *University of Iowa Center for International Finance and Development*, available at <[http://www.uiowa.edu/ifde/book/faq/Rule\\_of\\_Law.shtml](http://www.uiowa.edu/ifde/book/faq/Rule_of_Law.shtml)> (accessed 7 December 2008).

ultimate controlling factor on which our constitution is based.<sup>4</sup>

The importance of the rule of law in the European Union as a quasi-constitutional principle was recently highlighted by the ECJ in joined cases *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and European Commission*, where the Court had to decide, among other things, whether it was competent to review the legality of a Community Regulation which gave effect to an instrument of international law, i.e. the United Nations Financial Sanction Regime in the fight against terrorism. Answering this question in the affirmative, the ECJ emphasized that

... it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.<sup>5</sup>

Focusing on different relevant topics linked to the rule of law in the European Union, the contributions to the present issue of the *Erasmus Law Review* highlight both the ambiguity and broad scope of this notion, as well as its exceptional place in the European legal order; the application of the rule of law concept to a new, supranational legal order arguably being a contributing factor in this regard. In his contribution Dimitry Kochenov critically analyses the application of the rule of law as a supranational, Community legal construct, rather than a notion borrowed from the legal systems of the Member States. The author builds the case for the adoption of a substantive approach to the rule of law in the European context, emancipated from the different approaches in legal theory in the Member States, and rising above the level of a purely procedural safeguard. Interestingly, it is precisely these procedural safeguards which form the background to the contribution by Rachid Abdullah Khan and Gareth Davies. They pose the rather provocative question, whether one of the most important areas of European law, i.e. competition law and namely the law on mergers, can and should be referred to as *law* in the first place. Based on an analysis of merger control exercised in the European Union, the authors offer evidence for the assessment that actual practice points towards a policy of 'non-legal competition-regulation' that may not be fully subject to the rule of law. Finally, Wim Voermans' paper focuses on the longstanding issue of quality of European legislation. Indeed, poor legislation poses a serious challenge to the rule of law, as it may result in ineffectiveness, non-

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<sup>4</sup> *Jackson and others (Appellants) v. Her Majesty's Attorney General concerning the legal validity of the British Fox Hunting Act 2004* [2005] United Kingdom House of Lords Decisions 56 at para. 107.

<sup>5</sup> Joined cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* [2008] ECR I-nyp21 at para. 281.

compliance and market distortions. Against this background, the author critically analysis the scope and effectiveness of policies and instruments that have been put in place on the European level to improve the quality of European legislation. In this context it is emphasized that the outcome of an assessment of these efforts depends largely on the definition of the basic functions of European legislative instruments and the standards derived from it.

*Fabian Amtenbrink*

# **THE EU RULE OF LAW: CUTTING PATHS THROUGH CONFUSION**

*Dimitry Kochenov*\*

## **Abstract**

The Court of Justice of the European Communities (ECJ) has always been outspoken about the essence of the European Community (EC) as a Rule of Law Community. The notion of the Rule of Law entered the texts of the Treaty and arguably plays a crucial role in the Community legal order, serving as one of the fundamentals of ‘integration through law’. Yet, the analysis of numerous studies of the Rule of Law in Community context reveals that the understanding on the Rule of Law as a Community legal construct, as opposed to a notion borrowed from the legal systems of the Member States, is not receiving enough attention. Confusion persists between the Rule of Law as understood in the national contexts of the Member States and the Community concept, which presumably should be governed by EC law alone. This paper aims to bridge the gap between the obvious importance of the Community Rule of Law in the EC legal order and the country-specific vision, ascribed to the Rule of Law in each Member State, which results in a vague and even contradictory understanding of Community Rule of Law in different Member States, threatening to undermine the effectiveness and uniform application of Community Law throughout the entire territory of the Community. A substantive vision of Community Rule of Law is offered as a possible tool to be employed to this effect.

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## 1 Introduction and structure of the argument

As with democracy, the separation of powers, human rights, and the like, the Rule of Law<sup>1</sup> is a concept of overwhelming importance.<sup>2</sup> It is ‘not only a safeguard, but a legal embodiment of freedom’, as Hayek explained.<sup>3</sup> It plays a crucial role in the functioning of any modern democratic state.<sup>4</sup> The EU, a non-state entity sui-generis, also succumbed to the charm of this obviously attractive concept. It is clear, however, that a concept shaped in the context of a nation state legal system can hardly be transposed to the European legal order without any alteration of its meaning.<sup>5</sup> Given the profound differences that exist between the legal realities of the Community legal order and the legal orders of the Member States, one should always keep in mind Weiler’s warning of not confusing ‘oranges with apples’, initially issued in the context of a debate related to the transposition of the notion of democracy in such a way.<sup>6</sup>

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<sup>1</sup> This article develops and recontextualises the points made in D. Kochenov, *EU Enlargement and the Failure of Conditionality* (The Hague: Kluwer Law International 2008) at 98.

<sup>2</sup> Literature on the Rule of Law is abundant. See for example B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press 2004); T.J. Zywicki, ‘The Rule of Law, Freedom, and Prosperity’, (2003) 10 *Supreme Court Economic Review* 1; P. Costa and D. Zolo (eds.) *Lo Stato di diritto: Storia, teoria, critica* (Milano: Feltrinelli 2002); M. Rosenfeld ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) 74 *Southern California Law Review* 1307; P. Popelier, *Rechtszekerheid als beginsel voor behoorlijke regelgeving* (Antwerpen/Groningen: Intersentia Rechtswetenschappen 1997) at 35 (providing a good summary of literature); R.H. Fallon Jr., ‘“The Rule of Law” as a Concept in Constitutional Discourse’ (1997) 97 *Columbia Law Review* 1; M.J. Radin, ‘Reconsidering the Rule of Law’ (1989) 69 *Boston University Law Review* 781; J.W.M. Engels and others (eds.) *De rechtsstaat herdacht* (Zwolle: W.E.J. Tjeenk Willink 1989); W. Leisner, ‘L’État de droit – une contradiction?’ in M. Waline (ed.) *Receuil d’études en hommage à Charles Eisenmann* (Paris: Cujas 1977); N.S. Marsh, ‘The Rule of Law as a Supra-National Concept’ in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press 1961); A.L. Goodhart, ‘The Rule of Law and Absolute Sovereignty’ (1958) 106 *University of Pennsylvania Law Review* 7.

<sup>3</sup> F.A. von Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 1994 (1944)) at 90.

<sup>4</sup> On the relationship between the Rule of Law and democracy, see for example Kochenov above n. 1 at 110.

<sup>5</sup> Kochenov, ‘Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law’ (2004) 8 *European Integration online Papers* at 10.

<sup>6</sup> J.H.H. Weiler, *The Constitution for Europe* (Cambridge: Cambridge University Press 1999) at 268.

This article will make a number of observations on the nature of the EU Rule of Law, advocating strict separation between the Rule of Law as applied in the national legal context of the Member States and the Rule of Law to be employed within the system of Community law. It should be up to the EU law alone to define the essence of EU Rule of Law, and the filling of the concept should not change from Member State to Member State, following the change of legal system and the change of language. Indeed, a linguistic aspect plays a prominent role here, promoting confusion: charged with multiple national-legal connotations, the notions corresponding to the English 'Rule of Law' in the other 22 Community languages can clearly harm the unity of the EU Rule of Law.

Observations on the desired nature of the EU Rule of Law will require making important choices between the varying understandings of the Rule of Law apparent in the nation-state context before these can be applied at the Community and the Union level. The most important role here is to be played by the analysis of the doctrinal divide existing between the formal and the substantive approaches to the nature of the Rule of Law as understood in legal theory and accommodating the EU Rule of Law within this divide.

The article will proceed as follows: Firstly, as a starting point of the analysis a brief summary of doctrinal thinking on the Rule of Law will be provided, outlining both the importance and the potential vagueness of the notion, as well as the doctrinal differences existing between a number of conflicting approaches to the nature of the Rule of Law. To make a concise argument, the analysis contained in the article mostly builds on the Anglo-American approach to the concept, which suffices to introduce the reader to the complexity of the Rule of Law and to provide a background for the debate related to the possible problems connected with the formulation and the practical use of the EU Rule of Law. Needless to say, such an approach should not be taken as a denial of the added value of the corresponding continental concepts (2). Secondly, the present practice of using the notion of the Rule of Law in the Community (and, eventually, the Union) legal context will be discussed, outlining the legal roots of the concept in the Community legal order as well as the limitations of the dominant use of the concept (3). Thirdly, the essential traits of the Community Rule of Law-to-be will be suggested, building on the clashes between the analysis contained in the first and second parts of the article and suggesting a change in the use of the concept at the Community level (4). The paper concludes by arguing for a substantive concept of EU Rule of Law to be defined by EU Law itself (5).

## **2 Essential aspects of the concept**

The Rule of Law is both popular and vague. While every lawyer has a more

or less articulated idea regarding its meaning, these ideas are often in clear contradiction to each other. Consequently, any recourse to the Rule of Law begs for an explanation, clarifying what exactly is meant by the concept.

## 2.1 Popularity v. the lack of clarity

The Rule of Law is recognised by international legal instruments and is used by lawyers and policy-makers alike.<sup>7</sup> The ‘export of the Rule of Law’<sup>8</sup> became a prominent topic in the rhetoric of States and international organisations engaged in dealing with countries in transition and in the countries of the developing world.<sup>9</sup> The same also applies to the European Union, engaged in the promotion of the Rule of Law both in the context of its enlargements<sup>10</sup> and as part of its neighbourhood policy.<sup>11</sup> The concept is thus widely regarded as an absolutely necessary element destined to play a prominent role in any modern democratic legal system. Consequently, any legal system engaged in the export of the Rule of Law presumably allows this concept to play a prominent role internally as well. As a result of this, the Rule of Law is to be found virtually everywhere. This is not the self-image of the countries of the ‘first world’ only. On the contrary, just as with democracy, almost every regime in the world is more likely than not to presume its Rule of Law nature. It does not mean that all or the majority of jurisdictions in the world adhere to the ideals of the Rule of Law. The value of such a conclusion would obviously be marginal, since the omnipresence of the Rule of Law first of all suggests that the concept is sufficiently vague to be easily found in any legal system, which does not only play against its claimed importance but also allows questioning its essential components. It has even been claimed that ‘il successo del termine [Rule of Law] sia dato

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<sup>7</sup> UN Universal Declaration of Human Rights, GA res. 217 A (III) 10 Dec. 1948, U.N. Doc. A/810, Preamble, § 3; European Convention on Human Rights 4 Nov. 1950, ETS 005, Preamble, § 6.

<sup>8</sup> On this process, see for example J.C. Reitz, ‘Export of the Rule of Law’ (2003) 13 *Transnational Law & Contemporary Problems* 429.

<sup>9</sup> See T. Carothers, ‘Promoting the Rule of Law Abroad: The Problem of Knowledge’ *Rule of Law series Working paper No. 34* (Washington D.C.: Carnegie Endowment for International Peace WP 2003); M. Stephenson, *Rule of Law as a Goal of Development Policy*, available at <<http://www.worldbank.org>>; J.M. Ngugi, ‘Policing Neo-Liberal Reforms: The Rule of Law as an enabling and Restrictive Discourse’ (2005) 26 *University of Pennsylvania International Economic Law* 513.

<sup>10</sup> See Kochenov, above n. 1.

<sup>11</sup> For critique, see A. Magen, ‘The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?’ 12 *Columbia Journal of European Law* 384.

dalla sua vaghezza'.<sup>12</sup>

It becomes clear that notwithstanding the abundant references to the 'Rule of Law', the meaning of it is probably much less articulated than one might presuppose at first glance. Popularity and functionality of legal concepts do not go hand in hand. To agree with Brörtl, 'pure fashion or playing with words can hardly introduce real changes into the life of a State or a society'.<sup>13</sup> Those who find the concept important also point out that its meaning is far from clear.<sup>14</sup> Not only is the Rule of Law associated with different possible types of relationships between State and law and between law and moral but it is also rooted in different European legal traditions, making the scope of this notion, which is quite vague in any case, also dependent on the legal tradition in which the concept is used. Consequently, the scope of the Rule of Law, *État de droit*, *Rechtsstaat*, *Estado de derecho*, *Stato di diritto*, and so on, is highly diverse.<sup>15</sup>

The presence of this concept in EC law does not ease the tension between all its possible meanings. The European understanding of the Rule of Law is only at the stage of articulation. While a number of elements of it are quite clear, the general scope of the European Rule of Law is yet to be outlined.

## 2.2 Most often outlined components of the concept

At the core of the Rule of Law is the idea that any exercise of power should be subject to the law:<sup>16</sup> the Rule of Law, not men.<sup>17</sup> The concept does not

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<sup>12</sup> F. Biondo, 'Stato di diritto o stato di giustizia? Osservazioni critiche su un'alternativa troppo rigida' (2004) 4 *Diritto & questioni pubbliche* 7 at 7 [most likely, the term 'Rule of Law' is successful due to its vagueness].

<sup>13</sup> A. Brörtl, 'Challenges to the *Rechtsstaat*-Model in Slovakia' (1997) 17 *Rechtstheorie* 315.

<sup>14</sup> Carothers, above n. 9 at 8; Rosenfeld, above n. 2 at 1308; R. Grote 'Rule of Law, *Rechtsstaat* and *État de droit*' in C. Starck (ed.) *Constitutionalism, Universalism and Democracy – A Comparative Analysis* (Baden-Baden: Nomos Verlags-gesellschaft 1999) at 271; Fallon, above n. 2 at 1; Radin above n. 2 at 781; M. Scheltema, 'De *Rechtsstaat*', in J.W.M. Engels and others (eds.) *De rechtsstaat herdacht* (Zwolle: W.E.J. Tjeenk Willink 1989) at 11.

<sup>15</sup> For an extensive overview of the differences and similarities in question, see Grote, above at n. 14.

<sup>16</sup> See K. Popper, *The Open Society and Its Enemies* (Princeton: Princeton University Press 1971) (advocating the idea that any power, even that acquired democratically should be checked: the Rule of Law can limit democracy).

<sup>17</sup> U.S. Supreme Court, *Marbury v. Madison*, 5 U.S. 137, 163 (1803), where the government of laws is famously opposed to the government of men. The wording seems to originate in James Harrington's utopia *Oceania*, published in 1653. On the history of development of the concept of the Rule of Law see for example F.

leave room for any absolute arbitrary power.<sup>18</sup> Such an idea of government goes back to Locke<sup>19</sup> and the framers of the US Constitution<sup>20</sup> and was clarified at the end of the nineteenth century by A.V. Dicey in his seminal work 'Introduction to the Study of the Law of the Constitution'.<sup>21</sup>

Dicey outlined three main elements of the Rule of Law. The first is

absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, [which] excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.<sup>22</sup>

The second is

equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts.<sup>23</sup>

Lastly, Dicey submitted that

with us under the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.<sup>24</sup>

Although rooted in the English legal system of the time, Dicey's account captures the nature of the Rule of Law in general and remains one of the most influential to date.

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Dallmayr, 'Hermeneutics of the Rule of Law' (1990) 11 *Cardozo Law Review* 1449.

<sup>18</sup> Prohibiting the ultimate authority within a given system from being human and leaving it to the law. On the law as ultimate authority, see for example H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961); H. Kelsen *General Theory of Law and State* (Cambridge, Massachusetts: Harvard University Press, 1945).

<sup>19</sup> J. Locke, *Two Treatises of Government* (1698), (I. Shapiro (ed.)) (New Haven/London: Yale University Press 2003) Second Treatise, § 137, 160 *et seq.*

<sup>20</sup> As well as earlier constitutional documents. See for example Art. XXX of the Bill of Rights of the Constitution of Massachusetts, 1780: 'In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a *government of laws and not of men* (emphasis added).'

<sup>21</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London/New York: Macmillan and Co. 1907, 7<sup>th</sup> ed.).

<sup>22</sup> *Id.* at 198.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 199.

Most generally conceived, the Rule of Law requires, in accordance with Rosenfeld,

that the State only subject the citizenry to publicly promulgated laws, that the State's legislative function be separate from the adjudicative function, and that no one within the polity be above the law.<sup>25</sup>

Given the general character of such definitions, more detailed outlines of the meaning of the Rule of Law are clearly needed in order to grasp the meaning of the concept. One of the successful attempts to formulate the essence of the Rule of Law is that of Fallon.<sup>26</sup> Summarising the existing literature, Fallon formulated a five-element structure constituting the Rule of Law:<sup>27</sup>

1. 'The capacity of legal rules, standards or principles to guide people in the conduct of their affairs'.
2. 'Efficacy. The law should actually guide people'.
3. 'Stability. The law should be reasonably stable, in order to facilitate planning and co-ordinated action over time'.
4. 'Supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens'.
5. 'Impartial justice. Courts should be available to enforce the law and should employ fair procedures'.

Thus, the essence of the concept roughly includes guiding the citizen's conduct and limiting the government, the latter element being of particular importance.<sup>28</sup> It is vital not to confuse the Rule of Law with the 'law and order' advocated by the lawyers of authoritarian states, emphasising restraints on the citizens, not on government. Nevertheless, even having distinguished the authoritarian tendencies to misuse the concept, a

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<sup>25</sup> Rosenfeld, above n. 2 at 1307.

<sup>26</sup> Numerous other lists of elements of the concept have been suggested. See for example A. Arnull, 'The Rule of Law in the European Union' in A. Arnull and D. Wincott (eds.) *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press 2002) at 240; Popelier, above n. 2 at 98; J. Raz, 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195 at 198; L. Fuller, *The Morality of Law* (rev. ed.), (New Haven/London: Yale University Press 1964) at 38.

<sup>27</sup> Fallon, above n. 2 at 8.

<sup>28</sup> Limiting government is among the main aspects of constitutionalism. See also A. Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest/New York: Central European University 1999). Some scholars build their definitions of the Rule of Law almost exclusively on the idea of limiting government. See for example Popelier above n. 2 at 82: *Rechtsstaat is 'een dualistische visie op de verhouding tussen recht en staat, die een voortdurende poging inhoudt tot beperking van overheidswillekeur door de binding van de overheid aan het recht'*.

substantial number of different lists of the elements of the Rule of Law is still available, providing largely diverging definitions of the concept. This theoretical abundance is not always helpful in clarifying the meaning of the Rule of Law and can even cause doubt as to its usefulness and workability. To penetrate the veil of myriad divergent definitions offered by scholarly literature, a fairly structured approach to the essence of the Rule of Law is required.

### 2.3 Formal and substantive approaches to the Rule of Law

Two main views of the Rule of Law can be distinguished: formal (procedural) and substantive.<sup>29</sup> According to the former, the Rule of Law is vital for the effectiveness of the legal order and comes down to the rule by law, irrespective of the contents of the law.<sup>30</sup> According to the latter, the Rule of Law can only exist if the legal system in question embraces a particular public morality, the laws being valued for their content: namely, a clear distinction is made between ‘good’ and ‘bad’ laws. Thus, the substantive vision of the Rule of Law goes far beyond the formal one.

It seems extremely difficult, if at all possible, to choose between the two, since the concepts are clearly very different, if not contradictory. Advocates of the formal Rule of Law submit that determining when law is ‘good’ and when it is ‘bad’ would amount to complicated social philosophy and could result in the politicisation of the system:

laws would be condemned or upheld as being in conformity with, or contrary to, the Rule of Law in this substantive sense when the condemnation or praise would simply be reflective of attachment to one particular political theory.<sup>31</sup>

Raz emphasised that the Rule of Law is ‘just one of the virtues by which a legal system may be judged’,<sup>32</sup> pointing to the fact that coupling the principle of the Rule of Law with the formal assessment of the quality of the laws might lead to confusion between the Rule of Law on the one hand and democracy, justice, and equality on the other – thus making the concept totally unusable. Indeed, ‘we have no need to be converted to the rule of law

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<sup>29</sup> For details, see for example P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467; Radin, above n. 2 at 784; M.L. Fernandez Esteban, *The Rule of Law in the European Constitution* (The Hague/London/Boston: Kluwer 1999) at 91; also Biondo, above n. 12 at 11.

<sup>30</sup> Raz, above n. 26; R.S. Summers, ‘A Formal Theory of the Rule of Law’ (1993) 6 *Ratio Juris* 127. Dicey was also approaching the Rule of Law largely from the formal perspective. For the analysis of Dicey’s views in this light, see Craig, above n. 18 at 470; Kelsen, above n. 18 at 77.

<sup>31</sup> Craig, above n. 29 at 468 (discussing the views of Raz).

<sup>32</sup> Raz, above n. 26 at 196 (emphasis added).

just in order to discover that to believe in it is to believe that good should triumph.<sup>33</sup> However, it would be unwise always to turn a blind eye to the substance of the laws and to the goals they strive to achieve. In other words, while elaborate social-philosophical systems informing particular ‘thick’ concepts of the Rule of Law can ultimately undermine the principle, taking the contents of laws into account can be viewed as a natural requirement of any legal system striving to label itself as a Rule of Law regime. This can be especially acute in the context of development of the concept of Community Rule of Law, the Community largely being nothing but a consequence of the terrible cataclysms of the past century, which legal formalism failed to prevent. To agree with Biondo,

non si può separare la definizione di Stato di diritto dall’analisi di quali principi di giustizia sono sottesi alle particolari declinazioni dell’ideale del “governo delle leggi”.<sup>34</sup>

The formal conception of the Rule of Law boils down to two main ingredients: laws are passed correctly and legally by Parliament and they are ‘capable of guiding one’s conduct in order that one can plan one’s life’.<sup>35</sup> The substantive conception adds to this a requirement that law should be used to foster liberty and ‘capture and enforce moral rights’.<sup>36</sup> Making an analogy with the formal-substantive divide, if the Rule of Law is regarded merely as a procedural principle, it is possible to discuss the Rule of Law in a ‘narrow sense’,<sup>37</sup> contrasting it with a ‘broader sense’ of the Rule of Law. The working of the Rule of Law in the ‘narrow sense’ can have repugnant and unjust consequences. To illustrate this claim, it is sufficient to turn to the USA during the time of slavery.<sup>38</sup> To provide more recent examples, it has

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<sup>33</sup> *Id.*

<sup>34</sup> See Biondo, above n. 29 at 31 (it is impossible to separate the definition of the Rule of Law (*Stato di diritto*) from the analysis of the principles of justice informing the particular filling of the ideal of the rule by law (*governo delle leggi*)).

<sup>35</sup> See Craig, above n. 29 at 469. The latter element, writes Craig, includes a number of sub-elements: ‘that the laws should be prospective, not retrospective; that they should be relatively stable; that particular laws should be guided by open, general and clear rules; that there should be an independent judiciary; that there should be access to the courts; and that the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules.’

<sup>36</sup> R. Dworkin, *A Matter of Principle* (Cambridge, Massachusetts: Harvard University Press 1985) at 12; F.A. von Hayek, *The Political Ideal of the Rule of Law* (Cairo: National Bank of Egypt 1955); Fuller, above n. 26. (Radin claims that Fuller was an adherent of the formal Rule of Law theory: Radin, above n. 2, fn. 13).

<sup>37</sup> See Rosenfeld, above n. 2 at 1313.

<sup>38</sup> Consider Rosenfeld’s example of holding a federal law providing for the emancipation of a slave brought to federal territory unconstitutional as a deprivation

been pointed out that even the ‘principles used to organise Nazi Germany met in some formal sense the requirements of the Rule of Law’.<sup>39</sup>

The two visions of the Rule of Law are so substantively different that a clarification is always needed whenever criticism is levelled at the authority based on the substantive Rule of Law argument. If this critique is employed, as underlined by Craig, ‘then intellectual honesty requires that this is made clear, and it also demands clarity as to the particular theory of justice which informs the critique.’<sup>40</sup>

#### 2.4 Diverging understandings of the concept by different legal traditions

The Rule of Law controversy does not end at the formal-substantive divide. The differences between the content of the Rule of Law as understood in virtually any legal system in the world – obviously including all the EU Member States – add to the complexity of discovering what the Rule of Law could mean when transposed into the legal context of the European legal order with a view to making the best possible contribution to its functioning and development. The meaning of the concepts that correspond to the Rule of Law in the legal systems of EU Member States (and the candidate countries preparing to accede to the Union) differs to a considerable extent.<sup>41</sup> Since the legal systems of all modern democratic States only embrace certain elements of the concept and accord them different meanings, it is impossible to draw direct parallels between the national legal orders with respect to the precise meaning of the Rule of Law espoused by each system. As a consequence, even the correct translation of the term ‘Rule of Law’ into other languages is barely possible.<sup>42</sup>

These differences are analysed in the academic literature in

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of the master of his property right without due process of law: U.S. Supreme Court, *Dred Scott v. Sanford*, 60 U.S. 393, 459 (1857).

<sup>39</sup> R.A. Epstein, ‘Beyond the Rule of Law: Civic Virtue and Constitutional Structure’ (1987) 56 *George Washington Law Review* 152; Biondo, above n. 12 at 13. This observation would have been vigorously opposed by Hayek, who was suspicious of any ‘narrow technical meaning’ of the Rule of Law: Hayek, above n. 3 at 91 and also 80 & fn. 1, where he dismisses a narrow view espoused by Dicey. For a discussion of a fascinating example of successful application of the principles of the Rule of Law and equality to strike down ethnic segregation of students in pre-war Austrian universities by the Constitutional Court, going against main-stream anti-semitism see M.L. Marcus, ‘Austria’s Pre-War *Brown v. Board of Education*’ (2004) 32 *Fordham Urban Law Journal* 1.

<sup>40</sup> See Craig, above n. 29 at 487.

<sup>41</sup> F. Hoffmeister, ‘Changing Requirements for Membership’, in A. Ott and K. Inglis (eds.) *Handbook on European Enlargement: A Commentary on the Enlargement Process* (The Hague: T.M.C. Asser Press 2002) at 94.

