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Of the People, by the People, for the People? The European Union's Experience with Private Environmental Regulation and Enforcement

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1. Introduction

The recent Intergovernmental Panel on Climate Change (IPCC) report on the difference between a global temperature rise of 1.5°C and 2°C is clear in its conclusions: every half a degree counts. Capping temperature rises at 1.5°C would significantly limit our exposure to extreme weather, droughts and rising water levels, but would require 'rapid and far-reaching transitions in land, energy, industry, buildings, transport and cities'.[1] As the 2018 Nobel prize winner William D Nordhaus concludes, however, the reality is that 'most countries are on a business-as-usual (BAU) trajectory of minimal policies to reduce their emissions, taking non-cooperative policies that are in their national interest, but far from ones which would represent a global cooperative policy'.[2]

Climate change and environmental issues more generally manifest themselves in long-term, cross-border policy challenges of a highly complex and uncertain nature. The EU has set for itself, over the last few decades, highly ambitious goals to tackle climate change as well as interrelated environmental issues such as biodiversity loss.[3] Indeed, the EU has liked to characterise itself as a global

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[1] IPCC Secretariat, 'Summary for Policymakers of IPCC Special Report on Global Warming of 1.5ºC Approved by Governments', 2018, available at: www.ipcc.ch/report/sr15/, accessed 16 October 2018.

[2] W Nordhaus, 'Projections and Uncertainties about Climate Change in an Era of Minimal Climate Policies' (2018) 10 *American Economic Journal: Economic Policy* 333, 333.

[3] See European Commission, 'EU Action Against Climate Change: Leading Global Action to 2020 and Beyond' 2008, available at: http://ec.europa.eu/clima/sites/campaign/pdf/post_2012_en.pdf, accessed

environmental leader,[4] and environmental protection is often identified as an example of the EU's 'soft power' – in Joseph Nye's sense of achieving policy aims by attraction rather than coercion – in action.[5] In attaining these goals, the EU is heavily dependent on the efforts of private actors such as industries, environmental NGOs (ENGOs), activists and networks of firms, as well as citizens, both with regard to the regulation of environmental matters as well as the enforcement of environmental rules set.[6] In line with the other chapters in this volume, we will focus here on the role which such private, non-state actors play in an EU context. Regulation, for this purpose, is understood as the intentional use of authority by state and non-state actors to affect a third party,[7] with *environmental* regulation more specifically indicating those types of measures 'deliberately taken to prevent, reduce and/or mitigate harmful effects on the environment'.[8] Enforcement, then, is understood as efforts including 'monitoring compliance, investigating an alleged violation and the sanctioning of a violation' with as core aim to 'rectify non-compliance and promote the attainment of policy goals'.[9]

As we observe below, environmental protection is an excellent example of a field where the EU has embraced a wide range of private regulatory measures – not, it should be noted, generally in replacement of public regulatory techniques, but complementing them. This trend has included a notable rise to prominence of market-based instruments, the encouragement of private rule-making and standard-setting (self-regulation) and hybrid regulatory techniques such as co-regulation,[10] as well the legal embedding, via the Aarhus Convention, of a far greater role for private bodies (ENGOs and citizens) in the enforcement of environmental law.

At the same time, this trend occurs against the backdrop of the EU's pervasive and deep-rooted difficulties in connecting with its citizens, typically identified as a major contributory factor to the EU's so-called 'legitimacy crisis'.[11] Coupled with the growing scientific evidence demonstrating that the EU (in common, it must be said, with other states) is failing to meet its environmental targets in fields

29 August 2018; Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs Growth, Fairness and Democratic Change' 2014, available at: http://europa.eu/rapid/press-release_SPEECH-14-546_en.htm.

[4] J Vogler and H Stephan, 'The European Union in Global Environmental Governance: Leadership in the Making?' (2007) 7 *International Environmental Agreements: Politics, Law and Economics* 4, 389.

[5] See Commissioner Rehn, 'The EU's Soft Power and the Changing Face of World Politics' SPEECH/07/245 (Helsinki, 20 April 2007) and J Nye, 'Soft Power' (1990) 80 *Foreign Policy* 153–71.

[6] For an overview of private actors that may engage in regulatory efforts, see T Büthe, 'Private Regulation in the Global Economy: A (P)Review' (2010) 12 *Business and Politics* 1.

[7] M Lodge and K Wegrich, *Managing Regulation: Regulatory Analysis, Politics and Policy* (Basingstoke, Palgrave Macmillan, 2012) 16.

[8] PPJ Driessen, C Dieperink, FSJ Laerhoven, HAC Runhaar and WJV Vermeulens, 'Towards a Conceptual Framework for The Study of Shifts in Modes of Environmental Governance – Experiences From The Netherlands' (2012) 22 *Environmental Policy and Governance* 143, 144.

[9] M Scholten, 'Mind the Trend! Enforcement of EU Law Has Been Moving to "Brussels"' (2017) 24 *Journal of European Public Policy* 1348, 1348.

[10] TA Börzel and T Risse, 'Governance without a State: Can it Work?' 4 *Regulation & Governance* 113.

[11] See the discussion in J Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34(7) *Journal of European Integration*, 825.

such as climate change and biodiversity loss,[12] and the resultant public concern,[13] the vital importance of keeping EU citizens engaged and on board with the EU's increasing reliance on private environmental regulatory techniques could hardly be clearer. It is critical, for legitimacy but also for effectiveness reasons, that such reliance on private environmental regulatory techniques should in fact further the public interest in achieving better environmental outcomes.

In this context, the structure of our contribution to this volume is as follows. First, we consider the constitutional context for private environmental regulation and enforcement in the EU to date, as well as its rationales. Second, we map the trajectory of environmental regulation in the EU, and examine the development of private environmental regulation and its legal consequences. Third, we look at these regulatory techniques from a citizen's perspective, focusing particularly on the challenges and possible benefits of involving private actors in what may traditionally have been seen as tasks properly belonging to the public domain.

2. Contextualising Private Environmental Regulation in the EU

2.1. Constitutional Context

The EU's environmental goals, as listed in Article 191(1) of the Treaty on the Functioning of the European Union (TFEU), are as follows:

> Union policy on the environment shall contribute to pursuit of the following objectives:
> - preserving, protecting and improving the quality of the environment,
> - protecting human health,
> - prudent and rational utilisation of natural resources,
> - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

These ambitious and far-reaching goals set the parameters for the EU's environmental activities. However, they do not in themselves suggest any preference, on the part of the Treaty authors, for public as distinct from private environmental regulation. Rather, the EU's environmental policy is, at the most fundamental constitutional level, conceived in terms of outcomes, with the overall objective being, as set out in Article 3(3) of the Treaty on European Union (TEU) (and mirrored in Article 37 of the EU's Charter of Fundamental Rights), the achieving of a 'high level of environmental protection taking into account the diversity of

[12] G Ceballos, PR Ehrlich and R Dirzo, 'Biological Annihilation via the Ongoing Sixth Mass Extinction Signaled by Vertebrate Population Losses and Declines' (2017) 114(30) *Proceedings of the National Academy of Sciences* E6089–96.

[13] See eg the Extinction Rebellion direct action movement: J Watts 'Extinction Rebellion Goes Global in Run-up to Week of International Civil Disobedience' *The Guardian*, 10 December 2018.

situations in the various regions in the Union'. In implying that the local matters, the final words in that overarching aim nevertheless point to a governance principle of particular relevance in considering private environmental regulation: the subsidiarity principle. This principle requires that (Article 5(3) TEU)

> in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

For the purposes of the present discussion, it is of particular significance that the subsidiarity principle began life in the environmental title of the Treaty as inserted by the Single European Act, subsequently moving to the general provisions of what is now the TEU.[14] From the very beginnings of the EU's environmental policy it was therefore, by its very constitutional definition, directed to consider whether its environmental aims could be better achieved at the local level and, if so, to give preference to action taken 'closer to the people'.

