Legitimacy in Administrative Law: EU

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This chapter examines the role played by the concept of legitimacy in EU administrative law. The discussion begins with consideration of formal legitimacy in relation to the different institutions that participate in EU administration, irrespective of whether they are located at EU or national level. The focus then shifts to discussion of legitimacy as judged by amenability to judicial review and to the equally important, albeit less well known, issue of the targeting of judicial review. This is followed by brief consideration of political accountability and EU. The chapter concludes with lengthier analysis of the importance of substantive/output legitimacy in the context of EU administration.

1 Formal Legitimacy

It is fitting to begin this analysis by consideration of the formal legitimacy of EU Administration. This has not been a problem, insofar as the Commission is concerned. It has, from the very inception of the EEC, derived its formal legitimacy from the Treaty, and this has imbued its administrative functions with formal legitimacy. This is evident from Article 155 EEC, which provided that the Commission shall,

> ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;

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> - formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;
> - have its own power of decision and participate in the shaping of measures taken by the Council and by the Assembly [European Parliament] in the manner provided for in this Treaty;
> - exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

The Commission's formal legitimacy under the Lisbon Treaty is to be found in Article 13(1) TEU, which confirms its status as one of the Union institutions. The Commission's formal legitimacy in relation to its functions concerning administration is found in Article 17(1) TEU, the text of which is set out below. This provides that the Commission shall, *inter alia*, ensure the application of the Treaties, measures adopted pursuant thereto, manage programmes and exercise the coordinating, executive and management functions as laid down in the Treaties.

> The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

The Commission is but one of the institutional players concerned with EU administration. It should however be noted that formal legitimacy of most other types of EU Administration is not problematic. This is because the relevant administrative powers and duties are enshrined in formal Community legislation. This is true for most instances of, for example, shared administration, direct administration, agencies, and Comitology. Thus the respective rights and duties of the Commission and national administrations in the many important areas where shared administration applies have been laid down in Community legislation enacted by the appropriate

legislative procedure for the making of legislation within that area.[1] This is equally true for direct administration, where the discharge of the relevant administration scheme is the responsibility of the Commission, albeit now often aided by the new breed of executive agencies. The respective powers and duties of the Commission[2] and the executive agencies[3] were specified in formal Community legislation.

The Comitology regime also had formal legitimacy. Delegation of power to the Commission, subject to a particular form of Comitology oversight, was always spelt out in the primary legislative act, whether a regulation, directive or decision, that governed the relevant area. There were, in addition, Community decisions of a more generic nature, which set out the details of the advisory, management and regulatory committee structures.[4] Community agencies were moreover secure in terms of their formal legitimacy. There was considerable variation in the precise powers accorded to Community agencies, but this should not mask the fact that they all had a secure foundation in Community legislation and thus were not problematic from the perspective of formal legitimacy.[5]

There are, however, some aspects of EU administration that are important and

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[1] P Craig, *EU Administrative Law* (Oxford University Press, 2006) Chap 3.

[2] Ibid Chap 2.

[3] Council Regulation (EC) 58/2003 of 19 December 2002 laying down the Statute for Executive Agencies to be entrusted with certain tasks in the management of Community programmes [2003] OJ L11/1.

[4] Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission [1987] OJ L197/33; Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/23.

[5] Craig (n 1) Chap 5.

are premised on soft law rather than hard law, the most prominent instance being the Open Method of Coordination, which is used in areas such as employment policy, social policy and for aspects of macro-economic policy.[6] It would be tempting to conclude that such soft law forms of administration lack formal legitimacy. This conclusion would be premature. The fact that administration takes the form of soft law, does not mean that there is no formal legitimacy for use of this mode of administration. Thus use of coordination methods in relation to macro-economic policy was grounded in the Treaties,[7] and in the Stability and Growth Pact, which was enshrined in Community legislation.[8] The use of the OMC in relation to, for example, employment policy also had foundation in the Treaty,[9] and in measures enacted pursuant thereto.[10]

2 Legitimacy and Legal Accountability

(a) Availability of JR

The Community courts decided at the inception of the Treaty that while Community

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[6] Ibid Chap 6.

[7] Arts 99, 104 EC, now Arts 121, 126 TFEU.