<sup>42</sup> See Marsh, above n. 2 at 229.

sufficient detail.<sup>43</sup> A short example building on the essence of the *État de droit* and *Rechtsstaat* compared to the Rule of Law should suffice to provide an illustration. Thus, the *Rechtsstaat* can be viewed as ‘State rule through law’<sup>44</sup> and *État de droit* as ‘a means to vindicate fundamental rights through law’.<sup>45</sup> Clearly, both are essentially different from the Rule of Law discussed *supra*. This is not to say that other legal traditions know approaches to the Rule of Law simpler than the Anglo-American one; however, in all the European legal traditions the Rule of Law is a complex concept surrounded by academic debate. In discussing the Rule of Law, it is indispensable to bear in mind constantly the danger of oversimplification. Nevertheless, having a large number of different approaches to scope and meaning for the concept of the Rule of Law does not mean that any attempt to find the underlying core of these concepts discoverable in all its diverging manifestations are bound to be futile. On the contrary, it is believed that such generalisations are possible. Attempts to outline such a meta-concept of the Rule of Law have been made since the middle of the previous century, as lawyers have tried to produce a common vision of the Rule of Law on a world scale.<sup>46</sup> Such attempts notwithstanding, Rule of Law is simply not a universal concept, as research demonstrates.<sup>47</sup>

### 3 The nascent EU Rule of Law

Notwithstanding the difficulties related to diverging views on the substance of the Rule of Law to be observed in different legal systems and in scholarly

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<sup>43</sup> For a brief account of the differences, see for example Rosenfeld, above n. 2 at 1318; Grote, above n. 14; Fernandez Esteban, above n. 29 at 66. (all with further references, analyzing each notion). See also Costa and Zollo, above n. 2 at 173, for specific analyses of the English, American, German and French concepts largely corresponding to the Rule of Law and also their historical development.

<sup>44</sup> See Rosenfeld, above n. 2 at 1318; on *Rechtsstaat* see also Fernandez Esteban, above n. 28 at 81 et seq.

<sup>45</sup> See Rosenfeld, above n. 2. at 1329; see also Fernandez Esteban, above n. 29 at 75 et seq. (discussing the concept ‘*Règne de la Loi*’).

<sup>46</sup> See Marsh, above n. 2, *passim*. While such attempts at the world scale were far from successful (largely due to the Soviet concept of *Sotzialisticheskaja zakonnost* [Socialist legality] which, though being similar to the Rule of Law, was still too different), in the Western democracies this exercise was a success. Now that the Soviet empire has collapsed, there is no longer a conflict regarding this issue. On the comparison between Socialist legality and the Rule of Law, see Marsh, above n. 2 at 235; O.S. Ioffe and M.D. Shargorodsky, *Voprosy teorii prava* (Moskva: Juridicheskaja literatura 1961) at 267.

<sup>47</sup> For example D.J. Simsovic, ‘No Fixed Address: Universality and the Rule of Law’ (2001) 35 *Revue Juridique Themis* 739 at 772.

literature,<sup>48</sup> European law has also embraced this principle. Clearly, the Rule of Law has been one of the milestone principles of the law of the European Communities from the moment of their creation.<sup>49</sup>

### 3.1 Legal roots of the concept in Community and Union Law

Although not part of the Treaties until the Treaty of Maastricht entered into force,<sup>50</sup> the concept certainly played a significant role in Community law before that,<sup>51</sup> stemming from the case-law of the ECJ, from the Court's obligation to 'ensure that in the interpretation of [the] Treaty the law is observed',<sup>52</sup> as well as from the national constitutional traditions of the Member States, as a source of legal principles recognised by the ECJ.

With the introduction of a reference to the Rule of Law into the EU Treaty, the importance of the principle in EU law augmented drastically, codifying (in what is now Art. 6(1) EU) the long-recognised importance of this principle in the legal system of the Union and also reshaping the Rule of Law idea in general terms, making it one of the guiding written principles of European law. Article 7 EU also seems to be of importance in this regard, as serious and persistent breaches of the principle by the Member States can be sanctioned following the procedure described therein.<sup>53</sup> Although it can be claimed that Article 7 EU communicates the vital importance of this principle for the Union, the Member States-oriented nature of this provision should not be underestimated. It is not about the Rule of Law of the Community, but the Rule of Law of its constituent parts.

As well as Article 6(1) EU, the principle of the Rule of Law is also mentioned in the Preamble to the Charter of Fundamental Rights of the European Union.<sup>54</sup> The Lisbon Treaty, pending ratification, not only includes the Rule of Law in the list of values on which the Union is based but also

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<sup>48</sup> See n. 43 above.

<sup>49</sup> Scholars started thinking about the Rule of Law as a principle of the Community legal order very early in the process of integration. See for example G. Bebr, *Rule of Law within the European Communities* (Bruxelles: Institut d'Etudes Européennes de l'Université Libre de Bruxelles 1965).

<sup>50</sup> The principle is mentioned in the Preamble to the EU Treaty (recital 3) and Arts. 6 (1) EU; 11(1) EU, 177(2) EC.

<sup>51</sup> On the principle of the Rule of Law within the Community law context, see for example Arnall, above n. 26; Fernandez Esteban, above n. 29; Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (London: Stevens and Sons 1977); Bebr, above n. 49.

<sup>52</sup> Art. 220 EC. On the key-role played by this article in the course of the articulation of the Community Rule of Law, see Fernandez Esteban, above n. 29 at 106.

<sup>53</sup> Art. 7 EU does not mention the principle of the Rule of Law directly, making a reference to Art. 6(1) EU instead.

<sup>54</sup> 2<sup>nd</sup> recital, OJ (2000) C 364/01.

mentions this concept in the Preamble.<sup>55</sup>

Before the Rule of Law was incorporated into the Treaties, its normative basis in EU law was not quite clear.<sup>56</sup> Consequently, the ECJ had to assume the leading role in the promotion of this principle within the European legal order. The ECJ stated, for example, that ‘the EEC Treaty, albeit concluded in the forms of an international agreement, none the less constitutes the constitutional charter of a Community based on the Rule of Law.’<sup>57</sup>

Given that the scope and the meaning of the Rule of Law varies depending on the legal system of the Member State concerned, it is clear that though it is mentioned in the Treaties and used by the ECJ, de facto the Rule of Law is not a purely EU law term, lying ‘at the crossroads of different constitutional traditions’ instead.<sup>58</sup> This is also related to the fact that the constitutional traditions of the Member States guaranteeing the Rule of Law are among the sources of legal principles of the Community legal order. Inter alia, Article 6(1) EU is clear that the Rule of Law is one of the ‘principles which are common to the Member States’. How true is it, actually, given the huge discrepancies existing between the concepts corresponding to the Anglo-American ‘Rule of Law’ in the legal traditions of 26 other Member States? The precise legal concept referred to in Article 6(1) EU and translated into the 23 official languages of the European Union is extremely vague to say the least. What Article 6(1) EU makes clear is that, to use the words of Lord Mackenzie Stuart in reflecting on the longstanding practice that Article 6(1) EU codified,

Communities rest on the concept that Member States are free and democratic societies which share the belief that relations between citizen and the state should rest upon the rule of law.<sup>59</sup>

But what does this statement, together with the reference to the Rule of Law in Article 6(1) EU, do in order to clarify and explain the nature of the EU Rule of Law, resting on the necessary separation between the legal systems of the Union and the 27 Member States? It can only mean that the EU itself should be inspired by almost three dozen diverging theoretical-legal concepts loosely corresponding to what the Rule of Law is in the English system.

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<sup>55</sup> OJ (2008) C 115/1.

<sup>56</sup> See Fernandez Esteban, above n. 29 at 102.

<sup>57</sup> Case 294/83 *Partie Ecologiste ‘Les Verts’ v. Parliament* [1986] ECR 1339, § 23; Opinion 1/91 *EEA Agreement* [1991] ECR 6097. For an overview of the role played by the ECJ establishing the Rule of Law at Community level, see Fernandez Esteban, above n. 29 at 102.

<sup>58</sup> *Id.* at 65.

<sup>59</sup> See Mackenzie Stuart, above at n. 51 at 5, 104.

### 3.2 Possibilities for confusion

In practice, since the Treaty refers to different terms while making references to the Rule of Law, depending on the language and, consequently the national legal system(s) corresponding to each of the languages, the Rule of Law in EU law co-exists with *État de droit*, *Rechtsstaat*, and other national doctrines of the Member States, which, while being close in meaning, are nevertheless not identical. The substance of these national concepts obviously influences the interpretation of Community/Union legal instruments by the national courts of the Member States concerned. This somewhat paradoxical situation can result in confusion. Clearly, in order to achieve consistency in the interpretation of the Treaties in all Member States, the Rule of Law at the EU level cannot be understood in the same way as any of the corresponding national concepts (the Rule of Law, *État de droit*, *Rechtsstaat* etc.) are understood within the national legal orders of the Member States. This holds, notwithstanding the fact that the same word is used in each of the Community languages to refer to the Rule of Law as understood in the national legal tradition of a given Member State and to the EU understanding of the Rule of Law to be found in the Treaties and in the case-law of the ECJ.

To make this difference clear, positive developments are required within the European legal order. More specifically, to agree with Arnull, an ‘autonomous Union concept of the Rule of Law needs to be identified’.<sup>60</sup> In practice it can be argued that this concept (theoretically at least) already exists. This is despite the fact that it is not well articulated and is mostly confined to the ideas of procedural legality and judicial review, as the case-law of the ECJ demonstrates.<sup>61</sup> Given the strong connection between the national legal orders of the Member States and the Community/Union legal order, the existence of such a concept results in a kind of double *dédoublement* of the Rule of Law, while at the EU level numerous national concepts compete with the EU concept. The latter exists at the national level side-by-side with the national conceptions of the Rule of Law, unlikely to result in any possibly unified approach to the concept in the EU context: the concept is thus context-dependent, its meaning being determined by the Member State where it is to be applied. This situation certainly does not add clarity to the meaning of the Rule of Law in any particular context. In view of this curious development, it has been predicted that ‘the paradox of the “two paradigms of law”, created by the co-existence of the two visions of the Rule of Law will become more and more evident.’<sup>62</sup>

The EU Rule of Law is thus a deep and multilayered concept in the

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<sup>60</sup> See Arnull, above n. 26 at 240.

<sup>61</sup> For example Case 294/83 *Les Verts* above n. 57 at § 23.

<sup>62</sup> See Fernandez Esteban, above n. 29 at 210.

process of articulation.

### 3.3 EU Rule of Law in the present: limited and vague

Unfortunately, the Treaties are silent on what the substance of the concept might be, ‘not indicat[ing] which meaning [of the Rule of Law] should prevail in the Community law context’.<sup>63</sup> Clearly, the Union Rule of Law cannot be identical to any of the Rule of Law concepts that developed within the legal systems of the Member States. Simultaneously, it can potentially build on the ensemble of these concepts.

The usual meaning of the Community Rule of Law as described in the scholarly literature is in most cases in close relation to legality. For instance, Lord Mackenzie Stuart characterised the Rule of Law as applied in Community Law as follows: ‘those who administer the Communities are themselves subject to limitations imposed by law and that those who are administered have rights in law which must be protected.’<sup>64</sup> The role played by the ECJ in the establishment of the Community Rule of Law régime is particularly emphasised.<sup>65</sup> Thus, to Alter, the Rule of Law in Europe is largely linked to the doctrines of supremacy and direct effect.<sup>66</sup> She describes the emergence of the

international rule of law in Europe where violations of the law are brought to court, legal decisions are respected, and the autonomous influence of law and legal rulings extends to the political process itself [...] the governments are not above the law.<sup>67</sup>

The ECJ was quite clear on this issue:

the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its Institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.<sup>68</sup>

The essence of the EU Rule of Law is quite a peculiar one, not only due to its layered nature and the poor articulation of its core meaning in the

<sup>63</sup> See Hoffmeister, above n. 41 at 94; also Arnall, above at n. 26 at 240.

<sup>64</sup> See Mackenzie Stuart, above at n. 51 at 3.

<sup>65</sup> J. K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press 2001) at 209.

<sup>66</sup> *Id.* at 218.

<sup>67</sup> *Id.* at 229.

<sup>68</sup> Case 294/83 ‘*Les Verts*’, above n. 57 at § 23.

Treaties. Another key aspect affecting the scope of this concept in the Community is in direct relation to the dual status of the Member States within the Community legal order. Each Member State is both subject to Community law and to a *pouvoir constituant*. As a consequence of this dual position, the Treaties, being the sources of primary law of the European legal order, are at the same time not solely the products of the Community legal order as such. Instead, they are negotiated and concluded by the Member States at the Intergovernmental Conferences with subsequent ratification in accordance with the Member States' own constitutional requirements.<sup>69</sup> This legislation–constitution divide inherent in the Community legal order affects the Union Rule of Law. For instance, partly as a consequence of this divide, the hierarchy of norms of Community law – an issue vital for establishment of the Rule of Law – although recognised by the ECJ,<sup>70</sup> is far from being a settled issue, thus provoking academic debate.<sup>71</sup>

The EU Rule of Law concept is also marked by a somewhat unfocused essence. While its importance is undisputed, nobody has been able to clearly summarise what it actually is and precisely how it is different from all its counterparts in the national law of the Member States. It is possible, however, to outline certain key features of the Community legal system that allow one to regard the Community as a Rule of Law entity. Such an exercise has recently been performed by Temple Lang, who focused on fourteen EC features that safeguard the Rule of Law in the Community:<sup>72</sup>

1. Every measure must have an identifiable legal basis;
2. Every measure must include a statement of reasons for its adoption;
3. All EC measures must comply with all the relevant EC rules of both substantive and procedural law;
4. If an EC measure infringes some fundamental or overriding rules, the Community may have to pay compensation;
5. Community institutions may tie their own hands as to how they will exercise

<sup>69</sup> Art. 52 EU, Art. 313 EC. The Institutions formally take part in convening an IGC: Art. 48 EU. This results in 'nearly complete separation between legislation and constitution (=Treaty) making': R. Bieber and I. Salomé, 'Hierarchy of Norms in European Law' (1996) 33 *Common Market Law Review* 911.

<sup>70</sup> For example Case 38/70 *Deutsche Tradax GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] ECR 145; Case 114/78 *Yoshida GmbH v. Industrie- und Handelskammer Kassel* [1979] ECR 115.

<sup>71</sup> A. Tizzano, 'The Instruments of Community Law and the Hierarchy of Norms' in J.A. Winter and others (eds.) *Reforming the Treaty on European Union: The Legal Debate* (The Hague/Boston/London: Kluwer 1996); Bieber and Salomé, above n. 69.

<sup>72</sup> J. Temple Lang, 'Checks and Balances in the European Union: The Institutional Structure and the "Community Method"' (2006) 12 *European Public Line* 1 at 128. For another attempt to outline the scope of the notion of the Rule of Law at the Community level, see Fernandez Esteban, above n. 29 at 153.

their powers;

6. EC powers must not be used for purposes other than those for which they were intended;
7. The EP may bring a case in the ECJ to assert or defend its prerogatives;
8. All EC measures must comply with fundamental rights principles;
9. The European Commission has no power to create new obligations;
10. No EC action may be taken which is not legally authorised;
11. EC measures may sometimes be invalid if they are contrary to rules of public international law binding the Community;
12. Community measures must be adopted in accordance with EC procedures and safeguards;
13. Private parties can take the Commission to Court under Art. 232 EC if it fails to adopt an act addressed to them;
14. There is a right of judicial review of all EC measures.

An analysis of this list demonstrates that all the features are generally confined to the idea of legality: viewing the law through the prism of procedural rules and a possibility for judicial review. The same applies to the Union at large, through the introduction, for instance, of the Union duty of loyalty, similar to that of Article 10 EC.<sup>73</sup> Is it enough for the formation of a genuine and functional concept of the Rule of Law to belong to the Community legal order? To answer in the positive would mean to embrace the thin concept of the Rule of Law.

#### **4 Towards the new EU Rule of Law?**

Thus far, the idea of the Rule of Law in European law has been characterised by an extremely high level of formalism and has suffered from a number of obvious contradictions inherent in its formulation. All this has come to undermine the potential of the Rule of Law principle in EU law.

The most important of the irregularities is directly related to the origin of the Rule of Law in the European legal order and is due to the connection that is made (both *de jure* and *de facto*) between the notion of the Rule of Law and the legal systems of the Member States. This is not to say that making connections between the Community/Union legal order and the legal orders of the Member States is problematic. However, in the case of the Rule of Law, such a connection, made *inter alia* through the mentioning of the Rule of Law in Article 6(1) EU, denies this notion its complexity. The Treaty does not recognise the deep diverging trends existing between the concepts of the Rule of Law in different Member States. Consequently, it is not quite clear what is left over for the EU to own as its own concept of EU

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<sup>73</sup> Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285, para 42.

Rule of Law. Obviously, generalisations are always possible, resulting in long summaries of the overlapping elements of all the national theories, but how well will the Union's own concept grow in such soil? To date, the purely formalist vision of the Rule of Law embraced by the Institutions at the Community level clearly has not resulted in the formulation of a truly workable and appealing self-standing concept. On the contrary, it seems that the notion of the Rule of Law has merely been used to describe the build-up of the system instead of enriching it and guiding its development.

In practice, the link made between the EU Rule of Law and the notions corresponding to it in the legal theory of the Member States means that getting rid of the burden of the national way to interpret the notion in a situation where the EU notion should have come into play might be extremely difficult if not impossible. This leads to the unclear border lines between the EU Rule of Law (or the translation of this term into all the official Union languages) and the national concepts of the Rule of Law employed in the Member States. This observation has implications for the legalistic side of the problem as well: as long as no separation between the national and EU notions is made, the concept cannot be employed in an effective manner.

The second irregularity is related to a *de facto* emptiness of the notion at the Community/Union level. Since neither the Treaties nor the Court explained with clarity what the Rule of Law actually means at the Community level, the presumption of commonness in approaches taken by the legal systems of the Member States in filling the idea of the Rule of Law with substance almost hangs in a vacuum: only the minimal idea of legality and judicial review is to be found in the ECJ's case-law. Most likely, this is indeed something shared by all the Member States, but as a consequence of such a minimalist perspective, the actual potential effects of the Rule of Law at the level of EU law have been unable to achieve expected proportions.

The Rule of Law certainly suffers from a limited use made of it by the European Court of Justice. Although it plays a significant role, its importance stops short of being a true guiding principle in Community/Union law, something that could be expected of it given the prominent role this concept plays in the national legal systems of the Member States. This is why only a simplistic idea regarding its essence exists today in the EU. If it were to guide the EU in a true legal sense, the Court would be bound to embrace the substantive notion of the Rule of Law and employ it alongside the formal one. Such a move would also make it impossible to avoid formulating a well-defined EU-law approach to the concept.

This is where the reasons for all the outlined shortcomings are rooted: they all relate to the limited vision of the Rule of Law adopted in EU law, focusing on a narrow formal approach. Scholars studying the functioning of the Rule of Law in the European legal context rarely go

beyond a pure description of how the Community/Union legal system functions. It is obvious that any true legal system will adhere to the basic minimalist Rule of Law idea, and the EU is not an exception. In other words, instead of guiding the development of the system and enriching the legal realities of the EU, the Rule of Law functions merely as a term referring to everything and to nothing. To say, for instance, that supremacy and direct effect as formulated by the ECJ became the cornerstones of the EU Rule of Law is not to say anything, because they simply constituted the Community/Union legal system as we know it. Thus, what is the practical use of the term 'the Rule of Law' in such a context? The Rule of Law is a genuinely important legal principle with a potential to explain the ongoing process of legal-political development of European integration as well as to improve people's lives. To use it merely as a tag, not as a tool, seems to be a waste of its potential.<sup>74</sup>

This is all the more paradoxical given that in general the EU and especially the Community legal system is not formalistic at all. Marked by the pro-active use of the teleological method of interpretation by the ECJ and the increasing importance of the goals of integration, enabling even the reassessment of the Community competences in their light, there is a place for a more inclusive concept of the Rule of Law in the system. In a way, it has in fact always been there, only not called such. The objectives of integration outlined in Article 2 EC and Article 2 EU can be viewed as the 'moral good' to provide the Rule of Law with substance. Consequently, this is beginning with the goals of integration that the idea of the EU Rule of Law needs to be analysed. Adhering to the substantive reading of the Rule of Law, the Court will acquire an additional tool in its arsenal of legal means to ensure that the law is observed. The potential impact of the employment by the Court of the principle of the Rule of Law as a substantive Rule of Law (as opposed to a purely formal concept) is likely to have far-reaching effects. It will not only allow shaping a true EU-law notion of the Rule of Law (based on the goals of the Treaties, it will not necessarily belong anymore to the legal-theoretical perceptions dominant in the Member States) but it will also better use the potential offered by the very idea of the Rule of Law. The Court will thus be enabled to employ the Rule of Law as a functional tool for the promotion of integration as opposed to a purely descriptive concept with limited added value for the shaping of the Communities and the Union.

In other words, in order to deal with the present shortcomings related to the functioning of the concept of the Rule of Law at the Community/Union level, two main developments can be of assistance: a clear formulation of the principle of the Rule of Law at the level of EU law,

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<sup>74</sup> For an unflattering analysis of the general state of the EU legal theory, see N. Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 *Oxford Journal Legal Studies* 581.

and the employment at the Community level of a substantive concept of the Rule of Law, allowing the goals of integration to play the leading role in the construct. The substantive concept of the Rule of Law is thus to be reinvented at the EU level, the 'filling' of it coming from the very rationale behind the integration edifice.

## **5 Concluding remarks**

This article looked at the way the concept of the Rule of Law is understood in legal theory and how it is applied in the legal context of European integration. Although the potential of the notion is clear, problems abound with regard to its application. They are related to the vagueness of the notion itself, to the number of different approaches existing in legal theory to the meaning of the Rule of Law, and also to the discrepancies between the scope and functioning of the Rule of Law and similar concepts in the legal orders of the Member States. The article argued that the Rule of Law as one of the principles of EU law stops short of its potential. As used in the doctrine to this day, it is purely descriptive of the European legal system and never transcends the limitations of a purely formalistic approach to the Rule of Law, mostly focusing on the idea of legality and procedural guarantees. In order to enrich its meaning, the concept of the Rule of Law to be used in European law should also acquire a substantive dimension, to add substance to its procedural aspects. This substance is nothing other than the objectives of integration. The formulation of a genuine EU-law concept of the Rule of Law independent of those of the Member States should naturally mean stepping away from formalism.

# MERGER CONTROL AND THE RULE OF LAW

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## **Abstract**

This article asks whether competition law, in particular the law on mergers, should always be called law. It concentrates on merger control in the European Union but draws on US experience and history to provide ideas and to contribute to the framework for the analysis. The starting point is that competition law is increasingly located not in courts but in agencies: in the EU, the European Commission. These agency regulators take decisions based allegedly on economic theory, but which are non-predictable and non-replicable; they do not provide a tight enough reasoning process to serve as a guide to action in future cases. Yet they are only marginally reviewable by courts. Finally, even insofar as identifiable and coherent rules exist for agency behaviour, their rule-like character is undermined by a culture of negotiation and compromise, which means that the link between rule and decision becomes even more tenuous and even less apparent to the non-party. Over-reliance on questionable economics, as well as inadequately constrained agency behaviour, suggests that merger control is now the domain of ad-hoc decision making as much as it is of law.

## **1 Introduction**

This article asks if competition law, in particular the law on mergers, should (always) be called law. It concentrates on merger control in the European Union, but draws on US experience and history to provide ideas and

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contribute to the framework for the analysis. The starting point is that competition law is increasingly located not in courts but in agencies, in the EU the European Commission. These agency-regulators take decisions based allegedly on economic theory, but which are non-predictable and non-replicable; they do not provide a tight enough reasoning process to serve as a guide to action in future cases. Yet they are only marginally reviewable by courts. Finally, even insofar as identifiable and coherent rules exist for agency behaviour, their rule-like character is undermined by a culture of negotiation and compromise, which means that the link between rule and decision becomes even more tenuous and even less apparent to the non-party.

These points have been made by others, but overwhelmingly in the context of efficiency critiques of competition law, and with the aim of making it quicker and more economically rational. We are simply concerned about whether 'law' is still the right name for what is going on, or whether the EU merger regulation process in particular is better described in terms of a personal authority vested in the Commission and controlled via the appointment of Commissioners. Is the Commission still the enforcer of competition law, or rather its King, albeit a puppet King whose strings are ultimately pulled by political masters?

In the first part of our main argument, we look at the nature of competition law and the emergence of the agency-regulator – in the EU, the Commission – and the ouster of the courts. We then consider three specific criticisms of EU merger regulation – each of which could be extrapolated to other areas of competition law – which are connected with this agency centrality. One is the reliance on economic theory and the way this is used to give an aura of objectivity and rationality to decisions, while there is a consensus among economists that a diversity of competing economic approaches exists, and none are confining enough that they actually determine decision outcomes.<sup>1</sup> Preaching economics, therefore, neither explains nor justifies specific decisions. The second criticism is that despite excitement surrounding some recent cases, judicial review remains marginal and procedural, and cannot be otherwise. The Commission can be called to account for process errors, but cannot be constrained to reach any particular result nor prevented from reaching any particular one of the many plausible results. Finally, we consider the role of negotiation in merger control, and whether this further undermines what may be left of the rule of law.

To prove our case would require empirical research beyond the scope of this article. The potential transparency and predictive power of economic theory applied to competition cases is a substantive – and

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<sup>1</sup> See D.L. Prychitko (ed.) *Why Economists Disagree – An Introduction to the Alternative Schools of Thought* (New York: State University of New York Press 1998).

contested – question of economics, business theory, and consumer psychology, while the actual process and effects of negotiation on competition law can only be established after empirical research, which we have not done but would like to see done by others. However, we think we can establish by reference to the work of others that there is every reason to believe that genuine problems exist, and that further investigation of them is worthwhile. Whether and to what extent competition law has the characteristics that are associated with law remains an open question, but what follows aims to show that there is good reason to be concerned that it does not.