Indeed, this aligns with the significant body of scholarship and evidence demonstrating that local knowledge and citizen involvement is particularly important in achieving effective environmental regulation.[15] Environmental conditions, and resultant policy needs and capabilities, may vary widely across the EU, and citizens' buy-in is essential in the case of rules that may considerably affect the way people can use their land.[16] Further, as concerns private enforcement, citizens' assistance in detecting non-compliance and enforcing the law is critical in circumstances where no state regulator, still less the European Commission, could possibly have the resources to police the EU's territory – at almost 4.5 million km^2 – alone.

While the EU Treaties may as a matter of principle therefore be described as agnostic towards the debate about public versus private environmental regulation, that is not to say that the public–private distinction is irrelevant to EU law. On the contrary, clearly, very different bodies of legal rules apply depending on whether the regulatory tool at hand is public or private in nature. Further, the overarching aims of the rules applicable to private environmental regulation (e.g., competition law, state aid law) are typically considered to be essentially economic in nature (such as increasing economic efficiency, and maintaining a level playing field).[17] This leaves little room for incorporating or even acknowledging important public interest aims such as ensuring citizen trust and participation in the private regulatory tool selected. The following sections explore these developments in further detail.

[14] See Art 5(3) TEU.

[15] See further S Kingston, 'Flexibility in EU Environmental Law and Policy: A Response to Complexity, or Fig Leaf for Expediency' in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Cheltenham, Edward Elgar, 2017).

[16] ibid.

[17] See further S Kingston, *Greening EU Competition Law* (Cambridge, Cambridge University Press, 2012).

2.2. Rationales for Private Environmental Regulation in the EU

As we consider further below, the increasing role of private environmental regulation in the EU can be linked to broader shifts towards economic liberalism, reflected in an increased reliance on market forces in a variety of its policy spheres. Nevertheless, it is worth emphasising the particular factors at play in the specific case of environmental policy that may justify or even require embracing private regulation in some form.

In particular, important rationales for the involvement of private actors in environmental regulation and enforcement can be derived from the special and complex nature of the natural environment as such,[18] as well as the process of policy-making in this specific field.[19]

As Aril Underdal observes, the key processes underpinning the adverse social-ecological changes unravelling today share three interacting challenges that together make it extremely difficult to tackle such environmental issues effectively. The challenges also provide the basic rationales as to why the inclusion of private actors in the process of environmental regulation may help address shortcomings commonly associated with traditional direct regulation.

A first of these challenges is that of time-lag. Thus, the environmental and climatic changes unwinding today can be framed as long-term policy problems in which the effects of certain policy measures (including inaction) may manifest themselves in environmental effects only generations thereafter.[20] We now know that the climatic changes we observe today are largely caused by greenhouse gases that have been emitted in the previous decades, which are further subject to feedback loops that are estimated to strongly accelerate the process of climatic change in the years to come.[21]

As a result, environmental policies must take account of the fact that the outcomes of our present actions may take a long time to unfold. Clearly, however, popular elections may be ill-adapted to accommodate policies with long-term aims, especially where such policies may have negative impacts such as increased energy costs that occur in real time. Further, long-term policies may be halted

[18] A Underdal, 'Complexity and Challenges of Long-Term Environmental Governance' (2010) 20 *Global Environmental Change* 386; A Duit, V Galaz, K Eckerberg and J Ebbesson, 'Governance, Complexity, and Resilience' (2010) 20 *Global Environmental Change* 363; DA Farber, 'Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty' (2003) 37 *University of California Davis Law Review* 145.

[19] A Macintosh and D Wilkinson, 'Complexity Theory and the Constraints on Environmental Policymaking' (2016) 28 *Journal of Environmental Law* 65.

[20] Underdal (n 18) 386. See also: D Frank et al, 'Effects of Climate Extremes on the Terrestrial Carbon Cycle: Concepts, Processes and Potential Future Impacts' (2015) 21 *Global Change Biology* 2861; F Essl et al, 'Delayed Biodiversity Change: No Time to Waste' (2015) 30 *Trends in Ecology & Evolution* 375; D Wu et al, 'Time-Lag Effects of Global Vegetation Responses to Climate Change' (2015) 21 *Global Change Biology* 3520.

[21] T Schuur et al, 'Climate Change and the Permafrost Carbon Feedback' (2015) 520 *Nature* 171.

or even reversed by succeeding political parties, again reducing the usefulness of purely state-based action in this arena. From an EU perspective, the delegation of regulatory tasks to private actors, in contrast, may provide a possibility for credible commitment that lasts beyond the average election cycle.[22] Furthermore, as private regulation does not depend on public votes, it may constitute one means of implementing long-term policies that may be deemed unpopular by the majority.[23]

A second particular challenge posed to direct regulatory techniques derives from the fact that we are still far from truly understanding how environmental systems work. As a result of the complexity of environmental systems, our understanding of which is still, as Underdal says, 'clouded by profound uncertainties',[24] it is extremely difficult to implement fully scientifically sound environmental policies.[25] This issue of complexity of environmental systems might be mitigated, at least partially, through the expertise that can be cultivated by private entities, where again the absence of electoral cycles allows them to become more specialised.[26] In the EU context, engaging different private actors across the Member States also makes it possible to take account of environmental and climatic differences among different countries and, in doing so, mitigating some of the complexity at hand.

A third challenge is presented by the fact that environmental policy concerns global collective goods that are 'of a nature that links them to a wide range of human activities and at the same time leaves them beyond the scope of "single best effort" solutions'.[27] Thus, a common narrative adopted in individual states regarding internationally coordinated climate policies, as exemplified by the Australian Prime Minister Scott Morrison's response to the IPCC 1.5°C report, is that 'there are a lot bigger players than us out there'.[28] In other words, countries are pointing at each other to act first, effectively resulting in inaction across

[22] See F Gilardi, 'Institutional Change in Regulatory Policies: Regulation Through Independent Agencies and the Three New Institutionalisms', in *The Politics of Regulation* (Cheltenham, Edward Elgar, 2004) 70. See also, more broadly, T Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113 *American Journal of Sociology* 297, 306.

[23] This aspect, however, evidently also raises severe legitimacy issues, as will be discussed in greater detail in section 4 of this chapter.

[24] Underdal (n 18) 386.

[25] See, in this regard: G Palsson et al, 'Reconceptualizing the "Anthropos" in the Anthropocene: Integrating the Social Sciences and Humanities in Global Environmental Change Research' (2013) 28 *Environmental Science & Policy* 3.

[26] C Koop, 'Assessing the Mandatory Accountability of Regulatory Agencies' in A Bianculli, J Jordana and X Fernández-i-Marín (eds), *Accountability and Regulatory Governance: Audiences, Controls and Responsibilities in the Politics of Regulation* (Berlin, Springer, 2014) 78–104.

[27] See Underdal (n 18) 386.

[28] Source: AAP, 'Morrison on IPCC Emissions Report: There Are a Lot Bigger Players than Us out There – Video' *The Guardian*, 9 October 2018, available at: www.theguardian.com/environment/video/2018/oct/09/morrison-on-ipcc-emissions-report-there-are-a-lot-bigger-players-than-us-out-there-video, accessed 11 October 2018.

the board.[29] The fact that private regulatory initiatives do not necessarily need to be confined within the jurisdiction of a single state can make it easier to coordinate regulatory efforts cross-border, breaking political deadlock. This factor may also apply to transnational coordination within the EU (for fields that are not subject to EU legislation) and also between the EU and third states. The involvement of private actors may encourage transnational initiatives released from the traditional political obstacles characterising environmental policy within the confines of a single state.