[8] Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1; Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6.

[9] Arts 128, 130 EC, now Arts 148, 150 TFEU.

[10] Council Recommendation 2003/579/EC of 22 July 2003 on the implementation of Member States' employment policies [2003] OJ L197/22; Council Decision 2005/600/EC of 12 July 2005 on guidelines for the employment policies of the Member States [2005] OJ L205/21.

administration might well be formally legitimate in the preceding sense, it could only be properly legitimate if it was subject to legal control through judicial review. There was thus a proximate connection between legitimacy and legal accountability. There was of course warrant for this in the Treaty which expressly laid the foundations for direct and indirect judicial review in Articles 230 and 234 EC. The availability of judicial review has not been problematic in relation to the principal Community institutions, which were rendered susceptible to such review via Article 230 EC.

There was however some difficulty in relation to other Community institutions. The ECJ nonetheless took a teleological approach towards the availability of judicial review, in relation to those bodies where this was uncertain. Thus in the famous *'Les Verts'* case[11] the EC reasoned as follows. It held that the Community was based on the rule of law; the Treaty had established a complete system of legal remedies to permit the ECJ to review the legality of measures adopted by the institutions; a direct action should therefore in principle be available against all measures adopted by the institutions intended to have legal effects; and therefore the fact that the European Parliament was not at that time listed as being amenable to review under Article 173 EEC did not preclude judicial review.

The availability of judicial review in relation to Community agencies prior to the Lisbon Treaty was more problematic. Such agencies are given legal personality by the instruments that created them. There are however significant differences between the agency regulations in relation to legality review. Some Regulations, such as those dealing with trademarks, OHIM, and aviation safety, EASA, contain detailed and explicit provisions on legality review, with a system of internal appeal to a Board of

[11] Case 294/83 *Parti Ecologiste – 'Les Verts' v Parliament* [1986] ECR 1339, [23].

Appeals followed by legality review by the Community courts.[12] Other Regulations, such as that applicable to the monitoring centre on racism, EUMC, contained no provision for internal appeal, but stated that the ECJ should have jurisdiction in actions brought against the Centre under Article 230 EC.[13] The format used in relation to the agency responsible for disease control, ECDC was different yet again, enabling a reference to be made to the Commission concerning the legality of the Centre's action, explicitly backed up by the possibility of recourse to the Community courts to annul the Commission decision.[14]

The very diversity in the regulations governing different agencies meant that the interpretation accorded to the primary Treaty concerning legality review was especially important. Article 230 EC did not explicitly refer to agencies and other Community bodies as subject to judicial review. The express wording of Article 230(1) stated that the ECJ should review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

This formal deficiency was addressed by the Lisbon Treaty in Article 263(1) TFEU, the successor to Article 230 EC. Article 263(1), which follows in this respect

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[12] Council Regulation (EC) 40/94 of 20 December 1993 on the Community Trademark [1994] OJ L11/1, Arts 61, 63; Regulation (EC) 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of Civil Aviation and establishing a European Aviation Safety Agency [2002] OJ L240/1, Arts 31-41.

[13] Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ 1997 L151/1, Art 15(3).

[14] Regulation (EC) 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for Disease Prevention and Control [2004] OJ L142/1, Art 28.

Article III-365(1) of the Constitutional Treaty, added a further sentence to the pre-existing provision, which stated that the ECJ should also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

The CFI had however in effect already filled this gap, as is evident from the *Sogelma* case.[15] The applicant sought judicial review of a decision by the European Agency for Reconstruction, EAR, to cancel a public tender for a public procurement project. The applicant was one of those who had tendered a bid for this project before the tender was withdrawn. The Agency claimed that it was not susceptible to review under Article 230, since agencies were not listed in Article 230(1) EC.

The CFI acknowledged that this was so, but held that the Agency was nonetheless subject to judicial review. It reached this conclusion by drawing on the principle in *Les Verts*[16] set out above, in which the ECJ had made clear that the legitimacy of the power to make decisions that impacted on the legal position of others was that such measures must be subject to judicial review, the conclusion being that the European Parliament was subject to review even though it was not at that time mentioned as being so.