As a preliminary, we outline how we understand the rule of law as well as the sense in which we will be using it in this article.

## 2 The rule of law<sup>2</sup>

The rule of law is commonly associated with – among other things – predictability. If rules do not provide a sufficiently precise framework that outcomes in the future can be predicted, then they do not deserve the name ‘law’. The decision-maker is not in reality constrained. We accept this, and also want to emphasise one element of predictability: the role of law in providing guidance to actors. If law is so unclear that individuals or their lawyers cannot use it to guide their actions because they cannot determine what actions would be lawful and which would not be, then we question whether it is meaningful to talk of law. This is captured in the term replicability, and we draw on Eisenberg’s discussion of this in the following paragraphs, which attempt to show how replicability is relevant to the problems of merger control.<sup>3</sup>

Eisenberg points out that the law is in reality usually too complex to be accessible to non-lawyers. When they need to make plans and to be certain of the legality of future actions they consult a lawyer. As well as the intricate nature of much written law, the fact that law is de facto also contained in judgments means that individuals need legal advice to know what the law really is. This is particularly so in a complex area such as economic regulation.

A consequence of this is that the legal profession occupies an important role in determining the law in practice. Most legal questions are determined by lawyers, not by courts, and most individuals will be guided by lawyers rather than judges as to what the law actually is. Eisenberg argues

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<sup>2</sup> See generally on the rule of law, B.Z. Tamanaha, *On the Rule of Law – History, Politics, Theory* (Cambridge: Cambridge University Press 2004).

<sup>3</sup> M.A. Eisenberg, *The Nature of the Common Law* (Cambridge, Massachusetts: Harvard University Press 1988) at 8.

that to a large extent this is desirable, because determination of the law by a lawyer is generally a less expensive and quicker process than legal proceedings, as well as being less risky and threatening. The sheer numbers of lawyers mean that they can disseminate much more effectively and communicate the law to society than judges could alone.

This central role of lawyers in determining law makes it critical that they should be able to replicate the process of legal reasoning that decision-makers use. This in turn means that binding decision-makers – courts or other tribunals or agencies – must use a replicable process of reasoning. Not only does this allow lawyers to advise their clients but the replicable reasoning process allows lawyers to communicate with each other. It ‘creates a channel through which the reasoning of the profession can flow’, allowing private actors to define relationships and agreements with each other, via their lawyers, without the need for governmental intervention.

Use of a replicable process of reasoning also ‘alleviates the retroactivity dilemma’, as Eisenberg puts it. A common legal problem is that the judicial contribution to law is essentially retroactive: every time a judge ‘interprets’ a law in a new way, he is essentially changing the rule at that moment, yet his judgment applies to actions that have already taken place. Case law is, in this sense, always retroactive. However, when such developments in the law are predictable because they are the natural consequence of replicable processes of reasoning, lawyers can then mitigate this retroactivity problem by advising their clients in advance of what is ‘likely’ to happen. Individuals can determine the legal rules that will apply to a transaction even if those rules have not yet received official recognition in the courts.

Additionally, decisions depend on findings of fact and value. In some areas of law, such as competition law, the way of proving these facts may itself be controversial. The question of whether two products are potential substitutes for each other is different from the question of whether Mr X was in the bar on Saturday night: even with all the factual evidence in the world, opinions might differ on the first question because it depends on judgments about consumer and commercial behaviour in the future, which no area of science is yet developed enough to settle beyond doubt. Mr X’s presence may be difficult to establish because it may rely on witnesses, who may be unreliable. However, certainty on the issue is not a ridiculous goal, and with concurring witnesses, or a video camera, may be achievable. By contrast, there is no hope of reaching certainty on future hypotheticals about market behaviour and preferences. However expert the witnesses, however much they agree, and however transparent their methods,<sup>4</sup> any rational

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<sup>4</sup> The authors are grateful to an anonymous referee for pointing out that Dutch proposals on expert witness regulation attempt to address this problem by requiring expert witnesses to indicate their methods and judges to explain why they consider

observer will be aware that it is not currently within the powers of mankind to predict with anything close to certainty how markets will develop.<sup>5</sup> A number of very highly educated guesses remain just that.

Other questions of fact, such as whether competition would be harmed, depend on the balancing of numerous factors, estimates of how firms, countries, economies, and consumers will behave, and value judgments about ‘harm’: are fewer but better products more desirable than a greater number of cheaper but worse ones? Some of these judgments are ‘irreducible’ in that, as with ‘reasonableness’ in the common law, they are not practically amenable to further analytic reduction. This is the point at which we hand over authority to the wisdom of the decision-maker.

The result of such multi-factor balancing situations is that systems of law are rarely entirely predictable. Whether they are therefore deserving of the name ‘law’ is a question of degree, of how much uncertainty can be tolerated. Some discretion and uncertainty is unavoidable, but at some point it undermines the rule of law.

The importance of replicability here is that it confines areas of irreducible wisdom, and thus uncertainty, to a clear and defined place in a transparent reasoning process. This both mitigates the uncertainty they cause, and reduces it, by making it easier to compare cases and so extract guidance as to how judges may decide.

In our view, if a scheme is incapable of serving as a guide to conduct it is not law. Is the process of reasoning that leads to decisions apparent enough that lawyers can reproduce it for the clients? Is the weight given to various ‘irreducible’ factors apparent enough that a serious prediction can be made? We suggest that it should be possible to make predictions that are right significantly ‘more often than not’, and that if the predictability and replicability of an area of law are significantly different from other areas of law then we may have a rule of law problem. The standard for tolerable uncertainty is measurable in the legal system as a whole. Competition law should not leave this too far behind.

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evidence relevant. (It is disturbing that this is not already the case.) This must increase transparency, and is certainly a step forward, but it will not increase predictability if the lack of this comes from the limitations of science, rather than from individual scientists; and this is the case, since market development is as much dependent on psychology, scientific innovation, and creative product development as on the rules of economics.

<sup>5</sup> See here section 5.5 below, especially text to footnote 62 et seq.

### 3 The story in the US

#### 3.1 The contrast between regulation and competition law

Competition law has often been seen as the antithesis of traditional regulation of the economy, particularly in the US. Traditional regulation is a mechanism for the control of industrial actors, dictating the terms on which they may enter the market, price their product, or select their customers. It is a positive enterprise, through which public bodies exercise influence and steer economic activity. It will entail and embody public choices and preferences about the nature and form of industry. In return for giving up a considerable degree of freedom, firms are offered, implicitly or explicitly, a 'regulated fair rate of return'.<sup>6</sup>

The traditional view of competition law is that it contrasts with this regulatory activity by being primarily negative and using only 'second order' incentives. Opting for competition law entails some belief that in most cases the market will produce the correct amount of competition and innovation, and competition law does not need to concern itself with substantive industrial policy but simply ensure that the market functions reasonably well. As such, competition law does not embody decisions about whether firms should build plants or distribution mechanisms, or about the nature of their products. It simply sets a few global limits to behaviour, based not on the substance of commercial activity but on abstract notions of economic decency, and reactively enforces these. Hence the 'second-order' label that has been attached: competition law steers industrial activity indirectly, via non-specific market rules.

It can be seen that while the contrast has some explanatory power, it is also vulnerable to collapse in the middle. Positive traditional regulation and negative hands-off competition law differ considerably in their style and language, and in their density. A very loose traditional regulatory system would leave as much commercial freedom as 'traditional' competition law, while a dense and restrictive set of competition laws could be an effective tool for public steering of the economy and for control of economic actors. The contrast really resides in the choices that the two forms of regulation have tended to reflect; choices for positive regulation of specific industries have tended to result from a desire to steer those industries in particular directions. Choices for competition law as primary regulator have tended to result from a belief that the market makes the best industrial policy.

Numerous American commentators have noted that the contrast has

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<sup>6</sup> S.W. Waller, 'Prosecution by Regulation: The Changing Nature of Antitrust Enforcement' (1998) 77 *Oregon Law Review* 1383.

become unconvincing in the contemporary US.<sup>7</sup> Hovenkamp suggests that antitrust (American for competition) laws should be seen as part of traditional regulation,<sup>8</sup> one of many different regulators of competition and innovation. Intellectual property laws and market-specific regulations for such areas as telecommunications or energy also pursue the same ends. One can think of antitrust as a ‘residual regulator’. As he comments, much of antitrust decision making is concerned with the proper allocation of regulatory power between the antitrust laws and other legal regimes, such as intellectual property laws, industry-specific regimes, and land-use regulation.

Spencer Weber Waller also argues that ‘the traditional distinction between competition laws and regulation has not been convincing for some time.’<sup>9</sup> Increasingly, the general and the scholarly press refer to antitrust ‘regulations’ and to its key enforcers as ‘regulators’. He quotes McChesney:

Antitrust is economic regulation. Its essence is the regulation of certain kinds of economic relations: horizontal agreements to fix prices, agreements between competitors to combine (by mergers or otherwise) and so forth. Antitrust thus regulates the same things that other forms of regulation have traditionally covered.<sup>10</sup>

E. Thomas Sullivan has argued in detail in the particular context of mergers and acquisitions that the current merger appraisal process employs the interventionist and activist forms and techniques of classical positive regulation.<sup>11</sup> Thus, while the antitrust agencies originally cultivated an image as ‘cops on the beat’ who simply enforced a few strict rules,<sup>12</sup> and this image continues to play a role in both their self-perception and public views of their role, in reality they have become active managers and regulators of

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<sup>7</sup> See for analogous comments on the EU: M. Cini and L. McGowan ‘Discretion and Politicization in EU Competition Policy: the Case of Merger Control’ (1999) 12 *Governance* 175; R.J. van den Bergh and P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (London: Sweet & Maxwell 2006, 2<sup>nd</sup> ed.).

<sup>8</sup> H. Hovenkamp, *The Antitrust Enterprise* (Massachusetts, London: Harvard University Press 2005) at 13.

<sup>9</sup> See Waller, above n. 6.

<sup>10</sup> F.S. McChesney and W.F. Shughart II (eds.) *The Causes and Consequences of Antitrust: the Public-Choice Perspective* (Chicago: The University of Chicago Press 1995) at 328.

<sup>11</sup> E.T. Sullivan, ‘The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition’ (1986) 64 *Washington University Law Quarterly* 997.

<sup>12</sup> A phrase coined in this context by the influential former head of the Antitrust Division, Thurman Arnold. See Waller, above n. 6.

economic activity, pursuing what sometimes looks like industrial policy.<sup>13</sup>

Others will disagree with the strength of the assertion by these writers that antitrust law has become no more than industrial regulation. However, such disagreement does not detract from the convincing theoretical kernel of their argument: there is no necessary type difference between industrial regulation and competition law, and at the boundaries they flow into each other. A conceptual model that opposes them to each other is without logical basis.

### 3.2 Agency guidelines as law-making

A classic law enforcement agency relies on interpretation and development of the law by judges in court cases, or by the legislature. The agency itself is reactive and subservient to the boundaries defined by the other branches of the state. As Weber Waller observes, the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission no longer fit this template. Firstly, they have published a proliferation of guidelines on important aspects of antitrust and merger control, which while formally not legally binding have in substance eclipsed other sources of law and become the primary regulation of the field.<sup>14</sup> Secondly, the system has developed to

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<sup>13</sup> See P. Areeda, 'Antitrust Law as Industrial Policy: Should Judges and Juries Make It?' in T.M. Jorde and D.J. Teece (eds.) *Antitrust, Innovation, and Competitiveness* (Oxford: Oxford University Press 1992) at 29.

<sup>14</sup> See H. Greene, 'Guideline Institutionalization: the Role of Merger Guidelines in Antitrust Discourse' (2007) 48 *William and Mary Law Review* 771. The centrality of guidelines to merger control is paralleled and implicitly confirmed by their centrality to academic critique, and largely taken for granted. See for example B.A. Facey and H.Huser, 'Convergence of International Merger Control: A Comparison of Horizontal Merger Control in Canada, the EU and the US' (2004) 29 *Fall Antitrust* 43; J. Harkrider 'Proving Anticompetitive Impact: Moving Past Merger Guidelines' Presumptions' (2005) *Columbia Business Law Review* 317, treating guidelines as the legal basis on which further developments should build. Also of interest is this comment from a member of the New York bar: 'For as long as anyone can remember, judicial decisions have been the principal source of the "law" for those who strive to provide antitrust advice in the United States. This case law never has been a perfect instrument for furnishing guidance to foot soldiers of antitrust, but it least it enjoys the benefit of stare decisis. Administrative guidance likewise serves to provide direction to practitioners, but it can be subject to abrupt change depending on which way the political winds blow. To compound the problem, the reasoning behind such guidance is not always articulated, nor is it passed through the filter of successive level of appeal. There are no dissenting opinions to spawn opposing schools of thought in most instances. There are no case notes in law reviews to suggest criticisms and alternative approaches. There are no headnotes, no key numbers and no Shepards. Instead of judicial opinions there are advisory opinions and guidelines. Instead of appeals there are speeches. Instead of thirteen circuits

the point where most major transactions are notified in advance to the agencies, to achieve certainty for the parties involved. Even where not obligatory, this is encouraged by the agencies; they issue advisory opinions and business review letters indicating where they see problems and what needs to be amended, and negotiate with the parties on the basis of these, further establishing the agency perspective as the one defining the issues and the outcome.<sup>15</sup>

This is made possible because, as a result of considerations of both time and cost, neither the government nor the parties to a transaction want to push cases into court. They both have an interest in speedy and consensual settlement. This means that the opinions of the agencies are generally treated by parties as the last word, and the guidelines upon which they are based have come to be seen as the relevant law. The theoretical possibility that appeal through the court system might ultimately result in a successful challenge to an agency opinion is of marginal interest to the business party operating in real time. They need to know whether the agencies will challenge their actions, and to address that issue they need to speak the language of the agencies themselves – of the guidelines.<sup>16</sup> As Weber Waller says:

The guidelines set forth the language and framework that the agencies will use to make the critical determination of whether to bring an action. This is hardly surprising given their intended use as a statement of the enforcement policy of the antitrust agencies. The Merger Guidelines speak more to economic analysis and policy decisions than case law and legal doctrine. Counsel for both the government and private parties will use the text of the guidelines and other forms of soft law to frame their arguments. Arguments framed in terms other than those found in the guidelines are simply off the mark and are omitted from any serious presentation by the sophisticated advocate.<sup>17</sup>

Thus the agencies have become central to the antitrust legal process. Not only do they make the rules but via premerger notification provisions, advisory opinions, business review letters, and negotiation with the notifying parties, they have also become the interpreter and applier of the rules.<sup>18</sup>

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funneling into one Supreme Court there are two federal agencies and fifty state attorneys general funneling through the court of public opinion [...] The U.S. economy is undergoing dramatic changes and the antitrust issues being confronted are new and different. The resolution of those issues is often new and different as well, but the standards being applied and the reasoning behind such resolution are seldom articulated. This is the hidden law of antitrust.' R.M. Steuer, 'Counseling without case law' (1995) 63 *Antitrust Law Journal* 823.

<sup>15</sup> See Harkrider, *id.*, noting that 'agency actions are determinative'.

<sup>16</sup> *Id.*

<sup>17</sup> See Waller, above n. 6.

<sup>18</sup> See Greene, above n. 14.

## 4 Explaining the US move to regulation

Weber Waller offers two competing jurisprudential theories to explain the emerging centrality of the agencies and their guidelines to US antitrust, and the relative marginalisation of the courts.<sup>19</sup> They deserve consideration here because of the feelings of recognition that they will evoke in European lawyers. It is beyond the scope of this paper to examine whether such explanations are in fact also descriptive of the EU, but it is immediately apparent that the possibility cannot be ignored.

### 4.1 The legal process

Legal process jurisprudence has its roots in Hart and Sacks' book *The Legal Process*,<sup>20</sup> but it is Fuller's development of their ideas in 'The Forms and Limits of Adjudication'<sup>21</sup> which is of most use here. He refers to 'polycentric' decision-making involving the balancing of multiple and incommensurable values, and argues that courts are ill-equipped to deal with this kind of situation. Writers following Fuller have

noted the migration of polycentric decisions away from the courts towards the use of negotiation, specialized decision-makers, managerial techniques, informal bureaucracies, and other non-adjudicatory solutions [...] courts are ill-equipped to handle antitrust disputes requiring industry reorganization or similar remedies.<sup>22</sup>

The problematic concepts at the heart of antitrust are typical polycentric issues. The rule of reason, dominance, and the effects of mergers rely precisely on the distinctive mix of multi-faceted technicality and apples-and-pears-type value balancing that cannot be reduced to clear rules, and so courts quite rightly shy away from them. As the US courts have failed to bring clarity to these areas, the gap has been filled by the agencies, who, even if they are equally unsuccessful in reducing such issues to law, by being accessible and open to negotiation are able to bring day-to-day comfort and security to business partners. The legal process approach argues that in a context such as antitrust, bargaining between experts outside of the court room is a more efficient and transparent approach than official adjudication based on irredeemably opaque concepts. The move to agency regulation is not only inevitable but probably thus desirable.

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<sup>19</sup> See Waller, above n. 6.

<sup>20</sup> H.M. Hart, jr. and A.M. Sacks *The Legal Process*, prepared for publication by W.N. Eskridge, jr. and P.P. Frickey (Westbury, New York: The Foundation Press 1994).

<sup>21</sup> L.L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

<sup>22</sup> See Waller, above n. 6.

## 4.2 Public choice

Public choice analysis proceeds from the perception that people behave with the same rational self-interest in a political context as they are often believed to do in economic markets. Shughart notes:

The model of public choice insists that the same rational, self-interest-seeking motives that animate human action in ordinary markets be applied to decision making in the public sector as well. The assumption that all individuals, in or out of the government, pursue their own self-interest is the fundamental tenet of public choice. Just as consumers want to maximise their utility and firms want to maximise their profits, public policy makers want to maximise their welfare.<sup>23</sup>

In the public choice model, as Weber Waller puts it,

government actors are producers of laws and regulations. Interest groups and individual voters are consumers of such laws and regulations. Law producers seek to maximize their interests by behaving in such a way that promotes their long term retention in office and their overall influence. Bureaucratic interests act in such a way to aggrandize their power and influence.<sup>24</sup>

Applying public choice theory to antitrust produces a somewhat cynical but enlightening picture:

Using the standard tools of economic theory, antitrust activity is analysed as the outcome of decisions made by rational, self-seeking politicians, bureaucrats, and judges.<sup>25</sup>

Looking through this lens of self-interest, the apparent judicial acceptance of their pre-emption by agencies looks like an understandable and rational retreat from an area of jurisprudence where judges can never be masters anyway, an area steered by technical and economic arguments, which risks taking up huge amounts of judicial time and resources while offering little room for the legal reasoning and wisdom that judges have to offer, and that their prestige and status requires them to exercise. Why spend months on economic cases that do not really need judges as much as they need industry specialists? From another perspective, the agencies of course act with institutional self-interest, seeking to maximise their staff, budget, and power. They are not committed like courts to any particular form of reasoning or expression, but will adapt their way of working to extend their scope and influence; hence, their embrace of the positive regulatory model of antitrust,

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<sup>23</sup> See McChesney and Shughart II, above n. 10 at 7.

<sup>24</sup> See Waller, above n. 6.

<sup>25</sup> See McChesney and Shughart II, above n. 10 at 8.

and the ditching of the role of hands-off policeman, which was originally conceived for them.

Both legal process and public choice theory can explain the changes in antitrust. However, they lead to slightly different views of the future. Legal process analysis says that courts are simply not capable of adjudicating antitrust cases adequately, and offers a structural and permanent move to agency-centric regulation, and a growing place for informal processes and guidelines. By contrast, public choice suggests that the changes are less a response to the needs of the policy than the desires of the institutions. The obvious conclusion here is that agencies will extend their empire until, like all empires, it collapses under its own unmanageability or provokes a destructive backlash.<sup>26</sup>

## 5 The European Union

### 5.1 Rules and standards in EU competition policy

The European Commission's competition policy has been described as 'part

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<sup>26</sup> See E.S. Rockefeller: 'Decisions do not follow from principles on a case-by-case basis as they do in the development of English common law. Decisions do not clarify marginal ambiguities in statutory prohibitions or make rules precise. Instead, Supreme Court decisions are compromises over differing personal predilections and individual members of the Court as to what is evil. Lawyers and law professors search in the opinions for rules. Most court opinions simply muddy the water [...] Reformers are attempting reform, not abolition [...] They have to believe that, if federal judges are taught enough microeconomic theory, antitrust law will achieve "a high degree of rationality and predictability" and "become a branch of applied economics." Economics will not turn antitrust into law enforcement. Theoretical discussion of markets and market power is based on static analysis, not on facts in the real world. The definition in the analysis assumes a world standing still. Belief in market power requires ignoring the long run. In the antitrust world there is no long run. It's all about an imaginary now [...] Antitrust judgments are subjective choices of the judge about public policy. Law students should be taught that antitrust is not law enforcement [...] Although today's antitrust community is alive and well, antitrust is atrophying. It is becoming a relic, an anachronism, the irrelevant debris of past political demagoguery. Education in the antitrust facts of life could accelerate this process.' *The Antitrust Religion* (Washington: Cato Institute 2007) at 99. Alan Greenspan, former Chairman of the Board of Governors of the Federal Reserve of the USA simply described antitrust as 'utter nonsense in the context of today's economic knowledge', in 'Antitrust' in A. Rand, *Capitalism: The Unknown Ideal* (New York: Signet 1967) at 66. Mr Greenspan's essay is available online at <<http://www.polyconomics.com/searchbase/06-12-98.html>>.

jurisprudence and part political realism'.<sup>27</sup> Whatever this phrase may mean, if it results in arbitrariness and a serious lack of guidance because the policy is not replicable this may lead to a system that cannot properly be called a legal system.

The problems of replicability and predictability in the EU merger system are often discussed in terms of the choice between rules and standards, and the benefits of each.<sup>28</sup> Rules have what Monti refers to as

formal realisability: a determinate set of facts triggers the application of a law. For example, the rule that a minor is not entitled to vote, or a rule that states that all mergers where the combined market share exceeds 50 percent shall be blocked, is easily applicable because one fact is needed to trigger the rule. Rules maximise certainty by constraining discretion.<sup>29</sup>

Rules provide certainty and practicality, but can result in over- and under-inclusion: a merger of firms resulting in a market share above 50 per cent may sometimes not in fact endanger competition, while in other market circumstances a merger resulting in a lower combined market share might well have such an anticompetitive effect.<sup>30</sup> Thus, despite the clarity of rules, they are sometimes not effective for achieving substantive goals, such as protecting competition. Where rules are over-inclusive, that is to say that they prevent behaviour that is in fact desirable – or in the competition context, 'efficient' – this is called a Type 1 error (a false positive), whereas when a rule is under-inclusive and therefore does not prevent inefficient behaviour it is called a Type 2 error (a false negative). A single rule can result in both kinds of error, depending on the circumstances. An example is the rule discussed above, which would block mergers only where the joint market share is above 50 percent: some of those mergers may be beneficial, and some mergers below that market share may be harmful.<sup>31</sup>

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<sup>27</sup> See L. Briet, a member of Jacques Delor's cabinet, in G. Ross, *Jacques Delors and European Integration* (Oxford: Oxford University Press 1995) at 130 (also cited in Monti, below n.29 at 18).

<sup>28</sup> For the US perspective on this issue, see for example, D.A. Crane, 'Rules versus Standards in Antitrust Adjudication' (2007) 64 *Washington and Lee Law Review* 49 for the advantages of rules in antitrust adjudication; M.A. Lemley and C.R. Leslie, 'Categorical Analysis in Antitrust Jurisprudence', *Stanford Law School Working paper No. 348* (November 2007) available on [www.ssrn.com](http://www.ssrn.com).

<sup>29</sup> G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press 2007) at 16.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* On the balance between rules and standards, see A. Christiansen 'The "more economic approach" in EC merger control – a critical assessment' (2006) *Deutsche Bank Research Working Paper Series*, Research Notes 21, available at <<http://www.dbresearch.com>>; A. Christiansen and W. Kerber 'Competition policy with optimally differentiated rules instead of "per se rules versus rules of reason"'

The inability to express the goals and substance of competition theory in rules that can be applied to real world facts leads to the suggestion that perhaps standards are a better way of regulating competition. A standard is a more general norm, such as ‘effective competition must not be unduly restricted’. These have the advantage of capturing perfectly the purposes of the law but the disadvantage that it is difficult to know when they are actually satisfied. Adjudicating on standards cannot be done in any fully objective or non-controversial way, because they require the decision-maker to assess facts against an open and value-laden norm, and that assessment is inherently opaque – or at least, if it is not inherently opaque, then there is no reason to have the standard. The matter can then be expressed in rules.

This means that standards-based decisions are vulnerable to claims of arbitrariness, and can lead to expensive and slow adjudication. At some point, the inefficiencies resulting from such an imprecise body of norms outweigh the efficiency costs from the Type 1 and Type 2 errors that would be caused by rules. Hence, although we can almost guarantee that regulation by rules will result in errors and efficiency costs, it is by no means self-evident that standards are ultimately more efficient. Sometimes investigation and exploration of the facts on a case-by-case basis is so unwieldy that it would be better to pick a sensible-sounding rule and live with the cost. There is an extensive body of scholarship on precisely when this is the case, and if it is the case where merger control is concerned.<sup>32</sup> While it is clear that in principle the application of relatively open standards accords, if done well, with the combination of economic theory, political sensitivity, and industrial policy that comprises EU competition law better than any given rule would, the wide-ranging market and business analysis that merger decisions call for may make the operational cost of a standard-based system so excessively high that it is not only undesirable but in fact self-defeating in terms of the goal it aims to serve, namely: efficiency.<sup>33</sup>

While the standards-rules dichotomy is illuminating, it is important to note that there is no need to choose between extremes. The best solution may lie in a combination of the two, or in addressing the degree of openness of the standards or the degree of specificity of the rules. Standards can be made more rule-like, while rules can be made more standard-like. The question facing competition policy today concerns what the optimum position is and how close the current model is to that position. In deciding that, the goals of competition law are important – efficiency and a hint of industrial policy. However, competition law also needs to be seen as a body

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(2006) 2 *Journal of Competition Law and Economics* 215; O. Budzinski, ‘Monoculture versus diversity in competition economics’ *Cambridge Journal of Economics*, advance access publication 27 October 2007.