In sum, therefore, within the environmental sphere, private regulatory efforts may constitute an important means of addressing situations where government action is either ineffective, inefficient or simply non-existent. Common to the above rationales is the idea that traditional state regulators may simply lack the capacity effectively to regulate many of the most pressing modern problems of environmental degradation, whether due to the inherently cross-border nature of these problems, their complexity and/or the potential lack of resources, political will, or a lack of adequate information or expertise to tackle them.[30]

The greater reliance on private and/or hybrid environmental regulation in the EU, which we now turn to discuss, must therefore be viewed in the light of the above considerations. Clearly, however, an increased role for private regulation offers no panacea for the above regulatory problems. Indeed, increased reliance on private actors to achieve environmental public goods may give rise to its own crop of difficulties, arising, for instance, from the lack of accountability of private regulatory initiatives, and the potential for private regulation to be used in the interest of a subset of citizens rather than for the public good per se.[31] These difficulties will be dealt with in the final section of this chapter.

3. The Trajectory of EU Environmental Regulation to Date and the Role of Private Environmental Regulation

3.1. From Direct Regulation to Market-Based Instruments

The beginnings of EU environmental regulation may be traced to the 1960s, and took the form of legislation on dangerous substances.[32] As there was no express

[29] See Nordhaus (n 2).

[30] See KW Abbott and D Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in W Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton, NJ, Princeton University Press, 2009) 45.

[31] DK King and J Hayes, 'The Effects of Power Relationships: Knowledge, Practice and a New Form of Regulatory Capture' (2018) 21 *Journal of Risk Research*, 1104.

[32] Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances [1967] OJ L196/1 (subsequently amended).

environmental competence in the Treaty of Rome of 1957, this legislation had the ostensibly economic aim of removing the hindrances to trade caused by differing national legislation on the matter, rather than the aim of environmental protection as such. By 1985, however, the Court of Justice of the European Union (CJEU) in the landmark *ADBHU* case had confirmed that environmental protection was 'one of the Community's essential objectives', justifying certain limits on the principle of freedom of trade.[33] This situation was subsequently formalised in the Treaties by Article 25 of the Single European Act (SEA) 1986, which inserted a new Title VII on the Environment into the Treaty,[34] making environmental protection an express objective of the Community. While it was clear that this remained an ancillary flanking policy to the primary Community aim of achieving the internal market, the Title nonetheless contained a specific legal basis for environmental legislation (Article 130s), making it unnecessary to find an economic justification for such legislation.[35]

The regulatory technique employed during these early years of EU environmental regulation was overwhelmingly that of direct, command-and-control regulation, with the Community legislature setting out the relevant requirements in legislation (typically Directives), to be transposed by Member States into national law and enforced by national authorities, overseen by the European Commission.

Such direct regulatory techniques were supplemented in the 1990s by an increasing reliance upon market mechanisms to achieve environmental aims, reflecting the ideological shift that had taken place under President Reagan in the US, and Prime Minister Thatcher in the UK, towards neoliberalism and a belief that free-market values should apply throughout not only economic, but also social, political and environmental life.[36] Such market-based instruments (MBIs) seek to adopt an economic solution to Hardin's classic tragedy of the commons scenario which posits that, where environmental resources are public goods, this leads to overexploitation of the resource.[37]

In particular, MBIs seek to put a price on pollution, thus 'internalising' the negative externality of environmental degradation into the market's price mechanism, and correcting the market failure that would otherwise occur. Thus, MBIs employ economic instruments such as subsidies or taxes to provide incentives for individuals and/or corporations to either refrain from environmentally harmful activities (eg dumping waste) or to positively engage in environment-enhancing activities (eg planting trees on private land).

[33] Case 240/83 *ADBHU* [1985] ECLI:EU:C:1985:59, para 13.

[34] Art 130r–t – in amended form, present Arts 191–93 TFEU.

[35] See further S Kingston, V Heyvaert and A Cavoski, *European Environmental Law* (Cambridge, Cambridge University Press, 2017) ch 1.

[36] See generally, N Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21(2) *Journal of Environmental Law* 179.

[37] G Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243, taking its name from the fact that, historically, resources such as pastureland and fisheries were owned in common.

Within the EU, environmental MBIs have a constitutional foundation in Article 191(2) TFEU, by which the 'polluter pays' principle forms one of the foundational principles of EU environmental policy. In this sense use of MBIs is not only permitted but indeed required by EU environmental policy. In line with this, MBIs have formed an important part of the EU's Fifth, Sixth and (current) Seventh multi-annual Environmental Action Programmes, which set out the roadmap for the EU's environmental policy. However, as acknowledged by the European Commission, MBIs have benefits but also limits:[38]

> MBI implicitly acknowledge that firms differ from each other and therefore provide flexibility that can substantially reduce the costs of environmental improvements. MBI are not a panacea for all problems. They need a clear regulatory framework in which to operate and will often be used in a policy mix with other instruments. But if the right instrument is chosen and appropriately designed, MBI carry certain advantages over regulatory instruments:
>
> – They improve price signals, by giving a value to the external costs and benefits of economic activities, so that economic actors take them into account and change their behaviour to reduce negative – and increase positive – environmental and other impacts.
> – They allow industry greater flexibility in meeting objectives and thus lower overall compliance costs.
> – They give firms an incentive, in the longer term, to pursue technological innovation to further reduce adverse impacts on the environment ('dynamic efficiency').
> – They support employment when used in the context of environmental tax or fiscal reform.

MBIs, such as emissions trading and environmental taxes and charges, now play a vital role in the EU's regulatory mix.[39] While traditional direct regulation remains important within the EU, the use of MBIs is being considered in increasingly wide areas of EU environmental policy, including areas such as habitat conservation where it was formerly thought inappropriate.[40]

The precise role of the state and private parties varies, of course, according to the specific MBI at issue. In some cases (such as eco-taxes), the regulatory function (the 'command') is centralised in much the same way as traditional regulation: the private actor's role is that of taking the price signal, as set by the state, into account in its private decision-making. In other cases, a far greater role is played by private actors.

Carbon markets, for instance, may best be conceptualised as hybrid public–private regulation, with the state responsible for the institutional setting in which

[38] European Commission, 'Green Paper on Market-Based Instruments for Environmental and Related Policy Purposes' COM(2007)140 final.

[39] A Vatn, 'Environmental Governance – From Public to Private?' (2018) 148 *Ecological Economics* 170.

[40] See EFTEC, 'The Use of Market-Based Instruments for Biodiversity Protection – The Case of Habitat Banking' (2010), available at http://ec.europa.eu/environment; and the European Commission (n 38).

particular markets are embedded, in particular in setting up the market and (to a greater or lesser extent, depending on the market at issue) in ensuring that the market continues to function effectively. Conversely, non-state actors play an important role in market-making, price setting, and, in some cases, in verification of emissions (as with the Clean Development Mechanism under the UN Framework Convention on Climate Change (UNFCCC), for instance). In other cases, purely voluntary carbon markets have emerged, on the basis of what Jessica Green has described as private 'entrepreneurial authority'.[41] Even in these cases, however, the evidence shows that voluntary carbon markets work best, as Markus Lederer has observed, when acting in the shadow of the state and closely aligned to state authority.[42] Indeed, states that have ratified the Paris Agreement under the auspices of the UNFCCC are also strongly incentivised to provide a robust regulatory framework in which to embed their carbon market, as the UN emissions reduction targets are of course incumbent on those states, rather than the private actors.

Perhaps the best-known environmental MBI currently in use in the EU is the EU's own carbon market, the emissions trading scheme (ETS), which forms a vital part of the EU's efforts to tackle climate change. The ETS also constitutes a fascinating example of multi-level regulation in action, with the EU initially ceding significant regulatory authority to its Member States, but gradually reclaiming that ground with subsequent iterations of the ETS Directive.