The CFI in *Sogelma* held that 'the general principle to be elicited from that judgment is that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review'.[17] It acknowledged that the ruling in *Les Verts,* referred only to Community institutions listed in Article 7 EC, which did

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[15] Case T-411/06 *Sogelma - Societá generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)* [2008] ECR II-2771.

[16] Case 294/83 (n 11).

[17] Case T-411/06 *Sogelma* (n 15) [37].

not include the EAR. The CFI nonetheless concluded that 'the situation of Community bodies endowed with the power to take measures intended to produce legal effects vis-à-vis third parties is identical to the situation which led to the *Les Verts* judgment: it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review.'[18]

The CFI distinguished the *Eurojust* case[19] on the ground that it was concerned with the Third Pillar and that Article 41 EU did not provide for the application of Article 230 EC to the provisions on police and judicial cooperation in criminal matters in Title VI of the TEU.[20] The CFI also distinguished its own earlier ruling in *Keeling*,[21] which concerned the Office for Harmonization in the Internal Market. In *Keeling* the CFI held that the OHIM was not amenable to review because it was not among the bodies listed in Article 230(1) EC, nor was it a Community institution for the purposes of Article 7 EC. The CFI in *Sogelma* nonetheless distinguished *Keeling* on the ground that the judgment in the latter case had been premised on the existence of other remedies that were available against the OHIM. The CFI in *Sogelma* therefore concluded that the decision in *Keeling* did not preclude an action under Article 230 EC against a decision of a Community body not mentioned in Article 7.[22]

The decision that Community agencies are subject to judicial review represented a further example of teleological judicial reasoning in anticipation of Treaty amendment. The CFI's conclusion can be supported not only on the ground

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[18] *Ibid* [37].

[19] Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077.

[20] Case T-411/06 *Sogelma* (n 15) [45].

[21] Case T-148/97 *Keeling v OHIM* [1998] ECR II-2217.

[22] Case T-411/06 *Sogelma* (n 15) [46].

that it coheres with legal principle and constitutes a natural application of the reasoning in *Les Verts*, but also because, although not mentioned in *Sogelma*, the ECJ had made it clear that the principle in *Les Verts* could be applied to Community bodies endowed with legal personality, even if they were not formally listed as Community institutions in Article 7 EC.[23]

There were also some problems prior to the Lisbon Treaty in rendering Union bodies susceptible to judicial review, as was apparent from the *Eurojust* case.[24] Eurojust was established in 2002 to enhance co-operation between the competent authorities responsible for investigation and prosecution of cross-border and organized crime.[25] It has competence in relation to crimes that fall within Europol's jurisdiction and other crimes specifically listed.[26] Eurojust's objectives are to stimulate and improve coordination between the competent authorities of the Member States concerned with investigation and prosecution of these crimes; to improve cooperation between such authorities by facilitating execution of international mutual legal assistance and implementation of extradition requests; and otherwise to support Member State authorities in order to render their prosecutions and investigations more effective.[27]

In the *Eurojust* case Spain sought to review the legality of staff appointment

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[23] Case C-15/00 *Commission v EIB* [2003] ECR I-7281, at [75]; Case C-370/89 *SGEEM and Etroy v EIB* [1992] ECR I-6211, [15]-[16]; K Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community' (1993) 18 *ELRev* 23, 46.

[24] Case C-160/03 *Spain v Eurojust* (n 19).

[25] Council Decision 2002/187/JHA of 28 February 2002, setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L 63/1.

[26] Dec 2002/187/JHA (n 25) Art 4.

[27] Ibid Art 3.

measures contained in advertisements issued by Eurojust on the ground that the language requirements stipulated therein were contrary to the rules contained in the decision setting up Eurojust, to the staff regulations and to general precepts of non-discrimination.

The action was however deemed to be inadmissible by the ECJ. It held that Article 230 EC did not apply to Eurojust, a body established by the Council under the EU.[28] Moreover Article 41 TEU did not render Article 230 EC applicable to the provisions on Police and Judicial Cooperation in Criminal Matters in Title VI of the TEU, the jurisdiction of the ECJ being limited in Article 35 TEU to challenges to the legality of the basic decision or framework decision adopted by the Council.[29] The ECJ acknowledged the applicant's argument that in a Community based on the rule of law decisions that produced legal effects must be subject to judicial review, but held that this was met in the instant case because aggrieved candidates for the posts had access to the Community courts under the Staff Regulations.