<sup>32</sup> *Id.*, especially Christiansen and citations therein.

<sup>33</sup> *Id.*

embedded in a wider social and legal framework. Predictability, replicability, and enforceability in the courts have a value because they maintain respect for the law and social and legal stability, which may mean that they should be prized more than an analysis based exclusively on market efficiencies in the case at hand would suggest.

## 5.2 The institutional component of decision-making

The reform of competition law in 2004 resulted in many decisions being decentralised to national courts and competition authorities.<sup>34</sup> One aspect of the reforms was the move away from prior notification of anti-competitive agreements towards ex-post enforcement, through actions in national courts, potentially brought by competitors. This part of the story seems fundamentally different from the agency-centric picture that the US commentators paint, as if there is a move within the EU back towards rule-based decentralised policing.<sup>35</sup>

However, other aspects of the system tell a different tale. Some mergers are now handled at national level, but above the threshold they remain the exclusive domain of the Commission,<sup>36</sup> which in its management of the merger portfolio does display something of the move away from 'law' described earlier in this paper. Monti puts it nicely when he claims that competition authorities seem bent on making the law dull by publishing guidelines on every substantive and procedural topic,<sup>37</sup> going on to suggest that guidelines are probably the most problematic manifestations of a competition authority's powers today. Sometimes in reality they are attempts to make new law, in contrast to their stated purpose, which is always just to

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<sup>34</sup> Regulation 1/2003, 2003 OJ L1/1

<sup>35</sup> The authors are grateful to an anonymous referee for pointing out that even where enforcement is decentralized, this may amount to less than it appears: The Commission often intervenes as amicus in national proceedings; the European Competition Network ensures co-operation between National and Community Competition Authorities; and Community law binds national judges to follow European Commission and Court decisions. See S. Wilks 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy' (2005) 18 *Governance* 431.

<sup>36</sup> EC Merger Regulation 139/2004 (ECMR), OJ 2004 L 24/1. The qualifying threshold is EURO 5000 million. However, the threshold is more complex, requiring (a) a combined aggregate turnover of € 5000 million *and* (b) aggregate Community turnover of each of at least two of the undertakings of more than € 250 million. And if each of the undertakings achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State, the Commission does not have jurisdiction, Article 1(2) ECMR.

<sup>37</sup> See Monti, above n. 29, at Preface x-xi.

explain and clarify.<sup>38</sup>

As in the US, these guidelines function as the major part of the relevant law. In practice, a business will be likely to follow the guidelines to avoid being investigated by the competition authorities. Yet while the guidelines are presented as a clarification and working-out of the law, in reality the steps they outline rely in places on subjective and non-transparent assessments. As Monti suggests, guidelines hide the conflicts and inconsistencies within competition law without resolving them.<sup>39</sup> The following sections elaborate on this.

### 5.3 Competitive assessment of horizontal mergers

The broad substantive framework for assessing mergers is summarised in Article 2(1) of the EC Merger Regulation (ECMR):

2.1 Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this regulation and the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal the Commission shall take into account:

- a. the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;
- b. the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2.2 A concentration which would not significantly impede effective competition in the common market or a substantial part of it, in particular as the result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

2.3 A concentration which would significantly impede effective competition in the common market or a substantial part of it, in particular as the result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

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<sup>38</sup> On EU competition guidelines generally, see H.C.H. Hofmann 'Negotiated and non-negotiated administrative rule-making: the example of EC Competition policy' (2006) 43 *Common Market Law Review* 153.

<sup>39</sup> Making the same point in a specific (EU) context, P. Yde 'Non-horizontal merger guidelines: A solution in search of a problem' (2007) 22 *Antitrust* 74.

The regulation is further worked out in notices and guidelines, and the Commission outlines its ‘analytical’ approach to the competitive assessment of a concentration with horizontal effects in its Horizontal Merger Guidelines of 2004.<sup>40</sup> First it identifies the relevant market and then it applies market share and concentration thresholds to preliminarily identify problematic mergers. It then looks at these problematic cases in more detail, to decide whether the result of the merger will in fact be anti-competitive. First it looks at the effect of the merger as if all other factors remained equal. It then considers whether possible harmful effects of the merger are counterbalanced by countervailing effects that may occur. New entrants to the market and efficiencies are examples of countervailing factors. A further consideration is whether without the merger one of the firms involved would fail. This is seen as a partial ‘defence’ to a criticism that the merger reduces competition – that reduction would have been brought about anyway by the failure and so it is not entirely attributable to the merger.

The detailed guidelines covering this process of analysis emphasise that the primary consideration in determining what is anti-competitive is consumer welfare, as reflected in prices, choice, or product quality. Only mergers that are harmful for consumers, in this sense, are likely to be prohibited.

The guidelines also make clear that the evaluation of all this is based on ‘sound economics’ and a careful examination on a case-by-case basis. There are some ‘rules’, but these are essentially the rules of economics. For example, where the Herfindahl-Hirschman index (the HHI) is below a certain level, the Commission is very unlikely to interfere.<sup>41</sup> However, as will be outlined below,<sup>42</sup> such economic rules are not dispositive of the case on their own. They rest on factual assessments that are less precisely constrained by either law or economics, and that are at the root of the problem of predictability.<sup>43</sup> Thus the ‘rule’ that the HHI index must be above

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<sup>40</sup> EC Horizontal Merger Guidelines of 2004 OJ 2004 C 31/5. In November 2007 the Commission adopted Guidelines for the assessment of mergers between companies that are in a vertical or conglomerate relationship. These complement the Guidelines on horizontal mergers.

<sup>41</sup> It is well known that the HHI has serious drawbacks: see Hovenkamp, above n. 8 at 213: ‘Use of the HHI has added an appearance of great rigor to merger analysis. The HHI gives superficially precise “readouts” of market concentration, and also of the amount by which the HHI is increased as a result of a merger. But this ostensible rigor belies the extent to which our merger analysis relies on assumption, conjecture, and even speculation.’ See also Christiansen and Kerber, above n. 31.

<sup>42</sup> See section 5.5.

<sup>43</sup> See A. Schmidt and S. Voigt ‘The Commission’s guidelines on horizontal mergers: improvement or deterioration?’ (2004) 41 *Common Market Law Review* 1583; S. Bishop and D. Ridyard ‘Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control’ (2003) 24 *European Competition Law Review*

a certain amount to attract intervention is less clear and rule-like than it seems, given that determining when this is the case is dependent on a subjective and discretionary (it will be argued below in section 5.5) data assessment.

#### 5.4 Procedure and publication

If a merger is notified to the Commission, Article 6 of the Merger Regulation then allows a number of paths to be followed.<sup>44</sup> For over 90 per cent of cases, a decision is issued stating that the merger is compatible with the common market, sometimes after negotiations between the Commission and the parties, and following commitments made by the parties.<sup>45</sup> These first-phase clearance decisions are usually brief and to the point. While a version is made public on the internet, confidential data are removed, and the decisions are not published in the Official Journal. They do not contain a complete picture of the facts, and are certainly not complete enough to engage in an independent analysis in order to understand precisely why these mergers raised no difficulties.

It might be thought that the brevity of these published decisions is not problematic, since the outcome is welcomed by all parties. There is no problem, no dispute, and so no need for a full explanation. However, this brevity prevents a body of useful 'case law' from accumulating, which could serve as a guide for other actors.<sup>46</sup> There is nothing so helpful as to be able to

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357; J. Schmidt 'The new ECMR: "Significant impediment" or "significant improvement"?' (2004) 41 *Common Market Law Review* 1555; Also Harkrider, above n. 14, on the assessment of evidence; F.M. Rowe, 'The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics' (1984) 72 *The Georgetown Law Journal* 1511.

<sup>44</sup> See generally L. Ritter and W.D. Braun, *European Competition Law: A Practitioner's Guide* (The Hague, London: Kluwer Law International 2004, 3<sup>rd</sup> ed.) at 664.

<sup>45</sup> *Id.*

<sup>46</sup> On the US situation: 'The agencies [DOJ and FTC] often decide, after a thorough review of a proposed merger, not to seek any relief and to allow a merger to be completed. In the vast majority of cases, when either agency decides to close a merger investigation, it provides no explanation as to why it did not seek relief. In many of those investigations, the decision not to seek relief is non-controversial; over 95 percent of mergers that are notified to the FTC or the DOJ are determined not to pose competitive problems sufficient to warrant an extended investigation. Nonetheless, in the instances when the FTC or the DOJ closes the investigation of a merger after an extended investigation, the public and antitrust bar may be left to speculate why the agency declined to seek relief. Although the agencies are not required to explain why they decided not to challenge a merger, they have in recent years issued such explanations with respect to a limited number of transactions. For example, the FTC and the DOJ have issued explanations as to why they closed

compare one's own case with others, and if decisions where no problem was identified were fully reasoned it would be easier for other merging parties to see what they would have to do to avoid problems with their own transaction. However, this would also impose severe constraints on the Commission. As every common lawyer knows, the requirement to ensure that every decision is compatible with all others is demanding and results in fine and lengthy legal argument. The more that the Commission can be called upon to justify why case X is being treated differently from apparently similar case Y, the more the balance of power shifts away from it and towards the merging parties. Instead of being able to examine each notification on a 'case by case' basis – which if it means anything must be shorthand for 'without constraint by rules or comparison' – the Commission would have to consider whether the balancing of factors in a case is being done in the same way as in other cases.<sup>47</sup> Essentially keeping a large part of the cases 'secret', to put it melodramatically, preserves the Commission's freedom of movement, at the expense of its constraint by law or consistency demands.

Around 5 per cent of cases are referred to the second phase, for more thorough consideration.<sup>48</sup> Of these, most will either be prohibited or cleared only after significant concessions or commitments from the parties. Second-phase decisions can be lengthy documents with references to many different aspects of the markets and firms involved, their competitors, their products, their production processes, and so on. They consist of a detailed economic analysis of the market and the merger, essentially a term paper in economics, with conclusions predicting the future effect of the merger on competition, and the decision following from this. The economic tools vary from case to case,<sup>49</sup> but come from the standard toolbox of contemporary economics. However, there is no a priori structure to the analysis, no published protocol

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investigations without seeking relief in the cruise line, airline, media, and telecommunications industries. This increased use of closing statements has benefited the merging parties, interested observers, and the agencies themselves, by reducing uncertainty, increasing predictability, and promoting voluntary business compliance.' American Antitrust Modernization Report and Recommendations of April 2007 available at <<http://govinfo.library.unt.edu/amc/>> at 65.

<sup>47</sup> The emphasis on 'case by case' analysis, and deciding each case 'on its own facts', is indicative of sloppy thinking. Of course every case has unique facts. But if one is to speak of the rule of law, or of a scientific method (lest the economists think this is legal pedantry), those facts should be subject to common rules that, at least largely, determine the outcome of the case. Since the open nature of the written laws and guidelines is not even close to determinative, legal authority can only be established by extracting rules from earlier decisions, à la common law.

<sup>48</sup> See Ritter and David Braun, above n. 44.

<sup>49</sup> J. Faull and A. Nikpay (eds.) *The EC Law of Competition* (New York, Oxford: Oxford University Press 1999) at 1.04.

of the form ‘the market will be established following economic theory ABC’. While the Commission commits to economics, it does not commit to any particular economics, not even within a given case.<sup>50</sup>

### 5.5 Economics and predictability

In finally deciding whether a merger is prohibited, the Commission relies on a number of intermediate decisions, on matters such as the appropriate product and geographical market, substitutability, dominance, and potential efficiencies resulting from a merger. The relevant factors in determining these are well known, from market share, to customer preferences and the cost of transport, and so on. However, as the Commission has said, these cannot be applied ‘in a mechanical way’, and what is not deducible from law or guidelines or previous decisions is how these factors should be weighed to come to an intermediate conclusion.<sup>51</sup> There is no clear process of reasoning, rather a list of relevant bits of argument without any chain that links them. When does an efficiency count for more than an increase in dominance?<sup>52</sup> When is a consumer preference decisive and when can we conclude that it can be changed in the future? How much dominance is necessary to be dominant? What is ‘to an appreciable extent’, the words that define the degree of independence that a firm must enjoy to be dominant? We can possess information on all the bits of the case, but not know what they add up to.<sup>53</sup>

The response that defenders of the system would make to these criticisms is that assessments of all these market factors is rooted in economics, and it is by using that economics that the Commission or lawyers are able to determine each factor and how it should be weighed against the others. Thus, it would be argued, economics provides both the economic rationale for the law, and its objectivity and predictability, and the steps of the economic analysis provide the replicability for lawyers and their clients. Competition law is, in this view, the laws of economics.<sup>54</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> See Schmidt and Voigt, above n. 43.

<sup>52</sup> On the particular issue of weighing efficiencies there seems to be a consensus that there is no adequate economic method for balancing them, with the result of an open-ended Commission discretion. See Schmidt, above n. 43, D. Gerard ‘How to give meaningful consideration to efficiency claims?’ (2003) 40 *Common Market Law Review* 1367.

<sup>53</sup> A. Jones and B. Sufrin *EC Competition Law* (Oxford: Oxford University Press 2004, 2<sup>nd</sup> ed.) at 45.

<sup>54</sup> For background on the much discussed ‘move to economics’, the increasing reliance on economic theory by the Commission, see for example Christiansen, above n. 31; S. Voigt and A. Schmidt *Making European Merger Policy More Predictable* (Berlin: Springer 2005); Van den Bergh, above n. 7.

We can only sketch a full response to this, but a survey of the literature reveals no support for the idea that there is (a) a single consensus on an economic theory that could serve this function<sup>55</sup> or even (b) a clear choice by the Commission for a particular consistent and identifiable economic theory and process of analysis.<sup>56</sup> Such a choice, even if an arbitrary one from an economic point of view, could at least provide legal certainty. A choice that provides not only legal certainty but is also economically regarded as consensually appropriate would of course be preferable, but appears to be impossible in the current stage of economics.

This absence of a statement of theory, and of publication of its clear and complete application to the facts in each case, is understandable. Firstly, any choice would involve taking a stance on ongoing economic debates, and would essentially invite ridicule for the law.<sup>57</sup> It makes no sense to rely on a branch of science for authority and even legitimacy, while simultaneously rejecting all its controversies, ambiguities, and gaps. If economists do not claim they have a definitive theory that is complete enough to provide confident and unique answers in specific cases, then it is unconvincing for the Commission to claim that in its hands economics can provide such satisfying guidance. The difficult fact is that if the experts disagree or are uncertain – in this case the economists – they can no longer be used to provide authority or objectivity.<sup>58</sup>

Thus, from a legal point of view, stating that economic theory is to be relied upon is useless unless the content and process of that theory is spelled out in a way that ensures it determines outcomes, instead of simply being an additional ingredient in the decision-making soup. This is not the

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<sup>55</sup> See Christiansen, above n. 31; J. Burton 'Competition over competition analysis: a guide to some contemporary economic disputes' in J. Lonbay (ed.) *Frontiers of Competition Law* (London: Wiley Chancery Law Publishing 1994); Budzinski, above n. 31; F.M. Fisher 'Games economists play: a noncooperative view' (1989) 20 *Rand Journal of Economics* 113; Voigt and Schmidt, above n. 54; Gerard, above n. 52; there is also the concrete criticism that the economic theories relied on are too general, and do not take enough account of the specificities of particular markets; see L. Vandezande and others 'Evaluation of economic merger control techniques applied to the European electricity sector' (2006) 19 *The Electricity Journal* 49.

<sup>56</sup> Faull and Nikpay, above n. 49 at 1.01; Christiansen, above n. 31; Van den Bergh, above n. 7; Voigt and Schmidt, above n. 54. The Commission appears to use a wide and varying range of economic tools, drawn to some extent from different schools of thought.

<sup>57</sup> See Gerard, above n. 52.

<sup>58</sup> Christiansen, above n. 31, refers to the risk of a 'battle of the experts' in which a line-up of academics and consultants on both sides has the result that they 'neutralise' each other, essentially rendering the use of expert economists pointless. Budzinski, above n. 31, points out that 'a "neutral" basis for an unequivocal "scientifically-true" antitrust policy cannot be derived' (at 19).

case.<sup>59</sup> From an economic point of view, stating that economic theory is to be relied upon is only sensible if there is an economic theory that economists believe provides the answers to individual merger decisions.<sup>60</sup> That is highly contested, with multiple theories competing, and the situation being sufficiently far from a consensus that one may rationally conclude as a non-economist that it is in fact not yet possible to know what is economically 'right'; hence, any dogmatic choice to adhere to a particular theory is essentially arbitrary.<sup>61</sup>

However, there is a far more serious criticism. Even if economists agreed on a theory of mergers, any theory's output depends on the data fed into it.<sup>62</sup> Decisions ultimately turn just as much on questions of fact.<sup>63</sup> In the case of mergers, here we are talking about matters such as the appropriate market definitions and dominance, and whether competition will be reduced by the elimination of competitors. These depend on the way in which consumers and firms would behave if the merger occurred or did not occur. What would they switch to? Could they obtain finance? Would they take risks? Would they expand? Would new innovation result and fundamentally change the market?

It is quite clear that the answers to such questions depend on – among other things – individual and mass psychology, new technology and the nature of research, and on broader economic trends and perceptions. Insofar as the firm's behaviour is central, it has been argued that the appropriate theories to look at here, if any, are business theories, not economic ones: namely, the management methods taught in business schools.<sup>64</sup> These are what guide the behaviour of CEOs and firms to a greater extent than does economic theory. Know what Harvard teaches on its MBA and you may – perhaps – know something about how firms will react to a situation and what the effect on competition is. Know what economics says will happen in a situation where all the human and social oddities and

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<sup>59</sup> See Jones and Sufrin, above n. 53; Christiansen, above n. 31; Schmidt and Voigt, above n. 43.

<sup>60</sup> This is an important point. There is a greater consensus on the general factors relevant to merger assessment and influence on competition than there is on precisely how those general factors should be used to reach a particular conclusion. However, without this latter consensus any over-arching theory is no more than philosophical background.

<sup>61</sup> See Burton, above n. 55; Fisher, above n. 55; Budzinski, above n. 31; Jones and Sufrin, above n. 53.

<sup>62</sup> See Faull and Nikpay, above n. 49; Christiansen, above n. 31; Harkrider, above n. 14.

<sup>63</sup> *Id.*

<sup>64</sup> See S.W. Waller 'What should antitrust learn from the business schools? The use of business theory in antitrust litigation' (2003) 47 *New York Law School Law Review* 119; Voigt and Schmidt, above n. 54.

individualities are glossed away, as economic theory tends to have to do, and you know nothing very useful about the individual case.<sup>65</sup>

In making its decisions, the Commission relies on what are referred to as ‘future hypotheticals’ or counterfactuals,<sup>66</sup> predictions about what businesses would or will do. It provides no information on why the assumptions or reasoning process that it uses, or its interpretations of the data, are the only or best ones. Essentially, it is guessing.<sup>67</sup> If one wished to be cynical, one would remark that someone able to predict how firms will behave or how competition will look a year from now is far more likely to be reclining on their yacht than working in a greystone office in Brussels. The Commission is, to put it bluntly, engaging in interesting but academically indefensible futurology, of essentially the same intellectual depth as tips on share prices or horse racing.

None of this is to suggest that the Commission is dishonest or less competent than others. It is merely that its decisions in merger cases are not the result of objectively measurable, observable, or enforceable rules, and insofar as there are rules, they do not determine the outcomes.<sup>68</sup> They provide instead a post-fact rhetorical tool for justification of those conclusions. Any economic theory will give variable outcomes according to the premises fed into it. In the case of merger control, these premises consist of statements about the future behaviour of firms, and the state of competition, which even if founded on masses of data remain subjective and unpredictable, for the simple reason that there is no accepted theory that indicates precisely and clearly how such data should be interpreted. Economic theories can give us an answer if we can input what firms and consumers will do, but they cannot yet tell us the answer to these preliminary questions. Hence, reliance on economics leaves a ‘gap’ in the decision-making process that is not filled by any binding or constraining

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<sup>65</sup> Particularly in the light of the theory of the Second Best; approximate one variable and the whole outcome becomes unreliable – R.G. Lipsey and K. Lancaster ‘the general theory of Second Best’ (1956) 24 *Review of Economic Studies* 11. As mathematicians know, if you are permitted to tell just one tiny untruth, you can prove anything you want. On the problems with individual cases see K. Bagwell and A. Wolinsky ‘Game theory and industrial organisation’ in R.J. Aumann and S. Hart (eds.) *Handbook of Game Theory with Economic Applications* vol 3 (Amsterdam: North Holland 2002) at 1851.

<sup>66</sup> A. Bavasso and A. Lindsay ‘Causation in EC merger control’ (2007) 3 *Journal of Competition Law and Economics* 181.

<sup>67</sup> Counterfactuals are particularly problematic where the ‘efficiency defence’ or ‘failing firm defence’ is involved. See C.R. Fackelmann ‘Dynamic efficiency considerations in EC merger control’ *Oxford Centre for Competition Law and Policy Working Paper 09/06*, available on [www.ssrn.com](http://www.ssrn.com).

<sup>68</sup> See Jones and Sufrin, above n. 53; Budzinski, above n. 31; Bishop and Ridyard, above n. 43; Voigt and Schmidt, above n. 54.

reasoning process. The Commission simply ‘interprets’. However, since these premises are crucial to outcomes, this means that the final outcomes are not in fact constrained by economics, but rather by the Commission’s intuition.<sup>69</sup> Not only economic rationality but predictability is gone; or rather it is reduced to knowing people in the Commission well and having a good instinct for what they feel about different industrial, political and economic issues. Replicability is of course eliminated. There is no transparent process for the interpretation of data that can be reproduced. Economics may be the law, but it is not yet ready to be law.<sup>70</sup>

Thus, even in the lengthiest published decisions, there is nothing that convinces. There is extensive reference to statistics and reports and investigations, by the Commission and other parties, but no sense that all this data settles matters. Phrases have an authoritative and neutral tone; ‘the Commission’s investigation reveals that’

... ‘producers of X would be unable to enter the market for Y without significant investment in technology and production facilities.’... ‘the report concludes that they would be unlikely to consider this profitable’... ‘market research indicates that consumers do not consider X to be a substitute for Y’.

However, the kinds of things being discussed are not such that they can be settled on the basis of a few reports. It is the ability to think of a new and surprising way to enter a market, or to persuade consumers to change their habits, or to adapt a product to give it an unexpected new use, that brings persons to the top of firms and firms to the top of their markets. Such talents are subtle and various, relying on intuition and psychology and imagination as well as on market perception and economic rationality. We find the Commission’s decisions, which provide a calm and measured analysis of the future on the basis of only the most accessibly quantifiable aspects of the past, to border on self-parody. They provide a primarily static and

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<sup>69</sup> S. Bishop and D. Ridyard ‘Prometheus unbound: increasing the scope for intervention in EC merger control’ (2003) 24 *European Competition Law Review* 357; Voigt and Schmidt, above n. 54, who describe the assessment of dominance as ‘subjective’; Van den Bergh, above n. 7; Schmidt and Voigt, above n. 43; Gerard, above n. 52; Schmidt, above n. 43; D. Ridyard ‘The Commission’s new horizontal merger guidelines – an economic commentary’ *College of Europe GCLC Working Paper 02/05*; Budzinski, above n. 31, states that there is no ‘objective, unified competition theory’ which ‘makes normative assessments superfluous.

<sup>70</sup> ‘Industrial organization is hardly an exact science’ – R. Schmalensee, ‘Horizontal Merger Policy: Problems and Changes’ (1987) 1 *Journal of Economic Perspectives* 41; see also G. Brennan and J.M. Buchanan *The Reason of Rules* (Cambridge: Cambridge University Press 1985); V. Vanberg *Rules and Choice in Economics* (New York: Routledge 1994).

quantitative analysis of what is dynamic and qualitative,<sup>71</sup> and all the numbers in the world do not therefore make them into reasoned conclusions.

More formally, and for the purposes of this article more troublingly, they are not structured as arguments. Facts do not speak to each other, but across each other. Even if all the data led convincingly to the sub-conclusions claimed, the reports do not show why a particular degree of market power is just too much, or just too little, or why this much efficiency justifies but that much does not. Conclusions are finally of the form ‘in the light of the above the Commission considers that...’. We simply have an amassing of data, but no explicit – or implicit – framework that shows in any replicable way where the boundaries are between yes and no. In other words, no rule.<sup>72</sup>

### 5.6 Judicial review

The EU system of competition law contrasts with that in the US in that the European guarantee of legality is provided by judicial review of decisions. In the US, however, the courts are potentially involved in initial decisions, as the competition agency is required to go to court to obtain an order prohibiting a merger. The Commission may initially function not just as prosecutor but as judge as well, under the ultimate supervision of the courts.

It may be queried whether courts can ever be a match for the regulator in a highly technical area. However, in the US system they can play the role of arbiter between the agency and the opposing party, which may submit its own technical evidence. They are then forced to engage with the substance of the question and take a view. By contrast, in a system of judicial review it is never the intention that they second guess substantive decisions. The judicial role is primarily to ensure that correct procedure has been followed and that the boundaries of reasonable plausibility have not been transgressed. Within that broad plausible field, the Commission’s legal

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<sup>71</sup> See Ridyard, above n. 69; Fackelmann, above n. 67; Voigt and Schmidt, above n. 54.