The basic idea behind the ETS, as a tradable permit scheme, is relatively simple: polluters are granted (or sold) a limited number of rights to emit pollution. Should they pollute less than allowed by their permit, they may sell the excess to other polluters. In this way, tradable permit schemes can minimise costs, by encouraging firms that would find it costly to reduce their emissions to purchase the right to pollute from firms for which this cost is lower.

In principle, tradable permit schemes can allow for economic development to be reconciled with environmental protection, by allowing new industrial activities in the area covered by the scheme without necessarily increasing the total volume of emissions from that area.[43] The standard features of tradable permit schemes are typically: a binding target or 'cap' (which, in the most recent versions of the ETS, reduces over time so as to achieve an overall reduction in greenhouse gas emissions across the EU); a unit of trade (1 tonne of carbon dioxide equivalent); a system for distributing allowances to participants; and a compliance period, at the end of which participants must have enough allowances to cover their emissions, failing which they are subject to a penalty.

[41] J Green, *Rethinking Private Authority: Agents and Entrepreneurs in Global Environmental Governance* (Princeton, NJ, Princeton University Press, 2014).

[42] M Lederer, 'Market Making via Regulation: The Role of the State in Carbon Markets' (2012) 6(4) *Regulation and Governance*, 533.

[43] Note, however, that the term 'emissions trading scheme' is misleading, as trading takes place not in the emissions themselves, but in the allowances to emit the pollutant(s) covered by the scheme.

The creation of the EU ETS by a Directive of 2003 represents the greatest regulatory experiment the EU has ever undertaken in environmental policy.[44] The 2003 ETS Directive created the world's first international ETS covering, at least in its initial incarnation, carbon dioxide emissions from around 11,000 large industrial installations (essentially, those covered by the EU's Integrated Pollution Prevention and Control (IPPC) Directive),[45] amounting to around 40 per cent of the EU's total greenhouse gas (GHG) emissions.

In its current form, the public regulatory competence under the ETS is largely located at EU level. Thus, a total emissions cap is set by the EU, within which the default option for allocating individual allowances is now by means of auctioning, the auctions taking place at Member State level.[46] Member States should use at least half of the overall revenues collected through the ETS scheme – and all of the revenues from aviation sector auctioning – for the purpose of combating climate change either at the EU or international level, and are obliged to report to the European Commission on how these revenues are used.[47]

In its initial two phases, however, the EU's carbon market has experienced severe difficulties, including a persistently low carbon price due in part to overallocation of allowances by Member States (which, under the original Directive, had been competent for allowance allocation, but this competence was subsequently ceded to the EU). This led to a revision of the 2003 Directive in 2009.[48]

Nonetheless, the ETS has continued to be plagued with difficulties, some of which persist. Foremost amongst these difficulties has been the continued descent of the EU carbon price, which plummeted to under €3.00 per tonne in the early months of 2013, in circumstances where it became evident that, in the context of a serious economic recession, the supply of allowances allocated to installations far exceeded demand. This has meant that the European Commission has been forced to step in to stabilise the price mechanism by means of the market stability mechanism, which essentially props up the carbon price at times of weakness. Aside from the pricing/oversupply issue, the ETS was also used for widescale

[44] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32.

[45] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

[46] A common auctioning platform is used by the different Member States, with the exception of Germany, Poland and the UK, which have chosen to develop their own individual auctioning platforms.

[47] See, in this regard, 'Report from the Commission to the European Parliament and the Council: EU and the Paris Climate Agreement: Taking Stock of Progress at Katowice COP (required under Article 21 of Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a Mechanism for Monitoring and Reporting Greenhouse Gas Emissions and for Reporting Other Information at National and Union Level Relevant to Climate Change and Repealing Decision No 280/2004/EC)' (2018) available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0716&from=EN.

[48] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L140/63.

VAT fraud, in the form of bogus 'carousel' schemes peaking in 2009 and made possible by the divergent VAT treatment of EU allowances across Member States (estimated to have cost EU governments around €5 billion in total), giving rise to a concerted police response across the EU and internationally involving thousands of officers.[49] Separately, large volumes of ETS allowances have been stolen from the registry accounts in which they are kept, peaking at the end of 2010 and beginning of 2011, when allowances to a value of over €30 million were stolen. These persistent difficulties with the EU's flagship environmental market-based instrument illustrate well that attempts to use MBIs with the aim that the 'market' achieves environmental public interest goals require careful regulatory design.

In particular, the lesson from the ETS has been that the market cannot alone be trusted to achieve vital environmental goals: rather, the market may be allowed to work, but always in the shadow of public legislators and regulators, which may be required to step in at any moment in case of market failure.

A similar approach of conditional acceptance of the role of the market and environmental MBIs is also apparent in the CJEU's case-law. The Grand Chamber's important *Vindkraft* judgment is of key relevance here. In brief, the case concerned the compatibility with the TFEU's free movement of goods provisions of the way in which Sweden chose to transpose part of the EU's 2009 renewable energy sources (RES) Directive.[50] The RES Directive provides, inter alia, that Member States may meet their binding renewables obligations by applying 'support schemes' (Article 3(3) RES Directive), defined to include any instrument that promotes the use of renewable energy, including green certificate schemes, and expressly provides that: 'Without prejudice to Articles [107 TFEU and 108 TFEU], Member States shall have the right to decide, in accordance with Articles 5 to 11 of this Directive, to which extent they support energy from renewable sources which is produced in a different Member State.' In implementing the RES Directive, Sweden made use of this possibility to favour nationally produced green electricity, giving green electricity produced at the domestic level priority access to the grid, using a system of green electricity certificates which only domestic producers could obtain and which, once allocated, could be traded.

Ålands Vindkraft, a Finnish electricity producer, brought proceedings alleging, inter alia, that the Swedish legislation infringed Article 34 TFEU on free movement of goods, arguing that the effect of the Swedish scheme was to reserve around 18 per cent of the Swedish electricity market (ie the portion subject to the quota) to Swedish electricity producers.

The CJEU considered, inter alia, the proportionality of the Swedish renewables legislation's use of a market mechanism to achieve Sweden's environmental/

[49] See Europol Press Release, 'Further Investigations into VAT Fraud Linked to the Carbon Emissions Trading System' (2010) available at: www.europol.europa.eu/newsroom/news/further-investigations-vat-fraud-linked-to-carbon-emissions-trading-system.

[50] Directive 2009/28/EC on the promotion of the use of energy from renewable sources [2009] OJ L140/16.

energy goals.[51] The CJEU held that, in designing the Swedish national support scheme so that consumers bear the additional cost of producing renewable energy, Sweden was validly exercising its discretion in pursuit of the legitimate aim of increasing green electricity production. Further, the ability of the scheme to achieve that aim was proven.[52]

Nevertheless, the CJEU held that, in order to be proportionate and therefore lawful as a matter of EU law, such a market must be demonstrated to function effectively and fairly so that traders subject to legislation on renewable energy can in fact 'obtain certificates effectively and under fair terms'.[53] To this end, it was, 'important that mechanisms be established which ensure the creation of a genuine market for certificates in which supply can match demand, reaching some kind of balance, so that it is actually possible for the relevant suppliers and users to obtain certificates under fair terms'. Further, the CJEU added, the method for determining the penalty for non-compliance with the quota and the amount of that penalty must not go beyond what is necessary to provide an incentive to comply, and must not be 'excessive'.[54] Again therefore the EU's embrace of environmental MBIs is strictly conditional in nature, more specifically conditional on compliance with what the CJEU considers to be 'fair' terms for market participants.

Aside from the ETS, the other major environmental MBI in use across the EU is that of environmental taxation. In contrast to the ETS (which is not considered as a fiscal measure in EU law), virtually no environmental tax measures have been passed at EU level, and this regulatory instrument remains therefore overwhelmingly a national one. In particular, the EU continues to have difficulty in progressing proposals in relation to a harmonised EU-level energy tax, due to the need for unanimity within the Council in order for such a measure to pass. Following an unsuccessful 1992 Commission proposal on the matter,[55] and a 2003 Directive leaving much leeway to Member States in the field,[56] the Commission's newest Proposal (2011)[57] is currently stalled in the Council.[58] Aside from the 2003 Directive, there are few examples of environmental charges and taxes currently in use at EU level,[59] due mainly to the resistance of Member States to EU legislation on fiscal matters, which is still subject to unanimity of voting under the legal bases

[51] Case C-573/12 *Ålands Vindkraft AB* v *Energimyndigheten* [2014] ECLI:EU:C:2014:2037.

[52] ibid, paras 109–12.

[53] ibid, para 113.

[54] ibid, para 116.

[55] European Commission, 'Proposal for a Council Directive Introducing a Tax on Carbon Dioxide Emissions and Energy' COM(1992) 226.

[56] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity [2003] OJ L283/51.

[57] European Commission, 'Proposal for a Council Directive Amending Directive 2003/96/EC Restructuring the Community Framework for the Taxation of Energy Products and Electricity' COM (2011) 169.

[58] See Council of the EU, Irish Presidency Note, 'Energy Taxation Directive – State of Play', 12 June 2013, 10825/13.

[59] See generally, Commission Communication on environmental taxes and charges in the Single Market, COM(97) 9 final.

for indirect taxation and direct taxation.[60] However, the EU plays an important role in regulating environmental subsidies and taxation in Europe via its state aid policy, and the European Commission has published detailed guidelines on environmental state aid.[61]

3.2. The Embrace of Network-Based Regulation and Voluntary Regulatory Instruments

A further important variety of private environmental regulation in contemporary EU environmental policy is the increasing use of instruments aimed at encouraging individuals and organisations (voluntarily) to get involved in achieving the EU's environmental policy goals. These instruments may be conceptualised as 'network-based' governance, in the sense of reliance on non-hierarchical, societal-driven methods of achieving policy aims.[62]

In the case of corporations, one example is the emphasis on corporate social responsibility (CSR), a trend generally embraced by the EU and Member State governments, but regarded with deep suspicion by some environmentalists. In the environmental context, network-based, CSR-inspired regulatory techniques have led, in many states, to a plethora of voluntary agreements and covenants, environmental codes and charters, voluntary environmental management systems and voluntary eco-labels. Adherence to such voluntary green initiatives may give firms a market advantage (consumers, investors and employees may prefer greener firms; early development of greener technologies may give a first-mover advantage) or reduce environmental costs (energy costs, the costs of cleaning up pollution). From a consumer's and, more broadly, an environmental democracy perspective, providing consumers with additional information on environmental performance in taking purchasing decisions can enhance market transparency.

The CSR concept has also attracted the interest of policy-makers at national, EU and international level, who have latched onto it eagerly as fitting with the goals of sustainable development and the environmental integration principle (ie the requirement of integrating environmental protection into other policy areas), as a way of combining growth and enterprise with environmental protection.[63] As a matter of EU law, sustainable development and the environmental integration principle enjoy constitutional status by virtue of Article 3 TEU and Article 11 TFEU, respectively.

[60] See Art 113 TFEU – ie taxation not collected directly from the taxpayer, such as VAT; and Art 115 TFEU – ie taxation collected directly from the taxpayer, such as income tax.

[61] See further Kingston (n 17).

[62] See A Jordan and A Schout, *The Coordination of the European Union: Exploring the Capacities of Network Governance* (Oxford, Oxford University Press, 2006).

[63] See generally, O de Schutter, 'Corporate Social Responsibility European Style' (2008) 14(2) *European Law Journal* 203.

The task for a regulator is, however, a challenging one: the aim is to create an architecture or regulatory climate that is favourable to voluntary pro-environmental activity, without crossing over into actually mandating such activity as this may be costly and may even reduce market actors' overall willingness and motivations to act.[64] This demands a delicate balance which, ideally, should be based on a deep understanding of the interrelation between regulation and individual/corporate autonomous decision-making or, as Tanya Börzel has termed it, the 'shadow of hierarchy'.[65]

At the EU level, the European Commission has developed a CSR 'agenda', which is largely based on soft-law, non-binding efforts such as enhancing the visibility of CSR and disseminating good practices. However, it has also led to binding measures, including a 2014 Directive on disclosure of non-financial and diversity information by large companies (with more than 500 employees) and groups.[66] This obliges companies falling within its scope to disclose information on policies, risks and outcomes as regards, amongst other things, environmental matters. However, companies are left with considerable flexibility as to the manner in which they choose to disclose relevant information (eg they may follow UN, European or national guidelines, depending on their preference).[67] The national versus EU dynamics in this field can thus be described as fairly distinct from direct forms of regulation, in that a clear target is set at EU level (ie reporting), whilst providing a wide margin of discretion as to at what governance level this reporting should take place.

A further outcome of the current EU CSR agenda has been the encouraging of self- and co-regulation processes. An important technique for achieving this has been the use of voluntary environmental agreements, ie agreements entered into by private parties aimed at achieving environmental objectives.[68] These may include self-regulatory arrangements, where the agreement is put in place solely by market actors, on a voluntary basis, whether in the form of binding agreements or gentlemen's agreements. Well-known examples include the Marine Stewardship Council (MSC), which has developed sustainable fishing standards mainly via

[64] See Y Feldman and O Perez, 'How Law Changes the Environmental Mind: An Experimental Study of the Effect of Legal Norms on Moral Perceptions and Civic Enforcement' (2009) 36 *Journal of Law and Society* 501.

[65] T Börzel, 'European Governance: Negotiation and Competition in the Shadow of Hierarchy' (2010) 48(2) *Journal of Common Market Studies* 191–219.

[66] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1.

[67] eg companies can use the UN Global Compact, the OECD guidelines for multinational enterprises, or the ISO 26000 standards – depending on their 'own characteristics or business environment'. See European Commission, 'Non-Financial Reporting', available at: https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en, accessed 11 February 2019.

[68] European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 'Communication on Environmental Agreements' COM(2002) 412 final.

collaboration between an ENGO, the World Wildlife Fund, and a corporation, Unilever.[69]

Alternatively, co-regulation may be used, in particular where a legislative or regulatory act entrusts attainment of environmental aims to non-state actors.[70] In some cases, such as the public voluntary programme in the United States, the legislator or regulator establishes the key elements of the regulation – which may, for instance, include the regulatory objectives, the deadlines and mechanisms relating to implementation, methods of monitoring the application of the legislation, and any sanctions necessary to guarantee the legal certainty of the legislation – and the firms subsequently agree on the means of implementing it.[71] In other cases, as is popular within many EU Member States, the regulator and industry may arrive at a negotiated agreement, which includes environmental obligations.[72]

Voluntary environmental agreements have been a particular feature of the regulatory mix in states such as the Netherlands, Germany and Denmark. A prominent recent example is the so-called Dutch 'Energy Deal' by which a group of over 40 stakeholders (including employer organisations, trade unions, ENGOs, consumer organisations and central and local governments as well as energy firms) entered into an agreement in 2014,[73] intended to improve energy efficiency, to promote renewable energy and to reduce dependence on fossil fuels.[74] In other Member States, however, co-regulation plays little role in the regulatory mix in the environmental context.

Partly as a result of this variety of regulatory preferences across Member States, with some trusting self-/co-regulation more than others, the EU has generally refrained from setting a mandatory harmonised approach to the appropriate regulatory mix, and has relied largely on soft law to guide Member States where appropriate. Thus, the European Commission has encouraged the use of environmental agreements in Communications of 1996 and 2002, and has formally recognised particular voluntary agreements on a number of occasions, normally by adopting a Recommendation confirming the content of the industry's engagement, or simply acknowledging the environmental agreement by exchange of

[69] See L Gulbrandsen, 'The Emergence and Effectiveness of the Marine Stewardship Council' (2009) 33(4) *Marine Policy* 654.