<sup>72</sup> See Voigt and Schmidt, above n. 54, describe predictability in merger control as ‘almost non-existent’. The position is worsened insofar as even after the move to economics-based competition law non-competition factors may be taken into consideration. Views vary on whether this is the case. It has been noted that although competition law and industrial policy are largely at odds with each other, DG Competition and DG Industry meet regularly to discuss individual cases, and also that decisions are formally ultimately taken by the – diverse and political – college of Commissioners rather than the individual DG. See Cini and McGowan, above n. 7; A. Bagchi ‘The international political economy of merger regulation’ (2005) 53 *American Journal of Comparative Law* 1; Christiansen, above n. 31; J. Galloway ‘The pursuit of national champions: the intersection of competition law and industrial policy’ (2007) 28 *European Competition Law Review* 172.

constraints are of procedure, not substance.

*Tetra Laval* caused considerable excitement as an apparent move towards more penetrating review, and as a display by the courts of willingness to engage with the substance of merger control and its economic basis.<sup>73</sup> The Commission's decision to prohibit a merger was annulled by the Court of First Instance (CFI), which required it to have 'convincing' evidence for its position, which it found, after surveying that evidence, was not the case. The Court of Justice then upheld this. It seemed as though the substance of decisions was subject to meaningful control after all.<sup>74</sup>

On closer inspection, this illusion vanishes. The Advocate General said explicitly that judicial review could not go so far as to substitute the Court's economic assessment for that of the Commission's, and the judgments appear to accept this. While the CFI allowed the Commission only 'a certain discretion' in assessing economic data, which was seen by many as a significant step away from previous mentions of 'wide discretion', it is clear that even this 'certain' discretion is significant. Moreover, the very existence of discretion here is part of the problem. The issues involved are essentially ones of fact, not policy; they concern what will happen to competition if a merger goes ahead. To speak of discretion in this context is like saying that a judge has 'a certain discretion' to decide whether the accused fired the gun or not. It is an inappropriate context for the term. Discretion is appropriate where policy interests are being balanced. Of course this is a part of merger control, but if it is a substantial part then this discretion itself is enough to remove the illusion that we are talking about law. If perhaps it was a contained and defined part, within a broader context of rule-like economic theory, a tie-breaker where the theory led to specific either-way results, then legality would not be a problem. However, if it is a trump-card, which can be played in more or less any case to achieve the desired result, then legality is lost.

While the courts in *Tetra Laval* emphasised 'convincing evidence', the ECJ understood this to mean that the evidence must be 'capable of substantiating' the Commission's conclusion.<sup>75</sup> The strictness of this demand depends on the degree to which it is possible to substantiate different conclusions from the same data. This is precisely the problem: the absence of any strictly defined, public, and prescriptive process of economic analysis,

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<sup>73</sup> Case C-12/03 P *Commission v. Tetra Laval* [2005] ECR I-987; T-5/02 *Tetra Laval v. Commission* [2002] ECR II-4381; Commission decision 2004/124/EC of 30/10/01 COMP/M.2416 *Tetra Laval/Sidel*.

<sup>74</sup> See Bavasso and Lindsay, above n. 66; M. Bay and J.R. Calzado 'Tetra Laval II: The coming of age of judicial review of merger decisions' (2005) 28 *World Competition* 433; D. Bailey 'The standard of proof in EC merger proceedings: a common law perspective' (2003) 40 *Common Market Law Review* 845; P. Craig *EU Administrative Law* (Oxford: Oxford University Press 2006) at 453.

<sup>75</sup> Para 39 of the judgment.

and the room for discretion and policy balancing, mean that in all cases where conflict is likely to arise the Commission has enough room to ‘assess’ the data in different ways and to come to different conclusions.<sup>76</sup> In some cases, where it is manifest that a merger is of no importance to the market as a whole, or manifest that a market is being replaced by a monopoly, this may not be the case, but these are not the situations with which lawyers should be concerned, since there will be no reasonable disagreement. Instead, it is the cases where it is possible to argue for different positions that raise the problem, and precisely these where the data will not in fact constrain the Commission to any particular view, but will be usable for the substantiation of different views.<sup>77</sup> This is particularly so when one considers that the question is often not a simple yes or no but concerns exactly what conditions should be imposed on a merger. This sliding scale of possibilities makes evidence even less determinative of results and discretion even more powerful. The Commission is master of the evidence, not the other way round.<sup>78</sup>

Cases like *Tetra Laval* should be seen as training for the Commission. Decisions were overturned because of the way they were presented. The right evidence was not attached to the right conclusions, and bits of evidence were ignored. The procedural and presentational conditions attached to a decision are now very strict. The Commission must be very careful to ensure that all the evidence it gathers is marshalled and logically organised and that a sufficient mass is attached to every sub-conclusion for which it is used, that contrary evidence is addressed and dismantled.<sup>79</sup> However, provided it does this, the substantive question of whether the interpretation of that evidence really is the best or the only interpretation, a matter of economics, business theory, psychology, and futurology, will be outside the reach of the courts wherever there is more than one plausible interpretation,<sup>80</sup> which is usually the case.<sup>81</sup> We may expect the Commission

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<sup>76</sup> See Jones and Sufrin, above n. 53; Faull and Nikpay, above n. 49.

<sup>77</sup> See above n. 69.

<sup>78</sup> *Id.*

<sup>79</sup> B. Vesterdorf ‘Certain reflections on recent judgments reviewing Commission merger control decisions’ in M. Hoskins and W. Robinson (eds) *A True European, Essays for Judge David Edward* (Oxford: Hart Publishing 2003) at 143, also cited in Craig, above n. 74.

<sup>80</sup> *Id.* Although Judge Vesterdorf uses strong language, and appears to emphasise the role of the Courts in holding the Commission accountable, if one looks at his words carefully, as with the Court judgments, the substance is that there will be no tolerance of Commission arguments that are not supported by evidence or where evidence is ignored or improperly used, but where there are multiple plausible interpretations of that evidence, the Courts will not second-guess. The judicial role is thus somewhat less than it at first seems, given the nature of the evidence in question and its inherent open-endedness.

to become ever more polished in its presentation, and therefore in substance ever more immune from challenge.

Other recent cases may accord subtle differences to this picture, although it is too early to tell. In *Schneider*, *Airtours* and *Impala*, the Commission again had decisions overturned by the Courts, and the CFI engaged in what seemed to be a thorough analysis of the evidence before concluding that the Commission had got it wrong.<sup>82</sup> There is the suggestion that these cases indicate a heavier burden of proof on the Commission when it wishes to prohibit mergers, and they display an increased willingness by the CFI to assess evidence.<sup>83</sup> Yet, although *Impala* is being appealed to the ECJ, none of these cases can or do challenge the ECJ's analysis in *Tetra Laval*, which was subsequent to *Schneider* and *Airtours*. These cases may turn out not to be the beginning of a trend. Perhaps more importantly, the Community courts are no more able than the Commission – probably less able in fact – to create certainty and predictability out of economic analysis and the mesh of open guidelines. Were they to go so far as to substitute their own economic analysis for that of the Commission's, the problem of predictability would simply acquire a new venue. In fact, in these cases they emphasised that they were not doing so, but rather that the Commission had made egregious errors of omission and analysis. This attracts headlines, but makes the cases less interesting. There will always be moments of silliness, and authorities will always be caught out in these occasionally, but it is the decisions that might plausibly have gone either way that are of interest, and there is no reason to think that these would not pass the *Schneider*, *Airtours* and *Impala* level of scrutiny. These are the cases where considering all the factors and applying the economics still leaves room for 'discretion' or 'balancing' or 'assessment as a whole'. That privilege remains the Commission's alone.

Finally, one may note the importance of time. Whatever the quality and nature of review, firms often cannot wait for years for certainty about their deals. Despite expedited procedures before the CFI, the possibility of appeal to the ECJ means that litigation delays certainty for longer than most market transactions can tolerate.<sup>84</sup> This is probably the greatest single reason that what the Commission says is in practice most often the final word. The fact that occasionally a major firm does pursue a challenge does not detract

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<sup>81</sup> See above n. 69.

<sup>82</sup> Case T-351/03 *Schneider Electric v. Commission* [2007] ECR II- ; Case T-342/99 *Airtours v. Commission* [2002] ECR II-2585; Case T-464/04 *Impala v. Commission* [2006] ECR II-2289.

<sup>83</sup> See Bailey, above n. 74; S. Volcker, 'The CFI's *Impala* judgment: a judicial counter-revolution in EU merger control' (2006) 27 *European Competition Law Review* 589; K Wright, '*Impala v Commission* and the Standard of Proof in Mergers' (2007) 32 *European Law Review* 408.

<sup>84</sup> See Christiansen and Kerber, above n. 31.

from the fact that in most merger cases this will not be a practical solution to an undesired or unexpected Commission opinion.<sup>85</sup>

### 5.7 The culture of negotiation

In practice in the US, few merger cases go to court. Many matters are brought to the agencies' attention for advance review, and their legality is assessed in accordance with internal guidelines. The agencies sometimes negotiate complex consent decrees with the private parties, with the courts playing only a symbolic role in reviewing these decrees.

The centrality of this negotiation process means that the agency guidelines are a more important form of 'law' than case law for most firms and parties, and the advisory opinions that the agencies issue are taken seriously. These give an initial view of the legality of a transaction, and although not a formal requirement before proceeding with a transaction, they are a thriving part of antitrust practice both for the agencies and the private sector. Approval of borderline transactions is often sought in order to obtain agency review and establish the agency position before, rather than after, the commitment of major resources. These requests represent a welcome opportunity for the agencies to make their views known without the necessity for litigation. The agency responses are then studied carefully by the parties and are normally outcome determinative.

As well as such voluntary advance review, most significant mergers and acquisitions must be reported in advance to the enforcement agencies. Only a tiny handful of these are subsequently challenged in court. In practice, the law provides a system whereby the agencies and the parties negotiate their way to a resolution and a consent order.<sup>86</sup> This is seen by both

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<sup>85</sup> See D. Chalmers and others, *European Union Law* (Cambridge: Cambridge University Press 2006) at 1089; 'While it may be in the public interest to ensure that there is effective judicial review of administrative action, in many cases parties are under such pressure to ensure a merger clearance that they will accept whatever commitments are necessary to gain regulatory approval. In the bargaining that goes on between the Commission and merging parties, the Commission still retains the upper hand.'

<sup>86</sup> See B. Wasserstein, *Big Deal: The Battle for Control of America's Leading Corporations* (New York: Warner Books 1998) at 759: '[G]iven the uncertainty surrounding most antitrust issues, an acquirer typically demands that transaction documents contain a provision that allows the acquirer to pull out of the deal if it is challenged [...] In addition to negotiating an antitrust provision in the deal documents, an acquirer should be prepared to spend considerable time and energy on the review process. [A]n acquirer should not treat the review process as a black box that will take care of itself. Rather the acquirer should seek to create an ongoing negotiation with the reviewing agency. An alternative to the whole process under Hart-Scott-Rodino is for the parties to a deal to negotiate a voluntary settlement with

sides as an efficient and welcome approach, in which both sides are more inclined to take into account each other's interests and move to a satisfactory compromise than they would be in the polarising context of a courtroom contest.

A similar position is emerging in the EU.<sup>87</sup> The Commission encourages early contact by notifying parties, and often engages in discussions with them at various stages, from before the formal notification, to 'state of play' discussions where problems have been identified.<sup>88</sup> The most legally interesting and significant mergers are those around the border of legality, where the issue is not just yes or no but is precisely what commitments or concessions should be made for the merger to be permitted. The decisions on this are not reached in isolation in Brussels but after sometimes intense discussion and debate with the notifying parties, with the importance of particular concessions for each side being brought to the other's attention.<sup>89</sup> The Commission may wish to see a subsidiary sold to prevent a local monopoly emerging, while the parties may emphasise how vulnerable and short term that monopoly in fact is and will be, as a result of competitive pressures, and how vital the subsidiary is to the efficiencies of the merger. The mergers are important to allow the Commission and merging parties to fully understand each other's position,<sup>90</sup> and the outcome is often in substance almost consensual, not a million miles in spirit from the US consent orders. These are two powerful parties, circling each other, assessing each others' strengths and weaknesses, and finally usually agreeing that battle would be mutually destructive.

We do not take issue here with the advantages of negotiation. It may in fact be highly efficient. Law may not be the best way to deal with all situations. Our question is whether this diminishes the legal quality of the process, and we suggest that the already wobbly rule-like element of merger control is rendered even less rule-like by the negotiation trend. Instead of striving for clearer and more predictable frameworks, the shared energy of

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the government. Such settlements typically are reached during the review process. The government then files a complaint together with a proposed consent decree. Though a consent decree must be approved by a federal judge, the court in most cases merely validates the terms of the existing agreement.'

<sup>87</sup> See Voigt and Schmidt, above n. 54, who have tracked trends in contact between the Commission and parties, note that negotiation between the Commission and firms increased during the 1990s and the early years of the first decade of the new century. See also above n. 83.

<sup>88</sup> See Ritter and Braun, above at n. 44 at 664.

<sup>89</sup> See Cini and McGowan, above n. 7, refer to intense negotiations; D. Neven and others, *Merger in Daylight: The Economics and Politics of European Merger Control* (1993) Centre for Economic Policy Research, refer to a 'complex bargaining game'; see also Christiansen, above n. 31.

<sup>90</sup> See Cini and McGowan, *id.*

Commission and private parties is channelled towards good co-operation and working relationships. The personal, and the understanding of each other's concerns and interests, is prioritised at the expense of the predictability and replicability of the decision-making process.

## 6 Conclusion

The Commission in its merger control function looks more like a public authority exercising political discretion under procedural constraints than an enforcement body applying law. One may compare it with a municipal council deciding where to allow commercial activities and which zones to designate as residential. The decision is made on the basis of complex and multiple factors, balancing different interests and policies, and in no sense would one say that it is simply an 'application of the law'. The law is certainly involved in control. Ultimately there will be an obligation to consult relevant parties and to follow certain procedures, and it must be possible to demonstrate to a judge that the decision is basically rational: namely, that the relevant pros and cons have been considered and are capable of being interpreted to lead to the conclusion reached. However, provided the authority behaves in this rational and procedurally correct way, its political interpretation of what the best assessment of the pros and cons are will not be second guessed. It has a discretion, and in this sense there is no law – usually, though some jurisdictions may of course regulate such matters differently – requiring it to reach particular conclusions on particular streets or blocks. Although it must follow the law in deciding its zoning rules, it would not be said to be applying it.

Then we may compare, for example, a body granting licences, say driving licences, or permissions to practice medicine. Here there will be rules determining who is entitled to a licence, which tests they must have passed, and so on. The authority in question applies these rules, and is essentially an applicator or enforcer of the law, not a political decision-maker. That is not to say that there is no discretion – there may be a 'good character', or 'no disabling disease' requirement that requires some interpretation, but rules will typically attempt to define these concepts as precisely and transparently as possible, listing various diseases, what kinds of criminal offences will be unpardonable and which forgiven, and so on. The remaining area of irreducible judgment will be but a small and clearly defined island within a distinctly legal context. Anyone going to a legal advisor will be able to hear with reasonable certainty whether they are in fact entitled to the licence they seek, and to know exactly what process of reasoning leads to this conclusion, what factors are involved, and how they weigh against each other. If the discretionary element of a decision is challenged in court, the matters concerned will be clear and accessible to the

judge – is a person in this physical state able to control a vehicle, should this crime, this long ago, be seen as undermining good character – and even if there is no inclination to second guess, the judicial control is potentially real and effective. It is not the case that an authority will be able to reach whatever decision it wants on the basis of the medical or legal evidence.

The Commission looks much more like the municipal council when it considers mergers. The substance of its decision is not a matter that is regulated by what one could describe as law. Competition law is law in its procedural aspects, but the substantive question of whether mergers are permitted is primarily a personal discretion granted to an authority appointed by political masters. This raises the question of the extent to which this is true of other branches of competition law, to which many of the same considerations of economic analysis and negotiation are relevant.

We do not say that this necessarily matters. Firstly, merger control may grow into law. Competition regulation is a relatively new and changing field, and perhaps one should not be too hasty in demanding legal maturity. Secondly, law is not always the most appropriate way to deal with substance. In both personal and political life, considerations are too complex to be bounded by explicit rules. We expect our parliaments to think, rather than just apply rules, and we do the same in most aspects of our own lives. Perhaps competition regulation, since it has become regulation of the future economy – which is to say therefore also of the future society – rather than just enforcement of certain outer limits of commercial behaviour is also too complex for rules.

One is reminded of the origins of European competition law, in the desire by public authorities to control concentrations of private power and to prevent them being able to challenge or even usurp the state.<sup>91</sup> Efficiency and consumer considerations are a relative innovation, and perhaps they are more a mask than is often claimed, and the public-private power relationship remains at the heart of the system. After all, in the difficult cases, where different views are possible, and conflict is likely, the economists are divided, and therefore as a group unable to agree on what should be done. What rational person would then base their regulation on economic theory? It may be suggested that the very claim that a decision is based on ‘sound economics’ should be enough to have it annulled;<sup>92</sup> it shows either a lack of understanding of the state and scope of economics, or a total lack of sense.

The most plausible interpretation of the operation of merger control is that the state wishes to be involved in regulating and managing

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<sup>91</sup> See D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Oxford University Press 1998).

<sup>92</sup> Reference to a ‘sound economic framework’ is found in recital 28 of the ECMR. The Commission often refers to the basis of its competition policy in ‘sound economics’.

concentrations of private power, particularly in these times when international firms may seem able to escape the control of particular jurisdictions, but wishes to do so on terms that are relatively neutral and that do not structure the issue so as to necessarily create public-private opposition or conflict. Economics is a shared language, and what it does is provide a medium for negotiation and compromise that is balanced and accessible to both parties. A language of power and authority and political interests would immediately put firms on the defensive. On the contrary, the broad economic, sometimes policy-based, language of competition allows both sides to express their interests without it being 'owned' by either. The role of economics in competition law is not to determine results but to facilitate communication.

The policy of non-legal competition regulation may therefore be good. Nevertheless, lawyers will not be happy at the idea of a hole in the rule of law. It may be that the best response to this is not to change competition regulation to a rule-based system but instead to increase political control over the Commission, to impose on it the accountability that usually goes with political discretion. The appointment of Commissioners for a limited period – especially of course the Competition commissioner – already offers a potential mechanism for politically controlling the direction of competition policy, but perhaps there is a need to develop such control further. In any case, lawyers should be comforted by the fact that this is an area where the most basic rights are rarely an issue. The right to merge or not to merge hardly touches on fundamental human rights, and is a decision addressed to powerful and privileged parties.

We would be interested in research on whether a rule-like system would tend to work in favour of merging parties or the Commission. We suspect it would make it easier for private parties to assert rights and to shoot holes in decisions. The nebulous discretion that currently exists shifts the balance of power to the Commission, the public authority. We think that this is the essence of competition law – a quasi-legal framework to ensure that public authority always has the upper hand over commercial power, without going so far that firms feel humiliated, threatened, or unable to function, or that their interests are ignored.



# CONCERN ABOUT THE QUALITY OF EU LEGISLATION: WHAT KIND OF PROBLEM, BY WHAT KIND OF STANDARDS?

*Wim Voermans*\*

## **Abstract**

Over the last decade the interest in the quality of EU legislative instruments has surged due to serious threats to the effectiveness of the legislation. This contribution makes an inventory of the policies and instruments that have been put into place to improve quality of legislation and assesses their character, orientation and effectiveness. Any appraisal of these policies, so the paper argues, is dependent on a perception of the basic functions attributed to EU legislative instruments and the standards derived from it. The paper concludes that the present policies and instruments for Better lawmaking have the ability to promote regulatory quality, but not necessarily overall legislative quality.

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## 1 Introduction

Debates on the quality of Community – or EU<sup>1</sup> – legislation have, in the wake of similar debates in EU Member States,<sup>2</sup> become ever more topical in the last decade. Various reasons may account for this rising interest, for instance the increased volume and tempo of EU legislation accompanying the establishment of the single market and the accession of twelve new member states. The growing awareness of detrimental effects (non-compliance, ineffectiveness, market distortions)<sup>3</sup> of poor EU legislation have also contributed to a sense of urgency to improve legislation among EU institutions and member states alike.<sup>4</sup> On top of that, more critical attitudes in member states regarding the EU and EU policies, and problems pertaining to the legitimacy of EU legislation, have spurred the debate, as have the worldwide focus on better regulation and new insights in the effects of regulation on economic growth.

For more than a decade now the EU has been trying to get to grips

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<sup>1</sup> ‘EU-legislation’ is the common terminology to indicate all of the legislation enacted under both the EC- and EU-Treaty. Especially texts stemming from the period before 2002 (still) use the term ‘Community legislation’ which basically refers to legislation enacted under the EU’s first pillar (EC Treaty). In our contribution we will use the terms ‘Community Legislation’ and ‘EU Legislation’ almost indiscriminately, for purposes of readability. Most texts on the quality of legislation typically address Community legislation. Once the Reform Treaty of 2007 (Lisbon Treaty) is ratified and entered into force only ‘EU legislation’ survives as the proper indication. After the Irish ‘no’ of 13 June 2008, however, it remains to be seen whether the Lisbon Treaty will survive.

<sup>2</sup> Better regulation is spreading like bushfire in Europe the past few years. See for a few examples the UK (Better regulation and its Better regulation policy <<http://www.dti.gov.uk/bbf/better-regulation/index.html>>), Germany (the establishment of the National ‘Normenkontrollrat’ to promote Better regulation and cutting red tape <<http://www.normenkontrollrat.bund.de/Webs/NKR/DE/Homepage/home.html>>), Portugal (the Simplex 2007 and 2008-programs <[http://www.portugal.gov.pt/portal/PT/Governos/Governos\\_Constitucionais/GC17/Ministerios/PCM/MEAI/Comunicacao/Programas\\_e\\_Dossiers/20060327\\_MEAI\\_Prog\\_Simplex.htm](http://www.portugal.gov.pt/portal/PT/Governos/Governos_Constitucionais/GC17/Ministerios/PCM/MEAI/Comunicacao/Programas_e_Dossiers/20060327_MEAI_Prog_Simplex.htm)>), Ireland (<<http://www.betterregulation.ie/index.asp>>), the Netherlands and other countries (see also <[www.administrative-burdens.com](http://www.administrative-burdens.com)>).

<sup>3</sup> See for a treatise on this subject C. Radaelli, ‘Governing European Regulation: The Challenges Ahead’ (Florence: European University Institute 1998) *RSC Policy Paper No 98/3*. <[http://www.eui.eu/RSCAS/WP-Texts/RSCPP98\\_03.html](http://www.eui.eu/RSCAS/WP-Texts/RSCPP98_03.html)> (last visited 4 January 2008).

<sup>4</sup> See for instance the *White Paper on European Governance* COM (2001) 428 final, the EU Commission’s *Action Plan on Better lawmaking* COM (2002) 275 final, and (more or less) its follow up, *A strategic review of Better regulation in the European Union* (Common Better regulation Strategy, for short) launched in a Commission communication of 14 November 2006 COM (2006) 689.

with legislative problems. Especially over the last five years the law making institutions of the EU have committed themselves to a series of policies, protocols, instruments and review methods to improve the overall quality of legislation. The mass and intensity of these quality strategies is remarkable. They provide an interesting focal point for research for a variety of reasons. Firstly, they tell us something about the current state of affairs of the overall governance of the EU, a treaty-based union that uses legislative instruments to further its goals. What kind of instruments are used to attain the EU's objectives, why and to what effect? What works and what does not, and what are the side effects? Secondly – more interesting from a scholarly point of view – the quality strategies themselves may tell us something about shifts in the perception of EU legislation and, following from that, the standards it has to meet. This is basically a constitutional matter. If we ask ourselves what 'good' EU legislation is, or what kind of standards EU legislative instruments have to meet, than any answer to that question reflects notions, mostly constitutional, about what we expect from EU legislation, more in particular the functions we attribute to it.<sup>5</sup> These notions vary widely and the standards accordingly.

If, for instance, we find that the most fundamental function of legislation is to enable institutions to intervene in markets, social or political life (instrumental function),<sup>6</sup> then the standard to measure the success or

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<sup>5</sup> See L.A.J. Senden, 'The Quality of European Legislation and Its Implementation and Application in the National Legal Order' in E.M.H. Hirsch Ballin and L.A.J. Senden (eds.) *Co-actorship in the Development of European Law-making* (The Hague: T.M.C. Asser Press 2005) 29.

<sup>6</sup> The instrumental functions of legislation in modern societies are manifold. Summers distinguishes five common techniques to give effect to government policies using the law as an instrument. To further policy or political ends law is commonly used as: a. a *grievance remedial* instrument (recognition of claims to enforceable remedies for grievances, actual or threatened); b. *penal* instrument (prohibition, prosecution and punishment of bad conduct); c. an *administrative-regulatory* instrument (regulation of generally wholesome activities, business or otherwise); d. an instrument for ordering governmental/authoritative *conferral of public benefits* (education, welfare, economic infrastructure, etc.); e. as an instrument for *facilitating and effectuating private arrangements* (facilitation and protection of private voluntary arrangements, economic and otherwise). EU legislation - especially EC legislative instruments – basically perform most of these instrumental functions, be it that the *administrative-regulatory* function (e.g. in agriculture, health and environment legislation) and *facilitating and effectuating private arrangements* (e.g. consumer protection, telecommunication services etc.) functions are somewhat predominant. See R.S. Summers, 'The Technique Element in Law' (1971), 59 *California Law Review* 733 see especially at 736. The functions are inspired on an article by H. Kelsen, 'The Law as a Specific Social Technique; the Essence of Legal Technique' (1941-1942) 9 *The University of Chicago Law Review* 75 at 75.

failure of legislation is an altogether different one than according to notions that frame the principle functions of legislation in terms of establishment of institutions, attribution of power and constraints on governmental action (constitutional function). It does not stop there; legislation in modern states performs a host of other functions.<sup>7</sup> It expresses and fixes trade-offs between (opposing) interests in political arenas (political function); it provides the basis for popular participation – and so the legitimization – in the framing of legislation (democratic function); it communicates and reaffirms public morals, values and public goods (symbolic function);<sup>8</sup> and it organizes and structures implementing powers and institutions (bureaucratic function),<sup>9</sup> to name but a few of the most important functions. I will not deal with all of these functions at length, but it is important to see that quality notions are in fact implicit (most of the time) expressions of perceptions of the proper functions of legislation.