[70] See the EU's definition included in the 'Interinstitutional Agreement on better law making' of the European Parliament, Council and the Commission, [2003] OJ C321/4, para 18.

[71] An example is the US Environmental Protection Agency's 33/50 Program which invited firms to commit to reducing 17 priority chemicals and set as its goal a 33% reduction in releases and transfers of these chemicals by 1992 and a 50% reduction by 1995, measured against a 1988 baseline. See Gunningham (n 36) 186.

[72] eg the Federated Association of German Industry in 1995 agreed to propose a reduction of carbon dioxide emissions by up to 20% by 2005, in exchange for which the federal government announced the withdrawal of plans to introduce a waste heat ordinance and promised an exemption from a possible energy tax.

[73] Social Economic Council, *Energieakkoord voor duurzame groei*, The Hague, September 2014.

[74] See further E Kloosterhuis and M Mulder 'Competition Law and Environmental Protection: The Dutch Agreement on Coal-Fired Power Plants' (2015) 11(4) *Journal of Competition Law and Economics*, 855.

letters. The Commission has stressed, however, that such action can 'never' mean that it forgoes its right of initiative, meaning it can still propose legislation in fields where such environmental agreements exist.[75] This cautious approach reflects the fact that, while voluntary agreements may serve as an effective tool for laying down environmental commitments without prior legislative action – thus avoiding possibly costly and lengthy legislative implementation phases – environmental agreements have been criticised for not always being very credible or transparent.[76] In particular, clear problems of legitimacy and effectiveness may arise where a regulator decides not to act as a result of voluntary corporate green initiatives, in circumstances where it is the corporations, and not the national or EU legislature, that decides the level and means of environmental protection and monitoring they consider to be appropriate.

A further common example of corporate voluntary environmental initiative is the use of eco-management standards in undertakings' internal processes and planning, in order to achieve environmental aims. While some environmental management standards are mandatory, a substantial number are voluntary. Clearly, the credibility of a company's environmental report will depend on the reliability of the information and whether consumers and/or shareholders will find it convincing. Adherence to recognised environmental initiatives, such as environmental management systems and eco-labels, discussed further below, increases the credibility of such reports.

At international level, eco-management standards have been formalised in the ISO 14001 environmental management systems standard of the International Organization for Standardization (ISO).[77] ISO acts as a federation of national standardisation bodies, many of which are either part of their national governmental structure or are at least mandated by national governments, although some bodies active within ISO are strictly private in nature. For undertakings, the standards set by ISO may serve as an effective tool to minimise negative environmental impacts of their business operations, as well as a means to secure compliance with (often) internationally agreed environmental rules and regulations, where non-compliance may serve as a barrier for trading goods.[78] A further commonly used framework for environmental reporting are the Global Reporting

[75] European Commission (n 68) 5. See, for example, the recommendation issued acknowledging a voluntary agreement on the labelling of detergents in 1989 (Commission Recommendation 89/542/EEC [1989] OJ L291/55), and the recommendations acknowledging voluntary agreements between associations of European, Japanese and Korean car manufacturers on the reduction of carbon dioxide emissions from passenger cars (Commission Recommendation 1999/125 [1999[OJ L40/49, Commission Recommendation 2000/303 [2000] OJ L100/45 and Commission Recommendation 2000/304 [2000] OJ L100/57).

[76] J W Biekart, 'Negotiated Agreements in EU Environmental Policy' in J Golub (ed), *New Instruments for Environmental Policy in the EU* (London, Routledge 2013) 254.

[77] The International Organization for Standardization is a non-governmental organisation comprising national standards agencies of 162 countries. See www.iso.org.

[78] See 'ISO 14001:2015(En), Environmental Management Systems – Requirements with Guidance for Use' available at: www.iso.org/obp/ui/#iso:std:iso:14001:ed-3:v1:en, accessed 12 February 2019.

Initiative (GRI)'s non-binding guidelines. The GRI is a multi-stakeholder network launched in 1997 by the Ceres group of investors and environmental organisations.

In 1993, the EU passed a Regulation creating its own voluntary Eco-Management and Audit Scheme (EMAS), now covered by Regulation 1221/2009.[79] This scheme had a low uptake in the 1990s and 2000s, so one of the principal aims of the 2009 Regulation was to increase participation by (EU and non-EU)[80] undertakings. Essentially, in order to participate in EMAS, an undertaking must conduct an environmental review and audit of its activities, products and services, have these documents verified by an 'environmental verifier',[81] then prepare an environmental statement as set out in Annex IV of the Regulation. These documents are submitted to the competent authority in the relevant Member State for a decision on registration.[82] Databases detailing EMAS-registered organisations, environmental statements, and environmental verifiers are made publicly available by the Commission.[83] A key feature of the 2009 Regulation is the EU's desire to avoid duplication of effort by undertakings. Thus, the substantive requirements of EMAS mirror to some extent the ISO 14001 standard,[84] and Member States may request the Commission to recognise national environmental management standards as fulfilling part or all of the EMAS requirements.[85]

A final example of network-based, voluntary environmental regulation in the EU is its Ecolabel Regulation. This voluntary scheme was established in 1992 and is aimed at enhancing the visibility of high environmental standards of a product or service. Applicant manufacturers must apply to the relevant national competent authority to be awarded the right to display the EU's Ecolabel symbol, a flower, on their products. From a corporate perspective, eco-labels may provide enterprises with formal recognition for sustainability efforts, which may help to justify the use of a certain price-point that is reflective of (often more costly) sustainable production methods. If the eco-label holds sufficient meaning for consumers, it may constitute a powerful method of steering buying behaviour and, in consequence, may incentivise companies to attain to the standards required to be part of the eco-label 'club'.[86]

[79] Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L342/1 (the 'EMAS Regulation').

[80] EMAS Regulation, ibid, Art 1.

[81] ibid. Chapter V sets out the requirement for environmental verifiers.

[82] ibid, Art 3 and Chapter IV.

[83] ibid, Art 42.

[84] ibid, Annex II.

[85] ibid, Art 45.

[86] See, in this regard the work by Potoski and Prakash on voluntary programmes and club theory. As Heijden explains, their club theory perspective, 'indicates that the rules that participants must follow, the enforcement of these rules, and the exclusive rewards offered to participants are key indicators of program success or lack of success'. See J van der Heijden, 'Understanding Voluntary Program Performance: Introducing the Diffusion Network Perspective' [2018] *Regulation & Governance*; A Prakash and M Potoski, *The Voluntary Environmentalists: Green Clubs, ISO 14001, and Voluntary*

The EU's Ecolabel Regulation sets out broad criteria for the awarding of the flower label, giving the responsibility of developing more detailed requirements to the EU's Ecolabelling Board. This Board is composed of national competent authorities and acts as a 'consultation forum' comprising a 'balanced participation of all relevant interested parties concerned with that product group'.[87] In 2010, a new Ecolabel Regulation was passed, aimed in large part at increasing the label's effectiveness, including by streamlining the award process.[88] A variety of other EU labelling measures coexist with the flower label, some of which are voluntary. Despite such a voluntary nature, these schemes may have a strong public–private dimension. For instance, the Commission has indicated its willingness to recognise voluntary schemes set up by private operators such as the Roundtable on Sustainable Biomaterials (RSB) to demonstrate an undertaking's compliance with the requirements concerning biofuels or bioliquids as set out in EU legislation.[89]

3.3. The Push Towards Privatised Environmental Enforcement

A further striking example of network-based environmental regulation in the EU is the increasing emphasis on decentralised and privatised environmental enforcement, as reflected in the principles of access to information, participation, and access to justice in environmental matters provided for in the Aarhus Convention of 1998. In essence the aim is to enable non-governmental civil society (individuals and organisations) to get involved in environmental protection, through the increased recognition of environmental rights. Such techniques now form an important part of the regulatory toolkit for improving environmental protection within the EU and Europe more broadly. The Convention was hailed by the then Secretary-General of the United Nations, Ban-Ki Moon, as 'the most ambitious venture in the field of environmental democracy under the auspices of the United Nations'.[90] As the reference to environmental democracy suggests, the

Environmental Regulations (Cambridge, Cambridge University Press, 2006); M Potoski and A Prakash, 'Green Clubs: Collective Action and Voluntary Environmental Programs' (2013) 16 *Annual Review of Political Science* 399.