To complicate matters: the functions of EC legislation are not static. They have changed quite substantially over the years. Under the ‘old’ EEC Treaty the EC’s legislative instruments were means to very specific ends: establishing a customs union, achieving a common market, safeguarding economic freedoms.<sup>10</sup> Under the Treaty establishing the EU, the Union’s objectives have changed and, as a result, the way in which legislative instruments are used.<sup>11</sup> The way in which the bulk of EU legislative instruments is enacted nowadays, involving the European Parliament as a full legislative partner under the co-decision procedure, has left its mark on the character of EU legislation as well.

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<sup>7</sup> These functions in fact are a summary of the – Llewellyn-based (from his *Jurisprudence* (1962)) – basic functions Twining and Miers attribute to ‘rules’. See W. Twining and D. Miers, *How to Do Things with Rules?* (London: Weidenfeld and Nicolson 1991, 3<sup>rd</sup> ed.) paragraphs 3.8 through 3.11 at 159.

<sup>8</sup> This coincides to some extent with what Morgan labels ‘meta-regulation’. B. Morgan, *Social Citizenship in the shadow of Competition; the Bureaucratic Politics of Regulatory Justification* (Aldershot: Ashgate 2003) at 79.

<sup>9</sup> This in fact is more or less a subsection of the ‘constitutional function’. The constitutional function is commonly believed to be made up of the *constituent*, *institutional* function (establishing institutions), the *attributive function* (attributing power to institutions) and the *regulatory function* (outlining and limiting the scope of the use of power). See for instance C.A.J.M. Kortmann, (in Dutch) *Constitutioneel recht* (Constitutional Law) (Deventer: Kluwer 2008, 6<sup>th</sup> ed.) at 21.

<sup>10</sup> See the preamble of the EEC Treaty and articles 2 and 3.

<sup>11</sup> See for the different objectives article 2 of the Treaty establishing the European Union (TEU). The objectives of the Union can be summarized as follows: promotion of economic and social progress and a high level of employment to achieve balanced and sustainable development, implementation of a common foreign and security policy, establishment of citizenship of the EU, and providing for a area of freedom, security and justice.

These underlying notions as to the functions attributed to legislation are vital to any understanding of the EU's legislative policies. If we fail to take account of them, it will be impossible to understand where the standards for good legislation – on which most of the strategies are built – originate from, nor will it be possible to come up with a balanced appraisal of the effectiveness of these strategies.

It is therefore that in this contribution we will ask ourselves two basic questions:

1. What kind notions of and standards for EU legislation are expressed in recent policies and instruments aiming to improve the quality of EU legislation?
2. Are these policies and instrument effective means to solve legislative problems?

I will not, with this distinctive approach, address the questions primarily from a regulatory governance perspective (why regulate, who are the principle actors, what interest are served, etc.)<sup>12</sup> but rather from a more or less constitutional perspective (what are the basic functions attributed to legislation, what kind of standards for 'good' legislation emanate from that, how are these standards reflected in policies and enshrined in normative documents, and how and to what degree are these standards met, etc.).<sup>13</sup>

## 2 The quality of legislation: an elusive concept

Over the past decade, the concern for legislative quality and focus on better regulation has become popular in many EU countries for various reasons.<sup>14</sup> There is some evidence that legislation can and does affect competitiveness

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<sup>12</sup> See (from the vast lakes of literature on regulatory governance) for instance, A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Oxford University Press 1994); R. Baldwin and M. Cave, *Understanding Regulation* (Oxford: Oxford University Press 1999).

<sup>13</sup> This latter approach was also adopted by H. Xanthaki, 'The Problem of Quality in EU Legislation; What on Earth is Really Wrong?' (2001) 38 *Common Market Law Review* 651.

<sup>14</sup> The work of the Organization for Economic Cooperation and Development (OECD) has been an important inspiration as well the successes of other EU countries like the United Kingdom, the Netherlands and Belgium in freeing markets and limiting administrative and other burdens as a result of legislation. Or may be it is due to the fact that no one in all seriousness can oppose Better regulation. Who on earth would want to promote 'Worse legislation'? See S. Weatherill, 'The Challenge of Better regulation' in S. Weatherill (ed.) *Better regulation* (Oxford, Oregon and Portland: Hart Publishing 2007) 3.

and economic growth<sup>15</sup> and there are troubling problems regarding the effectiveness of legislation. As a result, better regulation policies have mushroomed throughout Europe and up to the level of the European Union.<sup>16</sup>

What many of these policies share, as does EU policy on Better Lawmaking,<sup>17</sup> is the ambition to improve the overall quality of legislation. But what do we mean by legislative ‘quality’? It is a very elusive buzzword indeed. According to a common definition, quality is the extent to which goods or services meet requirements or standards.<sup>18</sup> Hence legislative quality is the degree to which legislative instruments and procedures live up to the legislative standards. But then a new question emerges: what are the relevant or proper standards for EU legislation? A question like this can only be answered in the light of the function EU legislation performs in EU context.

### 3 Legislation as the source of quality standards

Legislation is primarily a medium through which law is expressed. As such it performs important functions in constitutional states, as we have already seen. In the political systems of welfare states, governed by the rule of law,<sup>19</sup> legislation provides both the basis and the framework for government action (constitutional function). At the same time, law expressed by legislation serves as an instrument to further policies (instrumental function), acts as a trade-off mechanism for interests (political function) and a channel for popular participation in the enactment of law (democratic function), and it offers the basic framework for the operation of a bureaucracy (bureaucratic function).<sup>20</sup> Aside from these more or less instrumental functions, legislation has less well known but important non-instrumental expressive and symbolic functions, which structure the legislative debate and provide the authoritative aura for and legitimacy of legislation (symbolic function).<sup>21</sup>

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<sup>15</sup> See for instance Organisation for Economic Cooperation and Development, *Cutting Red Tape: Comparing Administrative Burdens across Countries* (Paris: OECD Publishing 2007).

<sup>16</sup> See for instance the overview for simplification initiatives see <[www.administrative-burdens.com](http://www.administrative-burdens.com)> (last visited 16 June 2008).

<sup>17</sup> See <[http://ec.europa.eu/dgs/legal\\_service/law\\_making\\_en.htm](http://ec.europa.eu/dgs/legal_service/law_making_en.htm)> (last visited 16 June 2008).

<sup>18</sup> See for instance the ISO 9000-definition of quality of the International Organization for Standardization (ISO).

<sup>19</sup> An important – procedural - element of the rule of law is that it requires a mandate in law for governmental action and the obligation to act in accordance with law.

<sup>20</sup> See P. Eijlander and W. Voermans, *Wetgevingsleer* (On Legislative Drafting). (The Hague: Boom Juridische uitgevers 2000) at 18.

<sup>21</sup> The communicative function of law (and legislation, as its expression, for that matter) is, as observed by the Dutch scholar Wibren van der Burg, a complex one.

By and large, the EU's legislative instruments perform the same functions in the context of the EU legal order, but there are some differences compared to the situation in national states. Article 249 of the EC Treaty, for instance, provides that EU institutions can only enact legislation 'in order to carry out their task and in accordance with the provisions of this Treaty'.<sup>22</sup> On the face of it, this anchors the use of legislative instruments, like regulations and directives, to the objectives of the EU, notably the promotion of economic and social progress in a single market, the establishment of a common foreign and security policy, EU citizenship, and an area of freedom, security and justice.<sup>23</sup> Although the scope of the objectives has broadened since EEC became EC, even under the EU umbrella, article 249 of the EC Treaty seems to indicate that the rationale for EC legislation is totally different from the one in the member states. Historically this holds true. The EU was not set up as a plenipotentiary state, but as a community with specific, limited powers devised to achieve limited ends. As a consequence, the functions of legislative instruments put in place by this community are predominantly instrumental and bureaucratic, and should be appreciated accordingly, one could argue. This way of reasoning, however, ignores that the changes in the context in which the EU's legislative instruments have been used since the mid-1990s. Barents, for one, believes that the EU can no longer be deemed a mere intergovernmental community, since it has developed into a – originally self proclaimed – autonomous legal order governed by constitutional principles (adherence to democracy, fundamental rights, etc.).<sup>24</sup> Article 6 of the Treaty establishing the European Union (TEU) bears witness to this by stating that

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

This is especially relevant for the use of legislative instruments in the EU. These instruments are no longer a mere means to economic ends that must

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Law may create a normative framework, a vocabulary to structure normative discussions, as well as institutions and procedures that promote further discussion. The expressive function of law is at stake when it expresses which fundamental standards, which values are regarded as important. See W. Van der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20 *Journal of Law and Philosophy* 1 31. See also B. Z. Tamanaha, *Law as Means to an End; Threat to the Rule of Law*. (New York: Cambridge University Press 2006).

<sup>22</sup> A limited power. See also article 5 TEU.

<sup>23</sup> See article 2 TEU.

<sup>24</sup> R. Barents, *The Autonomy of Community Law* (The Hague, London, New York: Kluwer Law International 2004) especially at 19.

primarily be appreciated functionally, but instruments that perform vital functions in an autonomous legal order, governed by constitutional principles. EU legislation therefore basically serves the same ends and purposes as national legislation, although there are different accents. But it goes almost without saying that present-day EU legislation has a significant democratic,<sup>25</sup> political, constitutional and symbolic function, making it much more comparable to member state legislation than it used to be.

#### **4 Legislative and regulatory quality**

In order to be able to perform most of the functions mentioned above, legislation in a constitutional state as well as EU legislation must meet some basic requirements. Subject to the rule of law, as any other institution or agent in a constitutional state or the EU for that matter, the activity of legislating is subject to the law itself. This means that in order to legislate, a constitutional power to legislate is a prerequisite, and that legislative processes as well as legislative discretion are confined by law (preparation and enactment according to the due procedure, not acting contrary to higher ranking laws, and some form of accommodation to existing law). Aside from this ‘principle of legality’ the rule of law also imposes a duty on the legislator to consider – in some way or respect – the implementation and enforcement of legislation to be enacted (‘principle of effectiveness’). The last requirement the rule of law sets upon a legislative act results from the principle of legal certainty, and is what we can call the ‘principle of intelligibility’, the principle that legislative acts need to some extent to be readable and intelligible to its addressees. Most constitutional states are not only governed by the rule of law but are in effect democratic states too. The latter feature results in separate, additional requirements for legislatures connected to the democratic and political function of legislation. Legislative authorities are subject to the ‘duty to give reasons’, the ‘duty to consult or involve interested parties’, be it directly or indirectly, and the ‘duty to inform’ (transparency and accessibility), during the course of legislative processes resulting in primary legislation.<sup>26</sup>

For some it will be obvious that legislative quality standards can only emanate from constitutional principles (e.g. constitutional lawyers),

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<sup>25</sup> Especially now the co-decision procedure, involving the European Parliament, is applicable in most of the first pillar legislation and will be the regular legislative procedure under the Lisbon Treaty.

<sup>26</sup> ‘Primary’ used here as opposed to ‘subordinate’ or ‘delegated’ legislation, in the form of statutory instruments, government decrees or ministerial regulations that are based on higher ranking regulations and merely detail the norms of the higher ranking laws.

others may take a different view of the matter. The Organization for Economic Co-operation and Development (OECD), for instance, approaches the idea of – what they call - regulatory quality from a rather more economic angle. The overall OECD perception of regulatory activity – often taking the form of legislation – is largely instrumental. The OECD and a large part of the regulatory governance community<sup>27</sup> understand legislation primarily as a regulatory instrument, as a means to attain public good, and to provide prerequisites for stable institutions, fair market conditions, citizen's satisfaction, and economic growth and welfare.<sup>28</sup> Taken from this perspective legislation performs well if it maximises the net benefits of regulatory measures and citizen's wealth. Legislative quality, according to this view, is not in the first place the extent to which legislation complies with constitutional principles or conveys symbolic notions, but rather more the way legislation rates in terms of enhancing economic performance, or the dynamics of trade offs of interests. Over the last decade much effort has been invested in defining (a wide range of) regulatory quality indicators, in order to make regulatory quality measurable. Performance on indicators like these gives us an idea of the ability of a government to formulate and implement sound policies and regulations that permit and promote private sector development.<sup>29</sup>

The different functions of legislation translate into different views on legislation. When one adopts an instrumental or political view to legislation the conceptual lens to problems of and the proper standards for legislation will be a different one than from a more constitutional or symbolic perspective. That is why we will distinguish between the concept of 'legislative quality' and the concept 'regulatory quality'. From a constitutional point of view (and the symbolic function which is closely related to it) the only right measure for the quality of legislation is its ability to express law.<sup>30</sup> The quality of legislation is the extent to which the criteria,

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<sup>27</sup> Regulatory governance is topical in political science and the literature is developing rapidly. The European Policy Group for political research has an active standing group on regulatory governance. See <<http://regulation.upf.edu/>> (last visited on 19 June 2008). It is quite strange that scholars in constitutional law are not catching on: a state's regulatory capacity is the core business of constitutional law.

<sup>28</sup> See OECD, *Regulatory Policies in OECD Countries; from Interventionism to Regulatory Governance*. (Paris: OECD Publishing 2002).

<sup>29</sup> See the paper D. Kaufmann, A. Kraay and M. Mastruzzi, Governance Matters VI: Aggregate and Individual Governance Indicators 1996–2006 (2007) *World Bank Policy Research Working Paper No. 4280*. See also Centre for European Studies Bradford University, *Final Report on Indicators of Regulatory Quality*, report for DG Enterprise (European Commission 2004).

<sup>30</sup> See also J. Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press 1999) especially Chapter 2 - The Indignity of Legislation. See also

emanating from constitutional principles, are met. Regulatory quality on the other hand is the extent to which legislation, as a means to express public policies, is successful in implementing policies to permit and promote private sector development, fair market conditions, stable institutions, citizens' satisfaction, etc. The different notions are not mutually exclusive; in fact they coincide in some respects. One might, for instance, argue that the regulatory quality of legislation is a part of an overall notion of legislative quality, since it deals with effectiveness and efficiency of legislation. This would not, however, do justice to the very different perspectives on the function of legislation in the two different notions.

However interesting this discussion is, this paper does not take regulatory quality as its principle point of departure, but legislative quality instead. Not that I wish to disqualify the regulatory quality perspective, but in an attempt to add to it by taking a more constitutional point of view, one that has, in my opinion, not been fully explored and expressed in recent Better regulation debates.

## 5 Quality standards for EU legislation

The legislative requirements mentioned in paragraph 4 are still very general and theoretical, even though they are represented in quality policies of different member states.<sup>31</sup> If we want to find out what kind notions of and standards for EU legislation are expressed in recent quality policies we need to take a closer look to these policies themselves and the debates and considerations preceding them.

The idea to improve the quality of EU legislation is quite new. In the rush to complete the internal market, not much attention was given to the quality of legislative instruments. It did not sting up until 1990: the legislative volume of the EU had been quite modest up to that moment and legislative problems were dismissed as either 'collateral damage' or

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C. M. Radaelli and F. de Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes* (Manchester: Manchester University Press 2007).

<sup>31</sup> See for instance the Netherlands. The idea of legislative quality is closely related to the demands of the rule of law and demands of – so called - administrative quality of legislation. See *inter alia*, the legislative policy document 'Outlooks for Legislation' (*Zicht op wetgeving – Dutch Parliamentary Papers (Kamerstukken II) 1990/91*, 22 008, nos 1-2). Quality of legislation in the Netherlands is perceived as the degree to which a regulation complies with the requirements (so-called 'quality pairs') of: a. legality and lawfulness, b. implementation and enforcement, c. effectiveness and efficiency, d. subsidiarity and proportionality, e. harmonization and coordination and f. simplicity, readability and accessibility. These requirements are elaborated in policies and dedicated instruments, like reviews, manuals and (voluminous) drafting directives.

perceptions that did not duly account for the different setting<sup>32</sup> of EU legislation. After the Sutherland report sounded the alarm over the quality of EC legislation in 1992,<sup>33</sup> however, the debate was on, not only on the problems but on the proper standards for EU legislation as well. This does - to my mind - not accidentally coincide with the emergence of the new political and constitutional objectives the EU has set itself since the Maastricht Treaty. These new objectives bear on the expectations of EC legislation.

### 5.1 Sutherland, Koopmans, Piris and Timmermans

Since 1992 most commentators, scholars and policy makers have felt that the proper quality standards for European legislation are to be found in the Treaties and the objectives pursued in a Community context with the existing legislative instruments. At the conference 'Quality of European and national regulations in the internal market', held in Scheveningen in April 1997,<sup>34</sup> both the Director-General of the Council Legal Service, J-C Piris, and the deputy Director-General of the European Commission Legal Service, C. Timmermans, indicated what the term quality of European

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<sup>32</sup> Some authors argue that the EU legal order and national legal orders are in fact incomparable as regards legislation and legislative processes. Legislation at the EU level performs different functions than in the Member States and the setting of EU legislative processes is unique. Timmermans – for instance - notes that the nature of Community Law is a 'droit diplomatique', a product of intergovernmental negotiation that can only be judged on its own merits and is governed by its own standards. C.W.A. Timmermans, 'How to improve the Quality of Community Legislation: the Viewpoint of the European Commission', in A.E. Kellerman and others (eds.) *Improving the Quality of Legislation in Europe* (The Hague, Boston, London: Asser Press 1998) 39. This idea of incomparability seems to have caught on, especially in the Netherlands (see Hirsch Ballin and Senden, above n. 5 at 29).

<sup>33</sup> The Sutherland report ('*The internal market after 1992: meeting the challenge*') of 1992 SEC (1992) 2044 sets out some basic requirements for EC legislation, holding that each Community legislative act should be assessed on the basis of five criteria, namely the need for action, the choice of the most effective course of action, proportionality of the measure, consistency with existing measures, and wider consultation of the circles concerned during the preparatory stages. See for the follow up of the report, inter alia, the European Commission's Communication SEC (1992) 2277 and COM (1993) 361 def.

<sup>34</sup> For a summary of the contents of this meeting ('*Kwaliteit van Europese en nationale regelgeving in de interne markt*') see H. Hijmans, 'Over de kwaliteit van Europese regelgeving' (*On the quality of European Legislation*) (1997) 5 *Regelmaat* (Dutch Journal for Legislative Studies) at 192.

regulation must be taken to mean in a Community context in their view.<sup>35</sup> Building upon the work of the Sutherland report of 1992 and the Koopmans working group,<sup>36</sup> these EU officials came up with an impressive shopping list of quality standards for EU legislation.<sup>37</sup> Although shopping lists are not all that interesting per se, what is interesting to see is that the list of EU quality standards corresponds to a very high degree to the general observations set out in paragraph 4. The shopping lists express, to a certain extent, a somewhat constitutional view on EC legislation where one would expect a primarily instrumental view. There are also specific features and differences. The EU quality standards set out by Piris and Timmermans emphasise the demands of subsidiarity and proportionality (concurrent with the requirement of article 5 of the EC Treaty), and the right choice of instrument (and the accompanying procedure). The latter element is a typical consequence of the system of conferral or limited attribution under the EC

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<sup>35</sup> See J.-C. Piris, 'The Quality of Community Legislation: the Viewpoint of the Council's Legal Service' in A.E. Kellerman and others (eds.) above n. 32 at 25 and Timmermans, above n. 32.

<sup>36</sup> In the wake of the alarms raised by the report of the Molitor group (*Report of the Group of Independent Experts on Simplification of Legislation and Administration*, COM (1995) 288 final/2, of 21 June 1995) the Dutch presidency of the EU in 1996 commissioned a working group to try and find more or less universal standards for legislation. The Koopmans-group came up with a set of standards that are derived from (or inspired) by the common legal cultures from the - then - 10 EU Member States. Koopmans Report, '*The quality of EC Legislation. Points for Consideration and Proposals*' (The Hague 1995).

<sup>37</sup> According to approximation of these 'legislative chiefs' in 1997 EU legislation must meet with the following demands: 1. Necessity of regulation (alternatives to regulation are to be considered); 2. Proportionality (no more burdening than absolutely necessary); 3. Subsidiarity (in line with the subsidiarity principle laid down in article 5 of the EC Treaty); 4. Choice of the right instrument (directive, regulation, etc.); 5. Control over the volume of legislation, by preventing new regulation, excessive costs, red tape and overregulation; 6. Coherence and harmonization with existing measures; 7. Requirement of due care during preparation, in the sense of prior consultation of interested parties; 8. Implementation and enforcement; 9. Drafting quality, in particular compliance with Community requirements enshrined in manuals and style guides. At the time (1997) these were the Commission's and Council's Drafting manuals, style guides and the requirements following from the Sutherland-report. In 1998 a lot of these drafting requirements were forged and enshrined into the Interinstitutional Agreement of 22 December 1998 on *common guidelines for the quality of drafting of Community legislation* (OJ 1999C73/1) (hereinafter *IIA 1998*) and 10. Accessibility (*inter alia*, in the sense of providing easy access to, consolidation and codification of regulatory texts). Points 1, 2, 4, 6 and 7 were also put forward as requirements for EC legislation in the 1993 Sutherland report. See Commission Communication of 16 December 1993 COM (1993) 361 def.

and EU Treaties.

## 5.2 EU Quality standards

In the following years these sketchy notions on quality standards from the 1997 conference were elaborated in policy papers and policies, notably in the white paper on European Governance<sup>38</sup> and conclusions of the Laeken and Lisbon summits. They underpin the present EU legislative policies. Their echo also resonates in the work of the Mandelkern group,<sup>39</sup> the Better lawmaking initiatives and instruments of 2002<sup>40</sup> and the subsequent Better regulation strategy of 2006.<sup>41</sup> If we were to sum up the net result of these documents, the EU standards for legislative quality would boil down to the following requirements to be met when drafting, enacting and implementing legislative acts.

- i. Legality: the limits of the legislative attribution of the EC Treaty and EU Treaty, sufficient legal basis, not contravening superior or already existing legislation or treaties – including the EC and EU Treaty - with due regard for unwritten legal principles, etc.<sup>42</sup>
- ii. Due procedure and consultation: proper procedure, coordination (information exchange, cooperation, synchronization, etc.) between the three legislative institutions (Commission, Council and European Parliament),<sup>43</sup> (multi)annual programming of legislative activity, wide consultation,<sup>44</sup> evidence-based and duly motivated decisions,<sup>45</sup> transparency throughout the legislative process enabling maximum accessibility, etc.<sup>46</sup>
- iii. Subsidiarity and proportionality (including overall effectiveness and efficiency of an act): careful consideration of necessity of Community action<sup>47</sup> in view of the subsidiarity principle,<sup>48</sup>

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<sup>38</sup> COM (2001) 428 final.

<sup>39</sup> See Mandelkern Group on Better regulation, *Final Report* (2001).

<sup>40</sup> Communication *Better lawmaking* COM (2002) 275 final, followed by the *Action Plan for simplifying and improving the regulatory environment* COM (2002) 278 final.

<sup>41</sup> COM (2006) 689 final.

<sup>42</sup> See for instance point 2 *Interinstitutional Agreement on Better Law-Making* of 31 December 2003, *OJ* 2003C321/01 (hereinafter: *IIA 2003*).

<sup>43</sup> See points IIA 3 through 11 of the *IIA 2003*.

<sup>44</sup> See point 26 *IIA 2003*.

<sup>45</sup> See point 15 *IIA 2003*.

<sup>46</sup> See points 4 through 9, 10 and 11 of the *IIA 2003*.

<sup>47</sup> See points 16 and 17 of the *IIA 2003* (elaborated in point 18 through 23).

<sup>48</sup> See article 5 of the EC Treaty, the of 25 October 1993 on the procedures for implementing the principle of subsidiarity *OJ* C 329/135, points 13, 16 and 18 through 23 of the *IIA 2003*.

prevention of legislative proliferation, due regard for alternative methods of regulation,<sup>49</sup> avoiding red tape where possible, instruments and costs proportional to the policy goals and as simple as possible,<sup>50</sup> consideration of effectiveness of the solution in comparison to alternatives, informed and evidence-based decision-making e.g. on the basis of an integrated impact assessment,<sup>51</sup> screening the legislative stock from time to time, simplification (inter alia by repeal of obsolete acts), codification and consolidation,<sup>52</sup> etc.

- iv. The right instrument: choosing the right instrument (directive, framework directive, regulation, etc.), the right balance between general principles and detailed provisions, no excessive use of implementing powers, etc.<sup>53</sup>
- v. Implementation and transposition: attention to the operability and application of an act,<sup>54</sup> careful consideration of implementation powers for the Commission and the Member States, clear transposition deadlines for directives, consideration of transitory provisions and entry into force, monitoring implementation and evaluation, etc.<sup>55</sup>
- vi. Enforceability: due consideration of the enforcement and assessment of compliance, effective inspection and sanctioning.<sup>56</sup>
- vii. Technical quality (including accessibility and readability): clear, simple and precise language, due attention to internal and external consistency, consideration of the multilingual context of the EU, overall accessibility and readability.<sup>57</sup>

Lists like these always have an element of subjectivity<sup>58</sup> and this one certainly cannot claim to be exhaustive or the ultimate one. Some may feel that elements of the list should be joined or – on the contrary – should be split. Others will argue that the list is quite technical and administrative in nature and does not take full account of the political, social or economical

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<sup>49</sup> See point 16 IIA 2003.

<sup>50</sup> See e.g. point 12 IIA 2003.

<sup>51</sup> See points 27, 28 and 29 of the IIA 2003.

<sup>52</sup> These latter elements are at the heart of the Better regulation Strategy of 2006, COM (2006) 689 final. See also points 35 and 36 of the IIA 2003.

<sup>53</sup> See point 13 IIA 2003 and – somewhat remotely – point 2 of the IIA 1998.

<sup>54</sup> See the Commission's Communication *Better Monitoring of the Application of Community Law* COM(2002)725 final/4.

<sup>55</sup> See points 24 and 32-34 IIA 2003 and 20 and 21 IIA 1998.

<sup>56</sup> See the Commission's Communication *Europe of Results – Applying Community Law* COM(2007) 502 final.

<sup>57</sup> See points 1 through 19 IIA 1998.

<sup>58</sup> See Senden, above n. 5 at 29.

dimensions of legislation. This may well all hold true, but the purpose of this list of requirements is not to give any definitive answer, but foremost to provide an aid to understanding the discussion on quality of EU legislation and the proposed solutions, as well as to provide a guide through the dense woods of EU policies aiming to improve on it. If we look at it from that perspective, it is interesting to see that most of the quality standards voiced in the debate reflect and emphasize the constitutional, democratic, bureaucratic and instrumental functions of EU legislation. The quality standards expressed do not seem to fit the picture of EU legislative instruments as mere instruments of economic integration, which in fact is somewhat strange because the EU's objectives for the most part are.

## 6 Legislative problems

Legislative functions and standards derived from it are, as argued above, conceptual lenses to legislative problems. Not all EU legislation is up to the standards mentioned in the previous chapter, that much will be clear. But is this a large problem, if a problem at all? The Dutch Minister of Employment and Social Affairs in 2008, P. Donner, takes the view that the problem of lacking quality of EU legislation is often overrated due to national bias in the perception of quality. EU legislation needs to be judged on its own specific accord and merits, and a more teleological approach of EU legislation is called for, according to Donner.<sup>59</sup> Senden and Hirsch Ballin too argue that the notion of EU legislative problems to a large extent depends on the eye of the beholder.<sup>60</sup> Xanthaki, on the other hand, observes that the quality problems of EU legislation are probably not very different or more troubling than those of national legislation.<sup>61</sup> We tend to agree with her, since – as we have argued in paragraph 4 – the functions of EU legislative instruments have changed over the last decade, making EU legislation (and its problems) much more comparable to member state legislation than before.

Even if we allow for the fact that the discussion on the seriousness of legislative problems may vary according to the angle chosen, one cannot deny that EU legislation does on occasion come with quality defects. Such defects – the failure to meet quality requirements – can have serious consequences on different levels (individual, national, EU and international) and ultimately lead to ineffectiveness of EU legislation and the policies enshrined therein. Whatever relativist position one cares to take, a quality defect that cripples or threatens to cripple the effect of EU legislation is by

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<sup>59</sup> See J.P.H. Donner, *De kwaliteit van Europese regels (The Quality of European Legislation)* (2001) *RegelMaat* (Dutch Journal for Legislative Studies) 216.

<sup>60</sup> See Senden and Hirsch Ballin, above n. 5.

<sup>61</sup> See Xanthaki, above n. 13 at 651-652.

all means a ‘true’ legislative problem.<sup>62</sup>

If we want to assess the effectiveness of quality enhancing policies and instruments – as I have set out to do – we need to have some basic understanding of the problems they are meant to solve. Problems facing EU legislation have been researched and analysed over the last decade by different expert, high level groups (e.g. Molitor group,<sup>63</sup> Koopmans,<sup>64</sup> Lamfalussy,<sup>65</sup> Mandelkern<sup>66</sup>) academics and institutions,<sup>67</sup> although far more less detailed and systematically than one would expect in view of the seriousness of the problems. Briefly summarized the gist of these reports results in four categories of quality defects of EU legislation:

a. Qualitative defects as a result of the dynamics of EU legislative processes. These problems become manifest in various forms, ranging from insufficient consultation to a lack of ex post evaluation. At the heart of the matter lies the problem that EU legislative processes – until recently<sup>68</sup> – were not cyclic and – thus – not self correcting, but rather one dimensionally oriented at enactment, without due attention to the afterlife of legislation, notably problems of interpretation, application, implementation and

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<sup>62</sup> In a 2001 contribution to *RegelMaat* I suggested to take the *effectiveness test* as a method to decide whether or not a quality problem constitutes a serious legislative problem. The test holds that if a quality problem results in a situation where legislation cannot or no longer attain the objectives laid down by the legislative authority it creates a legislative problem. W. Voermans, ‘Nieuwe wetgevingsprocedures onder en regelingsinstrumenten voor de EU?’ (New legislative procedures and instruments for the EU?) (2001) *RegelMaat* (Dutch Journal for Legislative Studies) 204.

<sup>63</sup> See Molitor Group, above n. 36.

<sup>64</sup> See Koopmans, above n. 36.

<sup>65</sup> Committee of Wise Men on European Securities Regulation, *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* (Brussels 2001).

<sup>66</sup> Mandelkern Group on Better regulation, *Final Report*, above n. 39.

<sup>67</sup> See *inter alia* Radaelli, above n. 3; Kellerman, above n. 32; V.J.J.M. Bekkers and others, ‘The case of the Netherlands’, in S.A. Pappas (eds.) *National Administrative Procedures for the Preparation and Implementation of Community Decisions* (Maastricht: European Institute of Public Administration 1995) 397; L. Marissing, Vier rapporten inzake de kwaliteit van EG-regelgeving (*Four Reports on the Quality of EC Legislation*) (1996) 4 *SEW* 124; N.E. Bracke, *Voorwaarden voor goede EG-wetgeving* (Requirements for proper Community legislation), PhD-thesis (Amsterdam: University of Amsterdam 1996); W. Voermans and others, *Quality, Implementation and Enforcement; a Study into the Quality of EU Legislation and its impact on the implementation and enforcement within the Netherlands* (The Hague, Tilburg: Ministry of Justice, Tilburg University 2000).

<sup>68</sup> In a recent Communication the EU Commission advocates increased attention to aspects of implementation throughout the policy cycle COM (2007) 502 final.

compliance.<sup>69</sup> Because it is so difficult to achieve results and compromises, and the pressure to meet the integration goals is high, EU legislative processes tend to focus on direct, sometimes short term, results. Achieving policy goals was until recently more or less synonym to getting policies decided or legislation enacted. Problems of application, implementation, enforcement and compliance did not head the priority list of the EU's legislative institutions. This has had five consequences.

- i. Firstly, it has resulted in a lack of information on the overall effectiveness of enacted EU legislation in terms of application, implementation and enforcement. The EU legislative institutions simply do not know half of what happens when EU legislation is implemented, applied or enforced in the member states. Moreover, the institutions do not always seem to be very keen to know either; the overall sentiment seems to be that after enactment, implementation is the member states' business.

Information on what is actually happening after enactment, though, is vital for EU legislative institutions' ability to reconsider and adjust their course. The problem is not that there isn't any information on the application of EU legislation, but that in many cases it is not the information needed to assess the effectiveness of directives or regulations, and that they are reported by a more or less partisan organizations, i.e. the member states themselves. Transposition notifications, scoreboards, reports on litigation under EC legislation, the odd infringement procedure, will tell you only so much about what is really happening in the post-enactment stages of legislation. The EU by and large has a 'paper implementation culture' meaning that implementation and application are mainly monitored on the basis of abstract member state progress reports and notifications. Information on the law in action is quite rare.

The lack of (the right) information shows whenever a policy area is systematically evaluated. A 2004 evaluation of the Public Procurement Directives 1992-2003 for instance revealed that less than an estimated third of the public procurements complied with the administrative procedures laid down in the procurement directives.<sup>70</sup> This compliance deficit does not show from the monitoring data the Commission keeps nor from its annual reports on application. Sometimes even the central authorities of member states are not aware of the 'silent losses' as regards interpretation and application

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<sup>69</sup> See Bekkers and others, above n. 67.

<sup>70</sup> See Europe Economics, *Evaluation of Public Procurement Directives* (2004) Markt/2004/10/D Final Report. The researchers admit that this percentage of non-compliance can even be worse because they simply did not have all the necessary information.

of EU law.<sup>71</sup> We simply do not know whether, and to what extent, EU legislation is being complied with; judging by what is seeping through, the outlook is not altogether promising.

- ii. Secondly, from the little we know, we can deduct that the compliance rate of EU legislation is probably rather low. In 1998 Radaelli concluded that poor performance in the implementation stage is the Achilles heel of many European rules.<sup>72</sup> His conclusion still stands. In a communication of September 2007 the EU Commission<sup>73</sup> admits as much, but at the same time points out that it is, in fact, the member states which have the primary responsibility for the correct and timely application of EU treaties and legislation. The EU Commission cannot go it alone when it comes to overseeing and controlling the implementation. This divide in responsibilities only seems to add to the problems of implementation. Chinese walls seem to be cemented between the initial legislative stages and the implementation phase. The Commission cannot be held accountable for the implementation performance of the member states and lacks the resources to effectively monitor and check it. Member states themselves will not be all that motivated to review and verify their implementation performance more rigorously than is strictly required. In most cases only reports of on-time acts are required (notifications of transposition or an implementation report, for example). To do more than that is ill advised: overzealous implementation can result in disadvantages for national economic

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<sup>71</sup> In our own research project in the year 2000 (Voermans and others, above n. 65 at 28) it turned out that 'silent losses' occur quite frequently because national enforcement authorities, inspectors or administrative authorities simply cannot resolve residual legislative problems of their own, nor can they report back. One example is the provision on 'serious offence' in Directive 96/26/EC on the admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations, amended by Directive 98/76/EC *OJ* 1998 L 277/17. The directive holds that repeated – even minor - offences of drivers against the transport rules leads to the revocation of the license to practice as a road transport operator. This has the unforeseen and quite dramatic consequence that big operators, with a large staff, run a much bigger risk of losing their license than small operators. Obviously this was not the objective of the directive, but what are the administrative authorities to do? They do what they normally do: not apply the provision at all. This was but one example. We stumbled upon many problems like these in the five, randomly picked, dossiers we studied in our research.

<sup>72</sup> See Radaelli above n. 3 at 6.

<sup>73</sup> See *A Europe of results – applying Community Law*, above n. 56.

operators. Add to this that underachievement in the actual implementation of EC legislation is very difficult to bring to court, let alone the Court of Justice, and one can discern a constitutional flaw in the fabric of the EU legal order here. The system of checks and balances pertaining to the responsibility for implementation of EU legislation leaves much to be desired. The establishment of European agencies<sup>74</sup> and European networks that act as ‘ears and eyes’ as regards implementation, is to be welcomed in this respect, notwithstanding the need for a broader discussion on the institutional setting of European agencies.<sup>75</sup>

- iii. Thirdly, EU legislative processes lack an effective feedback culture. After EU legislation is concluded it sometimes proves difficult for authorities in member states to report back on interpretation, application and implementation problems without incriminating themselves and triggering an infringement procedure. The need for feedback shows in the emergence of different networks of implementation authorities over the years. A well-known network in this respect is the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), an informal network of the environmental authorities of the member states.<sup>76</sup>
- iv. Fourthly, the efforts of legislative institution are not always well coordinated, which results in inconsistencies and inefficiency.<sup>77</sup>
- v. Finally, the lack of transparency of the legislative processes and the idea that it cannot be influenced combine with the problems of intelligibility of EU legislation.<sup>78</sup>

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<sup>74</sup> According to the Commission’s website a Community agency is a body governed by European public law; it is distinct from the Community Institutions (Council, Parliament, Commission, etc.) and has its own legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task, in the framework of the European Union’s “first pillar”. See <[http://europa.eu/agencies/index\\_en.htm](http://europa.eu/agencies/index_en.htm)> (last visited 8 January 2008).

<sup>75</sup> See the recent communication of the European Commission *European agencies – The way forward* COM (2008) 135 final.

<sup>76</sup> The IMPEL network is both active and influential, especially since the European Commission accepted the invitation to preside it. Since 1992 IMPEL has generated almost 50 reports ranging from the Better Legislation initiative to the Reference Book on Environmental Inspections. Informal and semi-informal networks like IMPEL are mushrooming the five years. See P.C. Adriaanse and others, *Implementatie van EU-handhavingsvoorschriften* (Implementation of EU control and sanction provisions) (The Hague: Boom Juridische uitgevers 2008).

<sup>77</sup> See the *White Paper on European Governance*, above n. 4.

<sup>78</sup> See the findings of Working Group IX (D’Amato) on Simplification of the European Convention CONV 424/02 (2002). The group held that the Union’s system of lawmaking as we know it is not very clear or comprehensible to its citizens. The

b. A second group of quality problems concerns legislative proliferation (Normenflut) and defects in the use and abuse of EC regulatory instruments in policy-making. The EC legislative file is often believed to be too voluminous.<sup>79</sup> Although the volume of EU legislation is perhaps not large in itself compared with the stock of the member states, the excess of detail and the resulting administrative burden ('red tape') can, however, impede economic growth. Especially when EU legislation does not live up to the subsidiarity principle this is undesirable. It was the Molitor Working party that, in 1995, triggered an increased awareness of the detrimental effects of EU legislation to economic growth. At this moment the volume of legislation and the burdens it creates have become a prime political concern throughout Europe and at EU level as well.<sup>80</sup>

A problem specific to EU legislation and its volume is the cost involved in the translation of legislation.<sup>81</sup> Even a simple decrease of the number of pages of the legislative file will save a substantial sum of money. Another problem is the use of legislative instruments. The EU harbours a regulatory and legalistic approach to policy making<sup>82</sup> and policy implementation,<sup>83</sup> which means that most policies are implemented by legislative instruments. This drives legislative proliferation. A separate problem is the abuse of legislative instruments, detailing directives to such an extent that they are virtually regulations, with no room left for discretion during transposition.<sup>84</sup>

c. A third group of quality problems consists of technical flaws of

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ability to criticise the system is, however, a key factor of democracy. Citizens must be able to understand the system so that they can identify its problems, criticise it, and ultimately control it.

<sup>79</sup> In 2001 the EU the total number of pages enshrining the 'acquis communautaire' was estimated at 80.000 pages, COM (2001) 645 final.

<sup>80</sup> See for an interesting 'debunking' – though a bit partisan – comment on the often unsubstantiated claim that economic growth is impeded by large volumes of legislation, the report of the British Trade Union Conference (TUC), *Unravelling the red tape myths* (2003) < [http://www.tuc.org.uk/em\\_research/tuc-6257-f1.cfm#tuc-6257-1](http://www.tuc.org.uk/em_research/tuc-6257-f1.cfm#tuc-6257-1) > (last visited 6 January 2008).

<sup>81</sup> The latest figure (2005) for the total annual cost of translations is € 1,123 million, which is 1 per cent of the annual general budget of the European Union. Divided by the population of the EU, this comes to € 2.28 per person per year.

<sup>82</sup> Policy making is often equated with law-making. See L. Metcalfe, 'Building Capacities for Integration: The Future Role of the Commission' (1996) 2 *Eipascope* 1.

<sup>83</sup> See e.g. V.A. Schmidt, 'Procedural Democracy in The EU: the Europeanization of National and Sectoral Policymaking Processes' (2006) 13 *Journal of European Public Policy* 670.

<sup>84</sup> See the Koopmans Report, above n. 36 at 15.

legislative texts. It concerns problems such as the lack of readability and comprehensibility of legislation due to vague or ambiguous language, the use of unclear formulations and inconsistencies, and unnecessary complexity.<sup>85</sup> Legislation needs to be as simple, clear and precise as possible to allow the public, interested parties and those responsible for interpretation, enforcement and implementation, to understand and apply the law. Poorly drafted legislation is not merely a nuisance, it can also result in deficient<sup>86</sup> application, enforcement and compliance problems, and unduly restrictive interpretation.<sup>87</sup>

d. The last group of quality problems relates to the physical accessibility (including availability) of EU legislation and the management of the EC regulatory file.<sup>88</sup> In this context, it mostly concerns problems relating to the access to EU legislation, promulgation, codification and consolidation of legislation.<sup>89</sup> The EU legislative file used to be difficult to access, due to the piecemeal way of enacting bits and parcels of legislation on the same subject.

## 7 From Better Lawmaking to Better Regulation

The survey above demonstrates that EU legislative problems are by no means ‘cosmetic’ nor merely artificial in the eyes of some member state beholders. From what we know about the effects of EU legislation – which is little, due to the lack of a committed evaluation culture – a troubling picture emerges. Lack of legislative quality and the resulting problems seem to threaten European integration on all levels, both economical and political.

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<sup>85</sup> See for instance the wording of the former paragraph 1 of article 19 of Regulation 820/97 EC which read: ‘A compulsory beef-labelling system shall be introduced which shall be obligatory in all Member States from 1 January 2001 onwards. However, this compulsory system shall not exclude the possibility for a Member State to decide to apply the system merely on an optional basis to beef sold in that same Member State.’

<sup>86</sup> Divergent application in different Member States, for instance, can lead to heterogeneous regimes and thus resist harmonization and level playing fields.

<sup>87</sup> Point 1.3 of the *Joint Practical Guide* (2003) gives the example of the Case *C-6/89 ARD v. Pro Sieben* 1999 ECR I-7599 where a foggy text, intended to resolve problems in negotiating the provision, ultimately was interpreted by the Court of Justice to the exact opposite of what was intended.

<sup>88</sup> Admittedly a lot has improved since the arrival of EUR-LEX. <http://eur-lex.europa.eu/en/index.htm> (last visited 23 June 2008).

<sup>89</sup> The problem of poor accessibility was signalled quite early on by the French Council of State. See the *Rapport Public* of the Conseil d’État (1992), in particular at 49.

It is a problem that cannot be readily discarded.

This explains why the EU has adopted an increasingly activist approach to the matter. Since the Edinburgh European Council, in 1992, the need for Better lawmaking has been recognised and placed on the political agenda.<sup>90</sup> Although EU policies aiming to improve lawmaking are fairly recent, three distinct periods can be distinguished since the outset in 1992. The first period (1993-2002) was a period of humble beginnings. During this period, Better Lawmaking was approached in a rather technical, depoliticized way. The emphasis was on the improvement of the quality of drafting and on attempts to simplify legislation. The second period (2002-2006) is characterized by a more comprehensive approach to Better Lawmaking, which was perceived as an integral part of good governance and therefore required attention throughout the policy cycle. Elements of effectiveness and efficiency of legislation came to the fore as key aspects of consideration. Systematic use of impact assessment of legislative proposals, transparency and openness of the legislative procedure (including wide consultation) and programmatic simplification were added to the existing core of quality policies. Compared with the first period, the approach of this second period was more outward looking, with a keener interest in the overall external effects of legislation. The third period (2006-present) builds upon Better Lawmaking, but takes it one step further by mainstreaming the so-called Better Regulation strategy into the overall strategy of the Union. Better Regulation ties in with the Lisbon strategy of 2000, which aims to make Europe a competitive player in a globalised marketplace. Better Regulation is therefore much more political and economically oriented. It strives for a sort of ‘smart’<sup>91</sup> use of legislation that minimizes costs and maximizes benefits (increased productivity, employment, etc.).

### 7.1 1993-2002: Improving and simplifying drafting quality

After the Edinburgh Council, in 1992, the Council of Ministers adopted a resolution on the quality of drafting of Community legislation.<sup>92</sup> The set-up of this resolution was modest<sup>93</sup> and technical, and not binding for all European legislative partners. In 1995 the Commission followed suit, with

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<sup>90</sup> Keleman and Menon feel that these first initiatives to simplify and to improve EC legislation were a sort of ceremonial self-flagellation more or less to cloak the vast amount of regulatory initiatives of the Delors’ Commission. See R.D. Keleman and A. Menon, ‘The Politics of EC Regulation’ in S. Weatherill (ed.) *Better Regulation* (Oxford and Portland, Oregon: Hart Publishing 2007) 183.

<sup>91</sup> See R. Baldwin, ‘Is Better regulation Smarter Regulation?’ (2005) *Public Law* 485.

<sup>92</sup> Council Resolution of 8 June 1993 on the quality of drafting of Community legislation, *OJ* 1993 C 166, 17 June 1993 1.

<sup>93</sup> The resolution consists of a mere ten points.

an in-house legislative policy of its own.<sup>94</sup> Like that of the Council, the Commission's resolution was principally aimed at improving the technical quality of drafts, although somewhat more elaborately.

Further progress was made upon the conclusion of the Treaty of Amsterdam in 1997. To the final act of the Treaty a declaration (no. 39) was appended, calling upon the institutions to 'establish by common accord guidelines for improving the quality of the drafting of Community legislation.'<sup>95</sup>

This declaration, in turn, was followed by the Interinstitutional Agreement 1998 on common guidelines for the quality of drafting of Community legislation (IIA 1998).<sup>96</sup> This agreement binds all institutions involved in the enactment of Community legislation. The IIA stresses that the quality of drafting is a joint responsibility of the EU institutions involved in Community legislation.<sup>97</sup>

The Interinstitutional Agreement (IIA 1998) for the most part includes technical requirements and considerations pertaining to the quality of EU legislation (in sum 22 guidelines). They are supplemented by eight implementation measures.

Especially if we consider the fact that a comprehensive comparative analysis of all of the legislative drafting directions in the member states and an in-depth study into the case law of the EC Court of Justice were conducted as an inspiration for the IIA 1998, a harvest of 22 technical guidelines seems rather modest. The IIA 1998 includes hardly any points related to the implementation or enforcement of Community law, but focuses strictly on the technical aspects of drafting. However, compared to the former – very broad – Council resolution of June 1993, it is a step forward in terms of both content and its binding character. The IIA is binding for all three of the legislating European institutions: the Council, the European Parliament and the Commission.

The implementation of the IIA is proving to be a long haul. In 2001, Xanthaki observed that drafting rules, including the IIA, still were applied very poorly. That could, in her view, partly account for bad legislation. We however do not feel that meeting the standards of good drafting from drafting manuals or the IIA 1998 is a purpose in itself. Meeting them will certainly not safeguard against bad legislation. Drafting directives are tools to improve aspects of drafting by a 'dedicated dialogue'. The ultimate goal of the IIA and drafting instruments is to raise awareness for the quality of

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<sup>94</sup> EU Commission, General guidelines for legislative policy, SEC (1995) 2255/7, 18 January 1996.

<sup>95</sup> *OJ* 1997 C 340 at 139.

<sup>96</sup> The IIA 1998 was adopted on 22 December 1998, *OJ* 1999 C 73/1.

<sup>97</sup> See also See EC Commission, *Better lawmaking 1998: a shared responsibility*, COM (1998) 715 final, dated 1 December 1998.

legislative texts, to spark discussions on the quality of Community legislation, to give a voice and place to the aspect of quality in the drafting process, and ultimately to promote a culture of due care for technical quality. It is questionable whether this is catching on. Never in the past ten years has a reference been made to the IIA 1998 in parliamentary questions, rarely in case law,<sup>98</sup> and only twice in an opinion of the Commission.<sup>99</sup>

It must be noted that the IIA 1998 was never intended to be the final stage, but merely a step towards systematically drawing more attention to the drafting quality of Community legislation. The implementation measures attached to it voice this character of a continuous process. The measures provide, inter alia, for a further cooperation between member states and institutions, with a view to better understand the aspects to be considered when drafting, and to foster both the creation of drafting units and the drawing-up of a joint practical guide. This Joint Practical Guide, replete with best practices and illustrations, was published in 2003. It has proved to be a very practical tool indeed.<sup>100</sup>

After the report of the Molitor working party (1995) the European Commission decided to subject some sectors of the internal market to a critical review, with the assistance of the member states, the corporate sector and consumers. The so-called SLIM exercise (Simpler Legislation Internal Market) may be regarded as an element in the follow-up to the Molitor report. The European Commission proposed to have four sectors of the internal market examined by four SLIM teams. These SLIM projects were intended to assess the administrative burdens and business effects of community rules in some selected policy areas, but owing to the political sensitivities related to operations of this kind, these deregulation projects

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<sup>98</sup> It proves to be a bit of a hobby horse in the opinions of the – late - Advocate General Geelhoed. Of the 9 references made to the IIA 1998 in European case law, 7 are of his doing. The IIA itself is never the object of litigation, nor an important argument. See for an example Geelhoed's opinion delivered on 26 January 2006 in Case C-161/04 *Republic of Austria v. European Parliament and Council of the European Union*.

<sup>99</sup> Opinion of the Commission on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (optical radiation). COM (2005) 526 final - COD 1992/0449 and Opinion No 7/2006 on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) *OJ* 2007 C 8, 12 January 2007 at 1.

<sup>100</sup> The first French draft (*Guide Pratique Commun*) and later the English draft (*Joint Practical Guide*) circulated since the year 2000 within the Commission and the EP. In 2003 it was published in the other languages.

have not produced many tangible results.<sup>101</sup> A similar initiative, but specifically aimed at reducing administrative burdens on enterprises, is the Business Environment Simplification Taskforce (BEST), which was more or less in line with the SLIM operation. The task force submitted its final report to the Commission in May 1998. Although there were no direct and tangible results in the field of deregulation of EU legislation, it was successful in the sense that it revealed critical factors of deregulation. It demonstrated the need for planning simplification and a long-range simplification programme, the need for a dedicated legislative simplification procedure, and a political, common and continuous sense of urgency to simplify legislation.<sup>102</sup>

## 7.2 2002-2006: Better lawmaking

At the Lisbon Council in 2000 the European Union carved out an ambitious strategic goal for the next decade. The EU wanted to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth, with more and better jobs and greater social cohesion. The general feeling since the Lisbon Council is that European legislation, as an important instrument for these targets, needs to be tuned to this overall strategy. In its white paper on European governance of 2001, the Commission conceded that the European Union needs to pay ‘constant attention to improving the quality, effectiveness and simplicity of regulatory acts.’<sup>103</sup>

Later that year the Commission wrote an interim report<sup>104</sup> and issued a Communication on Better Lawmaking, mapping out the strategy for the three key elements of the new philosophy: simplifying and improving the regulatory environment; promoting a culture of dialogue and participation (i.e. furthering transparency, consultation, etc.); and the systemization of impact assessment by the Commission.<sup>105</sup> The Communication was accompanied by an action plan ‘Simplifying and improving the regulatory environment,’ detailing the responsibilities of the legislative institutions and the actions required of them.<sup>106</sup> Many elements have been enshrined in the

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<sup>101</sup> To quote a former Dutch Junior Minister (Benschop) ‘the SLIM operation as such is useful, but, to date, it has produced insufficient actual results’. This was at the time the common feeling. *Kamerstukken II* (Dutch Parliamentary Papers) 1998/1999 21 501-01, no. 123 at 2.