[87] EMAS Regulation (n 79) Art 15. Grant of the Ecolabel can have further consequences: for example, when granted to an energy-using product, the Ecolabel means that the product is considered to comply with Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of eco-design requirements for energy related products [2010] OJ L285/10.

[88] Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2010] OJ L27/1. Medicinal products and certain hazardous chemicals are excluded from the system.

[89] Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability scheme [2010] OJ C160/1.

[90] United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 2nd edn (UNECE, 2014) 3.

approach of the Aarhus Convention is firmly aimed at increasing citizens' involvement in achieving environmental protection, following on from Principle 10 of the Rio Declaration adopted by the 1992 Rio Conference on Environment and Development (UNCED), which provides:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[91]

The three 'pillars' of the Aarhus Convention – access to information, public participation, and access to justice – have, at their heart, the aims of improving transparency, democracy and accountability in decisions affecting the environment. Key to this approach is the idea that, by enabling citizens to access information on their environment, to participate in environmental decision-making, and to challenge environmental decisions before courts/tribunals, this will contribute to achieving a higher level of environmental protection. While the Aarhus Convention adopts an essentially procedural approach to environmental rights, its Preamble makes clear that its authors envisaged these procedural rights not as an end in themselves, but as a means of achieving what they recognised as a universal right for every person, 'to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'.

Since May 2005, the European Community (and subsequently the European Union) has been a party to the Aarhus Convention, alongside its Member States,[92] and has implemented it on two levels. First, in terms of measures directed at Member States, it passed two Directives in 2003 implementing the Convention's access to information and public participation principles (Directives 2003/4 and 2003/35, respectively),[93] although the latter applies only in narrowly designated fields of EU environmental law, namely, environmental impact assessment (EIA) and integrated pollution prevention and control (IPPC, now covered by the Industrial Emissions Directive). Due to opposition from certain Member States,

[91] Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (vol I); (1992) 31 ILM 874, principle 10.

[92] Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.

[93] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [2003] OJ L41/26; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment [2003] OJ L156/17.

the Commission's 2003 proposal for a general Directive on access to environmental justice implementing the third pillar of the Convention, access to justice, was never passed in the Council.[94] Second, in order to fulfil its obligations as a party to the Aarhus Convention in its own right, the EU passed a Regulation in 2006 that aims at implementing all of the three pillars of the Convention in relation to actions by EU institutions and bodies.[95]

4. The Citizen's Perspective?

It will be evident from the above that the role of private actors in environmental regulation and enforcement in the EU has grown steadily since the 1990s and, at EU level, they are now generally acknowledged as forming an essential part of the regulatory mix, be they individuals, corporations or ENGOs. It will also be apparent that this represents a fundamental change in the architecture of EU environmental regulation, from a state-centred approach to a more pluralist harnessing of business and society in pursuit of the EU's environmental aims.[96] In the words of Maria Carmen Lemos and Arun Agrawal:

> The fragmentary nature of the sources of complex environmental problems, such as global climate change, and the reluctance or inability of nation states to regulate the sources of these problems, means that nonstate actors and organizations may be able to play an essential role in mobilizing public opinion and generating innovative solutions.[97]

Nevertheless it must be recognised that, in reality, many of the EU's flagship market- and network-based regulatory techniques are more properly viewed as hybrid regulatory instruments, relying on legal frameworks that are themselves hierarchical in nature (ie created and enforced by the EU and/or Member States). In this context, one can question to what extent the EU's experience with private environmental regulation and enforcement can correctly be described as 'of the people, by the people' and, perhaps most importantly, 'for the people', as referenced in the title of this chapter.[98]

[94] Namely the failed Commission Proposal for a Directive on access to justice, COM(2003) 624 final.

[95] Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13. Note here that in particular the extent to which the access to justice pillar has been fully implemented at the EU level can be questioned. See N Berny, 'Failing to Preach by Example? The EU and the Aarhus Convention' (2018) 27 *Environmental Politics* 757.

[96] See further A Jordan, R Wurzel and A Zito, 'Policy Instrument Innovation in the European Union: A Realistic Model for International Environmental Governance?' in G Winter (ed), *Multilevel Governance of Global Environmental Change* (Cambridge, Cambridge University Press, 2011) 470.

[97] MC Lemos and A Agrawal, 'Environmental Governance' (2006) 31 *Annual Review of Environment and Resources* 297–325, 301.

[98] The historical roots of this credo can be traced back to John Wycliffe's English translation of the Bible of 1384, but were most famously used by President Abraham Lincoln in his Gettysburg Address (1863), stating that: 'Government of the people, by the people, for the people, shall not perish from the

The EU's Emissions Trading Scheme, for instance, is the product of EU Directives (plus other legal measures), implemented and enforced by the European Commission, EU Courts and Member State authorities. The EU Ecolabel, outlined above, is a further example of hybridity. Other important examples of hybrid public–private arrangements are found in the field of renewable energy where, as stated above, a corporation's compliance with a number of globally recognised private voluntary sustainability standards, such as the Roundtable on Sustainable Biomaterials (RSB), may be accepted as proof of compliance with the overall renewables requirements provided in the Renewable Energy Directive.[99]

In this sense, the EU's embrace of private environmental regulation has never been as wholehearted as, for instance, that of the United States, where truly private regulation has occupied (and been permitted by regulators to occupy) a far greater portion of the regulatory mix than in the EU. Fundamentally this reflects the fact that the predominant economic model in the EU, as expressed in the concept of a 'social market economy' found in Article 3 TEU, has never been based on the same unquestioning belief in the market (including for the achievement of environmental aims) as the neoliberal economic model that has achieved popularity in the US.[100]

Further, even those elements of private environmental regulation encouraged at the EU level may, if not properly designed and overseen by public regulators, raise significant questions about their compatibility with the EU's own constitutional democratic principles, as well as issues of trust, legitimacy and credibility from a citizen's perspective more broadly.

One such example is the encouragement of CSR and voluntary environmental initiatives, discussed above. In the EU, CSR has been embraced as a win–win policy, arguing that greener behaviour can indeed give firms a market advantage or reduce environmental costs. From an environmental democracy perspective, as explained above, by providing consumers with additional information on environmental performance in taking purchase decisions, market transparency can be increased.

At worst, however, voluntary environmental initiatives may be employed tactically by undertakings to avoid being regulated – and the concomitant costs of

earth.' See JL Haney, 'Of the People, by the People, for the People' (1944) 88 *Proceedings of the American Philosophical Society* 359.

[99] See ISEAL Alliance, 'Private Sustainability Standards and the EU Renewable Energy Directive' available at: www.isealalliance.org/impacts-and-benefits/case-studies/private-sustainability-standards-and-eu-renewable-energy, accessed 16 October 2018; European Commission, 'Voluntary Schemes', available at: /energy/en/topics/renewable-energy/biofuels/voluntary-schemes, accessed 16 October 2018.