<sup>102</sup> Commission Staff Working paper (2001) ‘Simpler Legislation for the Internal Market’, preparing for a fifth phase, SEC (2001) at 575.

<sup>103</sup> *White paper on European Governance*, above n. 4 at 20.

<sup>104</sup> *Interim-report Improving and Simplifying the Regulatory Environment*, COM (2001) 130 final.

<sup>105</sup> *Simplifying and improving the regulatory environment*, COM (2001) 527 final.

<sup>106</sup> COM (2001) 278 final.

Interinstitutional agreement on Better Lawmaking of 2003 (IIA 2003).<sup>107</sup> Better Lawmaking policy has left an impressive number of documents and policies in its wake.<sup>108</sup> We will not deal with them all but only discuss some main features.

i. Simplification of the regulatory environment

Simplification is a big issue under the Better Lawmaking strategy. The legislative stock is costly in the sense that it runs the risk of overburdening citizens and economic actors in the EU (compromising competitiveness, economic growth and sustainable development), and it also consumes considerable funds for translation. Therefore, and as a result of the Action Plan Better Lawmaking, the Commission has stepped up the pace of simplification in its Framework for Action 'Updating and Simplifying the Community Acquis'.<sup>109</sup> This ongoing Action Plan basically adopts a twofold approach. Firstly, it aims at a simplification of the substance of secondary Community legislation by continuous efforts to screen pending proposals, and by screening policy sectors to identify simplification potential (and acting upon it), mainstreaming this type of simplification screening, etc. The second part of the Framework for Action strategy aims at reducing the volume of the acquis by 25 per cent, 30,000 to 35,000 pages, by codification,<sup>110</sup> consolidation, and the removal of obsolete legislation.<sup>111</sup> The evaluation, 'First progress report on the strategy for the simplification of the regulatory environment',<sup>112</sup> reports that the simplification part of the Action Plan is in full swing. The Commission screened pending proposals in 2004 and withdrew 68, and foresaw a further 10 withdrawals in 2007. The simplification of existing legislation is also underway. From 2004 onward the Commission has reinforced its efforts to modernise and simplify EU legislation. Of the 100 originally planned proposals in the rolling

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<sup>107</sup> Interinstitutional Agreement on better law-making, *OJ* 2003 C 321 at 1.

<sup>108</sup> See for the road that leads from better law making to Better regulation <[http://ec.europa.eu/governance/better\\_regulation/index\\_en.htm](http://ec.europa.eu/governance/better_regulation/index_en.htm)> and <[http://ec.europa.eu/dgs/legal\\_service/law\\_making\\_en.htm](http://ec.europa.eu/dgs/legal_service/law_making_en.htm)> (last visited 23 June 2008).

<sup>109</sup> COM (2004) 432 final.

<sup>110</sup> At the EU level the process of *codification* is understood as a process whereby different parts of law on a related subject are in some form or other integrated into a single act. Codification involves adopting a new legal instrument, published in the Official Journal (L series), which incorporates and repeals the instruments being consolidated (basic instrument + amending instrument(s)) without altering their substance.

<sup>111</sup> Consolidation in fact is a sort of re-publication of pre-existing legislative texts.

<sup>112</sup> COM (2006) 690 final.

simplification programme 2005-2008,<sup>113</sup> about 50 had been adopted by the end of 2006. The Commission has now even beefed up its rolling simplification programme with new proposals,<sup>114</sup> even opening up the possibility of simplification as the outcome of ex-post evaluation of existing legislation. On a more critical note, the Commission report concludes that simplification proposals need to be given higher priority by the co-legislating institutions. The codification and repeal of obsolete legislation should be prioritised as well. More than 20 simplification proposals were pending in the spring of 2008. Procedures to facilitate adoption of simplification proposals should be considered, according to the Commission.

ii. Improvement of the regulatory environment

The improvement of the regulatory environment, another dimension of Better Lawmaking, includes a host of instruments and actions. The most topical ones, most of them enshrined in the IIA 2003, involve:

- a better coordination of the legislative process<sup>115</sup> by way of improved information exchange, synchronization of action between the various actors, multi-annual planning, programming en progress reporting, etc.
- improved transparency and accessibility of the legislative process.

Better planning, programming, and mutual exchange of information do not only improve the efficiency of the interaction between the European Council, the European Parliament and the European Commission, but are also relevant to the citizen. Transparency and better accessibility of legislation and legislative processes is an important subject in the 2003 Agreement.<sup>116</sup> Not only should European citizens gain greater access to Community rules, they should also be able to gain a better insight into the legislative processes preceding these rules.<sup>117</sup>

- a balanced choice of legislative instrument and use of alternative methods of regulation. Under the Better Lawmaking strategy,

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<sup>113</sup> COM (2005) 535.

<sup>114</sup> First progress report on the strategy for the simplification of the regulatory environment, COM (2006) 690.

<sup>115</sup> Points 3 through 9 IIA 2003.

<sup>116</sup> Points 10 and 11 IIA 2003

<sup>117</sup> The Commission (through PreLex) and the European Parliament (through the Legislative Observatory) will in the future ensure that citizens are able to see at a single glance to what stage of the decision-making process a specific proposal for a directive or regulation has proceeded and what documents are relevant.

Community action in the form of legislation is perceived as a last resort instrument. Regard for the principle of subsidiarity requires soul searching as to the necessity and appropriateness of Community action. Only when no alternative methods<sup>118</sup> (self-regulation, agreements, co-regulation)<sup>119</sup> of solution are open, and only when it is strictly necessary and unavoidable, is Community legislation to be considered. This policy of reluctance has the beneficial side-effect that it could keep the legislative stock in check, albeit potentially at the cost of transparency and effective operation.

- improving the quality of legislation by adhering to the IIA 1998, open and extensive pre-legislative consultation and an integrated impact analysis on the part of the Commission on legislative proposals: an ex ante evaluation of the estimated social, economic and environmental impact of the proposed legislation. This assessment can be communicated to co-legislators like the European Parliament and the Council, and even to the general public, to enable evidence-based rule-making. Due attention to consistency of text is the last measure to improve quality.
- better transposition and application. Even though member states tend to complain that the time limits for the transposition of directives are too tight, the IIA of 2003 agreement calls on the institutions to use time limits in directives that are as short as possible and that generally do not exceed two years. Further, an attempt has been made through a ‘pillory effect’ to urge the member states to transpose legislation at an even faster pace. A Commission scoreboard and annual reports with tables show the member states’ transposition record.

iii Consultation

Consultation is of prime importance for the quality of legislation. This is true not only from the viewpoint of due consideration of the relevant interests (and so the enhancement of input legitimacy) but also from the viewpoint of careful preparation of proposals. As a part of the Better Lawmaking strategy, the Commission established a set of minimum standards, procedures and techniques for external

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<sup>118</sup> See points 16 through 23 IIA 2003.

<sup>119</sup> I.e. the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognized in the field (such as economic operators, the social partners, non-governmental organizations, or associations (see point 17 IA 2003)).

consultations in 2002.<sup>120</sup> According to these standards attention needs to be paid to providing clear consultation documents, consulting all relevant target groups, leaving sufficient time for participation, publishing results and providing feedback. The standards provide a common framework for the operation of consultation, to ensure that they are carried out in a transparent and coherent way throughout the Commission.

Obradovic and Alonso Vizcaino are critical about the new common framework. They feel this framework signals the end of the era of the open access policy for interest associations wanting to partake in Community decision making.<sup>121</sup> Where the Commission has hitherto held that interest representation should be based on principles of good governance, like representativeness, accountability and transparency, the present consultation standards do not provide sufficient operational basis to meet these principles.<sup>122</sup>

iv Systematization of impact assessment

In 2003 the Commission introduced a system of integral Impact Assessment (IA), replacing and integrating all existing sector assessments of direct and indirect impacts of proposed measures. When IA was introduced in 2003, it required all items included in the Commission's Legislative and Work Programme (CLWP) to undergo a Preliminary Impact Assessment (PIA). Based on the PIA, the College of Commissioners decided whether an Extended Impact Assessment (ExIA) was necessary. This didn't work all that well and a number of aspects were revised in 2005.

The Commission decided that initiatives set out in its Legislative and Work Programme 2005 – key legislative proposals as well as the most important cross-cutting policy-defining non-legislative proposals – should all be subject to an integral impact assessment.<sup>123</sup> The distinction between PIAs and ExIAs was abolished. Roadmaps replaced PIAs, and a full IA is now required for all items in the CLWP.

The methods, too, were refined. By 2005, guidelines on IA

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<sup>120</sup> See the Commission's Communication *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, COM (2002) 704 final.

<sup>121</sup> D. Obradovic and J.M. Alonso Vizcaino, 'Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations' (2006) 43 *Common Market Law Review* 1049, especially at 1083-1084.

<sup>122</sup> *Id.*, at 1084.

<sup>123</sup> Communication from the Commission to the Council and the European Parliament, *Better regulation for Growth and Jobs in the European Union*, SEC (2005) 175 COM (2005) 97 final.

had been published, detailing the procedural rules and analytical steps in IA, which were updated in March 2006, to integrate, inter alia, the Inter-Institutional Common Approach to IA, which clarified the roles of the three EU Institutions with regard to IA. One element of this common approach consists of a mutually agreed method for measuring administrative costs (the EU Standard Cost Method).<sup>124</sup> The Commission also established an Impact Assessment Board in 2006, which primarily has a quality-control and support function.

The IA system was evaluated in 2006 and 2007.<sup>125</sup> The overall conclusion was that it is still difficult to tell whether IA is a success, as the system is still in an early stage of its evolution.<sup>126</sup> In terms of quantity, IA is serious business: as of November 2008, already more than 230 impact assessments have been carried out. In terms of quality the evaluation shows that the more IAs are understood and conducted as a genuine, objective and open analytical exercise, the higher their potential to lead to better informed and therefore higher quality proposals.<sup>127</sup> However, the preconditions are not always in place for such an exercise, due to an inappropriate approach or insufficient tools, expertise, time and resources. The quality of the IAs was found to vary, and the use of IAs by the Council and European Parliament was sometimes found to be hampered by internal factors (working culture, available capacity) within these institutions. IA is successful in terms of a growing cultural change in the Commission services, internal and external openness and transparency of the policy, development process, improved coordination within the Commission, the consultation aspects and more quantification and better quality analysis of proposals. The establishment of the Impact Assessment Board is believed to be a step forward for the quality of IAs.<sup>128</sup> The bureau concludes that there is room for improvement regarding the scope of application, elements of analysis, timing and approach, quality control and support and guidance. All in all, those are not bad marks for a four-year-old system. The system seems to be here

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<sup>124</sup> Council document 14901/05 of 24 November 2005; Parliament endorsed the Common approach as the last of the three institutions in July 2006.

<sup>125</sup> Evaluation Partnership Limited, *Evaluation of the Commission's Impact Assessment System* (2007) Final report.

<sup>126</sup> Meuwese more or less comes to the same conclusion. See A.C.M. Meuwese, *Impact assessment in EU Lawmaking*, PhD-thesis Leiden University (Alphen aan den Rijn: Kluwer Law International 2008).

<sup>127</sup> See Evaluation Partnership, above n. 125 at 5.

<sup>128</sup> See Information note from the President to the Commission 'Better regulation and enhanced Impact Assessment' 28 June 2007 SEC (2007) 926 OJ 1795 – point 16.1.

to stay, somewhat enhanced maybe, but largely unchanged.<sup>129</sup>

### 7.3 Since 2005 – stepping up Better Lawmaking to Better Regulation

In November 2007 the European Commission stepped up the Better Lawmaking programme, launching the Better Regulation strategy.

Better regulation is a broad strategy to improve the regulatory environment in Europe – containing a range of initiatives to consolidate, codify and simplify existing legislation and improve the quality of new legislation by better evaluating its likely economic, social and environmental impacts,

so the communication tells us.<sup>130</sup> Basically this is the same concept as held in the Better Lawmaking project but with an economic twist. The reason for this change of course is obvious: the failed European Constitution. The process resulted in the perception that EU lawmaking is in need of more legitimacy. This perception combined with the need to redirect the governance strategy from 2001 – which, to a certain extent, relied on the Constitutional arrangements and instruments – seem to be the underlying motives for Better Regulation. On the face of it, though, Better Regulation is just another denomination for Better Lawmaking.

Meuwese maintains that Better Regulation differs from Better Lawmaking in that it is made a political priority and explicitly linked the (output) legitimacy of EU lawmaking. Better Regulation further distinguishes itself by taking into account specific conditions of EU lawmaking, culminating in the formalization of the inter-institutional dimension of regulatory reform.<sup>131</sup> Whatever the case, the distinction is not all that clear-cut. The ‘Better Regulation’ label does, however, tie in better with the name of similar projects in the member states and OECD ‘lingo’.

The Better Regulation strategy that has emerged since 2005 comprises the following highlights:

- an updated simplification programme, aimed at generating tangible economic benefits (particularly by reducing administrative burdens)
- a reinforced scrutiny of impact assessments through the creation of an independent Impact Assessment Board under the authority of the President
- strengthening the enforcement of Community law

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<sup>129</sup> See C. Day, Secretary General of the European Commission, *Enhancing Impact Assessment*, speech of 28 June 2007 <[http://ec.europa.eu/governance/impact/docs/key\\_docs/speech\\_cd\\_rev2.pdf](http://ec.europa.eu/governance/impact/docs/key_docs/speech_cd_rev2.pdf).>

<sup>130</sup> Communication from the Commission *A strategic review of Better regulation in the European Union* COM (2006) 689 final.

<sup>131</sup> See Meuwese, above n. 126 at 22.

- more systematic impact assessments of major amendments to Commission proposals
- high priority to pending simplification proposals, to codification and to repeal of obsolete legislation
- development and enforcement of consultation mechanisms, where missing
- improved application of Community law.

The update of simplification, announced in the Better Regulation Strategy, was already underway. In October 2005, following the Commission communication on ‘Better Regulation for Growth and Jobs in the EU’,<sup>132</sup> the Commission launched a new phase for the simplification of existing EU law by setting out a rolling programme, initially covering the years 2005-2008.<sup>133</sup> It lists some 100 initiatives affecting some 220 basic legislative acts. It was updated for the period 2006-2009,<sup>134</sup> adding another 43 initiatives to the programme. In parallel, on the basis of a detailed programme covering more than 400 legislative acts, the Commission intends to codify the body of European legislation (acquis) by 2008.

A new element in the strategy is the reduction of administrative burden. To this end, an Action plan was published in 2007,<sup>135</sup> laying down a programme to reduce the administrative burdens, primarily caused by information provisions in legislation, by 25 % in 2012.

Another stone in the hail of Better Regulation priorities is that of the improvement of application of Community law. In September 2007 the Commission issued a Communication outlining its policy in this field.<sup>136</sup> The Commission plans to deal with poor application of Community legislation in four different ways: by prevention (giving increased attention to implementation throughout the policy cycle); by an efficient and effective response to poor application (with improved information exchange and problem-solving); by the improvement of internal working methods (prioritisation and acceleration in infringements management of the Commission itself); and finally by enhancing dialogue and transparency between the European institutions and improving information for the public.

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<sup>132</sup> COM (2005) 97.

<sup>133</sup> Communication of the Commission, *Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment*, COM (2005) 535.

<sup>134</sup> Communication from the ‘A strategic review of Better regulation in the European Union’, COM (2006) 690 final, COM (2006) 691 final.

<sup>135</sup> Communication of the Commission, *Action Programme for Reducing Administrative Burdens in the European Union*, COM (2007) 23.

<sup>136</sup> Communication of the Commission, *A Europe of results – Applying Community Law*, above n. 56.

## 8 Evaluation

If poor quality of EU legislation is the ailment, one cannot say that there isn't any medicine around. The last decade has shown a remarkable increase in awareness of the problems and insights in consequences of defective legislation, as well as a sense of urgency for 'Better Lawmaking'. But does the medicine cure or prevent the disease, and is it properly dosed?

This is a hard question to answer, not only because Better lawmaking (or Better Regulation) policies are fairly new and have not yet been fully evaluated, but also because any appraisal of these policies depends, as we have seen, on a perception of the basic functions attributed to legislative instruments and the standards derived from it. Debate, academic or otherwise, on the standards for 'good' legislation and its theoretical underpinnings is scarce in the EU. Different visions regarding the quality of EU legislation and the proper standards seem to have piled up in the present quality policies.<sup>137</sup> The EU's Better Lawmaking initiative (2002-2006) – its standards and policies – seems to reflect and emphasise the constitutional, democratic, bureaucratic and instrumental functions of EU legislation, whereas the Better Regulation initiative (2006-...) seems to favour the instrumental and political functions.<sup>138</sup> In the current Better Regulation strategy, however, strands of both perceptions, and the standards resulting from it, are still present. This leads to the paradoxical situation in which the Better Regulation strategy aims to improve the interventionist performance of legislation, a lot of the legislative standards reflect the constitutional, democratic and bureaucratic functions of legislation. Although admittedly there is some relation between standards and aim, this can lead to indetermination or even confusion about the objectives of the quality policies, and in the long run and hamper the effect thereof. The demarcation line between Better Lawmaking and Better Regulation was not drawn very precisely in 2006. It would be a good idea to clarify the issue here, if we want to see whether the regulatory policies are yielding result.

Baldwin, for one, has argued that there are no easy routes to regulatory improvement, and we feel he is right.<sup>139</sup> Not only is Better Lawmaking difficult, its success or failure is notoriously hard to review and

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<sup>137</sup> De Francesco and Radaelli label this 'the proliferation of objectives and goals of the regulatory reform' after the Lisbon Agenda (including competitiveness, the completion of the single markets and the participatory-transparent government). F. De Francesco and C.M. Radaelli, 'Indicators of regulatory quality', in C. Kirkpatrick and D. Parker (eds.) *Regulatory Impact Assessment; Towards Better Regulation?* (Cheltenham UK: Edward Elgar Publishing 2007) 50.

<sup>138</sup> See A.J. Harcourt and C.M. Radaelli, 'The limits to EU technocratic legislation' (1995) 35 *European Journal of Political Research* 107 at 109.

<sup>139</sup> See Baldwin, above n. 91 at 511.

assess. First of all there is the problem of the yardstick. What are the right standards for legislation, what is the right scale? From a Better Regulation perspective one may want to take a set of economic scales and try to calculate whether legislation strikes the right balance when it comes to minimizing costs (e.g. not creating any more burdens than is strictly necessary) and maximizing benefits (increasing productivity, employment, etc.). The benefits, however, may prove hard to calculate. Especially if we consider that European legislation also creates trust, security, legal protection and all kinds of other, more or less imponderable, benefits for the internal market, the 'pricing' of pros and cons may prove to be extremely difficult. In the update of the project 'Governance Matters 2007' the World Bank presents an impressive set of data on the scoring rate of 212 countries and regions on six dimensions of governance between 1996 and 2006.<sup>140</sup> One of these dimensions is 'regulatory quality', which breaks up into over 25 indicators for quality.<sup>141</sup> Based on these indicators, different groups and organisations were asked questions about the way legislation impedes, permits and promotes economic life in a country or region (Does the exchange rate policy hinder the competitiveness of firms? Is it easy to start a business? etc.). These data are compared with statistics on economic (and other types of) performance, giving an overall score on regulatory quality over a course of ten years. This allows a review on a countries performance over the years or a comparison to other countries. But does it really tell us something about regulatory quality and can it be used to judge the effectiveness of Better regulation policies?<sup>142</sup>

If we examine the data more closely we will see that performance indicators and outcomes do not calculate the effect of legislation to economic life as such, but merely estimate the risks of some regulatory impediments and the effect of laws directly pertaining to the economy, like business, tax and financial law. The quality of traffic regulations or human rights in a country, for instance, is not considered separately in this project. Traffic regulations and human rights, however, do form an inextricable part of a country's legal system but it is difficult to assess what their particular contribution to the quality of other legislation is, or to the overall legal framework. As of yet they may prove imponderable, which can blur the total assessment of the regulatory quality of other, more measurable domains of law. Regulatory quality assessment may be prone to a measurability myopia with a bias to the quality and effects of legislation that does not directly pertain to or affect economic life.

Even if we were to take a somewhat more general, utilitarian

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<sup>140</sup> See <<http://info.worldbank.org/governance/wgi2007/home.htm>> (last visited 18 January 2008).

<sup>141</sup> See Kaufmann, Kraay and Mastruzii, above n. 29 at 68 ff.

<sup>142</sup> See also Radaelli and De Francesco, above n. 30 at 48.

approach, it would remain difficult to find a quantitative net result of Better Lawmaking efforts in terms of impact or success of the measures on the overall quality of the legislation. The legislative standards themselves seemingly resist an objective calculation of success: What is the right measure for proportionality, what are the degrees of legality and drafting quality of a directive, what the right benchmarks?

It may even be undesirable to assess legislation and policies to improve them in this way. In his latest book, Tamanaha argues that a one-sided instrumental use and perception of law, one-sided debates on law as a mere means to an end, can threaten the very idea of legality itself.<sup>143</sup> Mere instrumentalism may in the end undermine important social and symbolic functions pertaining to legislation.

Regulatory quality and legislative quality are, as we have seen, different concepts, expressing and highlighting different functions of legislation. Where regulatory quality is about the extent to which legislation, as an instrument of public policy, permits and promotes 'private sector development', legislative quality is about the ability of legislation to express law. Improving legislative quality may require a different approach than the improvement of regulatory quality. Sometimes these objectives may even run counter or prove incompatible.

Does that mean there is no way of assessing the success of EU Better Lawmaking policies? On the contrary, we believe there is. First, one can take a more procedural point of view to the assessment: Have the relevant procedures been complied with, have the programme targets been met, is the message hitting home and are the actors satisfied with the result? One may also take the level of embeddedness as a success indicator.

Seen through that lens, EU Better Lawmaking and Better Regulation policies seem to be making some progress. Impact assessment seems to be well under way, the simplification programmes are yielding result, consultation is under control and the awareness for the need of Better Lawmaking seems to have caught on. Although the proper application and implementation of some (drafting) rules<sup>144</sup> and instruments<sup>145</sup> and the coordination of Better Lawmaking efforts between the institutions probably still leaves something to be desired, on the whole Better Lawmaking

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<sup>143</sup> See Tamanaha, above n. 21 at 227.

<sup>144</sup> Based upon her assessment of the drafting quality of EC legislation in 2001, Xanthaki argued that lacking quality of EC legislation was not as much the result of the lack of dedicated policy and instruments (criteria, manuals, drafting and such), but rather more the result of poor *application* of these instruments. Xanthaki, above n. 13 at 675.

<sup>145</sup> See Meuwese e.g. observes that the Austrian handbook for Strategic Environmental Assessment is still hardly implemented at all. Meuwese, above n. 126 at 259.

agreements seem to be abided by.

Another perspective on the result has more of a constitutional nature. One may assess Better Lawmaking policies by the level in which they express, enshrine and safeguard the relevant standards for legislative quality. In this respect, too, progress has been made. If we take the IIAs of 1998 and 2003 we can see that, after a modest start in 1992 and again in 2003, essential legislative quality standards (as we read them from the treaties and the common cultures of the member states) have been enshrined in binding documents.

In a somewhat more provocative way Better Lawmaking can also be seen as a source of EU constitutional law. Better Lawmaking policies provide instruments (the interinstitutional agreements, for instance) that lie down binding law on EU Lawmaking, but are not held within the EU treaties themselves (which contain the bulk of the EU's constitutional law). Some of the Better Lawmaking policies even coincide with some of the rules and tools required by the 2000 governance strategy, which the failed European Constitution could not deliver. The proper norm on the use of EC directives under the IIA 2003 and the Consultation strategy is but one of the few examples for that. It is not all that uncommon to take the view of Better lawmaking policies as an expression and source of constitutional law. In her PhD thesis, Anne Meuwese demonstrates that in some respects IA can function as a catalyst of legal principles (launching them in the political debate more prominently), act as a constraint to legislative processes (by the power of its present self-evidence it disciplines the legislative actors), and act as a platform for constitutional discourse and a source for soft constitutional law as well. Especially some of the interinstitutional agreements on Better Lawmaking are constitutional in character, especially where they function as the 'laws of lawmaking'.<sup>146</sup>

The ultimate test for Better Lawmaking will, of course, be the political appraisal of the outcome of the policies. Better Regulation and Better Lawmaking policies are essentially political programmes resting on political perceptions as to the overriding values of legislation in a market economy. This does not mean that the political assessment of the success is purely subjective or unstructured. It only means that in the end the effect and success of Better Lawmaking can only be weighed politically. On that note, in March 2007 the European Council acknowledged that 2006 had seen good progress towards improving the regulatory environment and underlined that further efforts on the simplification programmes and reduction of administrative costs were required in order to consolidate and build on achievements so far. With a view to the Strategic Review of Better

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<sup>146</sup> See I. Eiselt and P. Slominski, 'Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU' (2006) 12 *European Law Journal* 2 209.

regulation, in the spring of 2008 the Commission was considering an evaluation strategy to the Better Regulation initiatives, possibly including the establishment of a group of independent experts to advise the institutions on their work towards Better Regulation. We feel that on the occasion of the evaluation it is important to pay due attention not only to regulatory quality but to legislative quality as well. And especially to the difference between the two, for the improvement of legislative quality does not automatically entail the improvement of regulatory quality.