[100] On the emergence of private environmental regulation in the US, see J Bakan, 'The Invisible Hand of Law: Private Regulation and the Rule of Law' (2015) 48 *Cornell International Law Journal* 279; K Pastor, 'Multinational Corporations as Regulators and Central Planners: Implications for Citizens' Voice' in G Urban (ed), *Corporations and Citizenship* (Philadelphia, University of Pennsylvania Press, 2014) 233–34.

compliance, potential inefficiency, and loss of control over the applicable standard and regime – or to postpone it for as long as possible.[101] Moreover, empirical economic research suggests that this may be an effective tactic.[102] A well-known example within the EU was the choice of the EU car industry to enter into agreements on emissions standards, essentially in order to avoid being regulated. After unsatisfactory environmental performance, this ended in failure in 2010 when the EU lost patience, passing a Regulation on passenger car emissions.[103]

The risk, then, is that CSR may be viewed as mere greenwashing, with no assurance that environmental objectives will be attained, little accountability on the part of undertakings, and little ultimate practical effect on the behaviour of businesses – thus undermining the credibility of CSR initiatives.[104] Such criticism comes not only from the environmental camp, but also from the corporate governance perspective: in the capitalist corporate model, managers are accountable to shareholders for profits, and any attempts to achieve other goals at the same time are illegitimate. The 'triple bottom line' which the UN and the Commission advocate – aiming not just to make money, but also to protect the environment and to improve social justice – distracts attention from ultimate managerial duties.[105]

In sum, as with market-based approaches, voluntary environmental initiatives have in some circumstances certain clear advantages in comparison with direct regulation. In the right context, they may offer an important contribution to achieving a higher level of environmental protection by complementing, though not replacing, direct regulation. Their principal disadvantage lies in their very nature: they are not compulsory, and therefore inappropriate for use alone to deal with immediately serious environmental risks. Even where their use is in principle appropriate, their success in achieving environmental protection goals depends on how the initiative is constructed and functions in practice. For instance, the 'shadow of hierarchy' must be constructed in such a way that voluntary environmental initiatives cannot be used to create de facto compulsory environmental standards which are then used to exclude competitors. In the EU, that is achieved

[101] In this way, CSR can become 'a codeword for abandoning to market mechanisms certain questions which might otherwise be the target of regulatory approaches', de Schutter (n 63) 204.

[102] See C Decker, 'Corporate Environmentalism and Environmental Statutory Permitting' (2003) 46 *Journal of Law and Economics* 103.

[103] Regulation 443/2009 of the European Parliament and of the Council of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO_2 emissions from light-duty vehicles [2009] OJ L140/1.

[104] See A Ogus, 'Rethinking Self-Regulation' (1995) 15 *OJLS* 97.

[105] See 'Economic and Social Council Explores Integration of Three Sustainable Development Pillars – Economic, Social, Environmental – to Achieve "Triple Win" Solutions | Meetings Coverage and Press Releases', available at: www.un.org/press/en/2013/ecosoc6574.doc.htm, accessed 11 February 2019; European Commission, 'Corporate Social Responsibility Main Issues', available at http://europa.eu/rapid/press-release_MEMO-02-153_en.htm, accessed 11 February 2019.

by the competition rules laid down in Articles 101 and 102 TFEU, and the equivalent provisions of national competition laws.[106]

The 'shadow of hierarchy' must also be constructed in a way that ensures that, where an important environmental goal is not in fact being met, direct regulation takes over. This is what occurred, for instance, in the case of the voluntary agreement on passenger car emissions, but only after many years of environmental degradation had been allowed to take place. It is also what ultimately occurred in the case of the EU's ETS as discussed above, but again only after many years of a failing carbon market. Even then, while the ETS remains the EU's flagship climate policy instrument, it is a fundamentally economic construct which most EU citizens will never have cause to understand or even encounter in their day-to-day lives, again raising evident questions about the legitimacy of such a mechanism.[107]

The classic response to such concerns is that the benefits of such regulatory tools in terms of effectiveness are sufficient to outweigh any legitimacy concerns. Nevertheless, the regulatory flaws in the ETS as originally constructed (eg overallocation of allowances due to the initial delegation of competence for allocating allowances to the Member States) demonstrate well the dangers in relying on private and hybrid regulatory techniques if they are not properly designed. Given the increasing consensus that climate change is a human rights issue that potentially affects all citizens, including future generations, this is no longer an abstract issue. Rather, in the words of the UN High Commissioner for Human Rights: 'human rights are under threat from a force that challenges the foundations of all life on this planet we share.'[108] In these circumstances the conditional acceptance of MBIs is thrown into sharp relief: it is apparent that the EU may justify reliance on MBIs such as the ETS if and only if such mechanisms are in fact effective in achieving the EU's climate goals for the benefit of its citizens and in conformity with their rights.

While one may question the democratic legitimacy of many forms of private environmental regulation, the privatised environmental enforcement as epitomised by the Aarhus Convention is expressly intended to champion environmental democracy, by conferring rights on individuals and ENGOs to access environmental information, and participate in and challenge environmental decisions. Further, an increased reliance on private enforcement has obvious attractions: as is often acknowledged in the literature, a lack of resources (or inadequate prioritisation) on the part of public enforcers can be a serious barrier to effective regulatory

[106] In the EU, that is achieved by the competition rules laid down in Arts 101 and 102 TFEU. See Kingston (n 17).

[107] On the competing and converging goals of legitimacy and effectiveness in private and hybrid environmental governance, see V Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles* (Cambridge, Cambridge University Press, 2018), ch 9.

[108] Open Letter from Michelle Bachelet on integrating human rights in climate action, 21 November 2018, available at www.ohchr.org.

policies.[109] In this context, private enforcement through litigation may be seen as a response to possible capacity issues or other functional limitations of public enforcers in 'getting the job done'.

Nevertheless, little empirical proof yet exists demonstrating that increased environmental democracy in fact leads to improved environmental quality. Indeed, one might argue that the opposite could be possible in some situations. One might easily imagine, for instance, a case where individuals and/or communities may use such procedural rights in order to object to environmentally motivated restrictions that, from their perspective, reduces their access to local amenities. As Mason has observed:[110]

> Aarhus environmental rights straddle uneasily between, on the one hand, their embodiment as procedural entitlements and, on the other, the social welfare aspiration, expressed in Article 1 [of the Convention], to provide environmental quality adequate to the human health and well-being of all persons. The UNECE [United Nations Economic Commission for Europe] assumption that the former necessarily promotes the latter is asserted rather than substantiated.[111]

That is not to suggest that greater privatised environmental enforcement will necessarily lead to lower environmental quality, but rather that further evidence is required before public enforcers amend their enforcement priorities (or indeed reduce the resources allocated to enforcement) on the assumption that private actors will fill the gap that public enforcement action had previously occupied. As with any novel regulatory technique, the effectiveness of private enforcement must first be scientifically observed and tested.

5. Conclusion

Contemporary EU environmental policy offers fascinating examples of experimentation with novel and ambitious private and hybrid regulatory techniques. Such regulatory creativity has been necessitated by, in particular, the recognised failure of direct regulation effectively to achieve vital environmental policy goals in fields such as climate change and nature conservation. In certain instances, such novel regulatory initiatives have been designed purely with a view to effectiveness and without regard to citizen trust and participation (eg market-based instruments such as the EU ETS). In other instances, private regulatory techniques have involved only certain market actors to the exclusion of private

[109] J Glover, 'The Structural Role of Private Enforcement Mechanisms in Public Law' (2012) 53(4) *William and Mary Law Review* 1137.

[110] See further M Lee and C Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 *Modern Law Review*, 80.

[111] M Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' (2010) 10 *Global Environmental Politics* 3, 17.

citizens (eg CSR and voluntary corporate agreements). Privatised environmental regulation has worked best when closely supervised by state authorities and when they have proved that they are ready to step in to regulate where privatisation has failed. Further, encouragement of private enforcement is a striking feature of EU environmental policy at present, with the express aim of encouraging greater environmental democracy. However, the jury remains out on the extent to which this will in fact result in improved environmental outcomes.