The ECJ's reasoning stood in marked contrast to that of Advocate General Poiares Maduro. He rejected the applicant's argument that admissibility could be based on Article 230 EC, since the contested measures were not Community measures, and Eurojust had been established under the EU Treaty. He was however willing to read Article 35 TEU in the same spirit that the ECJ in *Les Verts* had read Article 230 EC. Thus in a Union based on the rule of law it was essential that Union institutions, as well as those of the EC, should be amenable to review when they

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[28] Case C-160/03 *Spain v Eurojust* (n 19) [38].

[29] Case C-355/04 P *Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council* [2007] ECR I-1657, [47]; Case C-354/04 P *Gestoras Pro Amnistía, Juan Mari Olano Olano and Julen Zelarain Errasti v Council* [2007] ECR I-1579, [47].

produced legal effects vis-à-vis third parties. It should therefore be possible to review the measures taken by Eurojust, in addition to the legality of the decision creating the organization.[30]

The ratification of the Lisbon Treaty the problem has now obviated the problem posed by the *Eurojust* decision. This is because the provisions on 'Police and Judicial Cooperation in Criminal Matters', the Third Pillar of the old TEU, have been moved into the new TFEU. They have been integrated with what was Title IV EC, dealing with visas, asylum, etc., and is now Title V TFEU, renamed, 'Area of Freedom, Security and Justice'. Subject to certain limited qualifications, decision-making in these areas is subject to the normal principles of judicial review exercised by the Community courts pursuant to Article 263 TFEU, the successor provision to Article 230 EC. Thus an agency such as Eurojust will be susceptible to legality review pursuant to Article 263 TFEU in the normal manner.

It should however be noted that Article 263 now contains a new provision that is found in Article 263(5) TFEU, which states that the legislation setting up EU bodies, offices and agencies can lay down specific conditions and arrangements concerning actions brought by natural or legal persons against their acts intended to produce legal effects in relation to them. It remains to be seen what use is made of this new provision in relation to the detailed arrangements whereby actions are brought against EU agencies by natural or legal persons.

(b) Targeting Judicial Review

The Community Courts have also been adept at 'targeting' judicial review, by

[30] Case C-160/03 *Spain v Eurojust* (n 19) AG Poiares Maduro, [15]-[22].

ensuring that it is available against the correct body, even where this requires some teleological reasoning on its part. The link with legitimacy and legal accountability is forceful. Legal legitimacy not only demands that a body should be susceptible to judicial review, it also demands that the review is directed against the particular body within a complex administrative structure that actually made the decision. There should in this sense be a conjunction between administrative power and legal responsibility. Three brief examples show this judicial strategy at work.

First, with respect to certain types of problem, the Community courts did much to fill in or prevent gaps. This can be exemplified by the application of the right to be heard where administration was shared between the Community and the Member States. Thus the ECJ concluded in *Technische Universität München* that the right to be heard in such an administrative procedure in the customs context required that the person concerned should be able during the procedure before the Commission to put his case and make his views known.[31] A similar approach was taken in *Lisrestal*[32] in the context of the European Social Fund, where the Commission issued a decision to the Portuguese ministry requiring the re-payment of funding to Lisrestal on the grounds that it had mismanaged the funds.

Second, the Community courts also ensured that judicial review was applied

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[31] Case C-269/90 *Hauptzollamt München-Mitte v Technische Technische Universität München* [1991] ECR I-5469, [25]; Case T-42/96 *Eyckeler & Malt AG v Commission* [1998] ECR II-401; Case T-50/96 *Primex Produkte Import-Export GmbH & Co. KG v Commission* [1998] ECR II-3773.

[32] Case T-450/93 *Lisrestal v Commission* [1994] ECR II-1177; Case C-32/95 P, *Commission v Lisrestal* [1996] ECR I-5373; Cases C-48 and 60/90 *Netherlands v Commission* [1992] ECR I-565, [44]; Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885, [39].

against those with responsibility for the disputed action. The *Sogelma* decision[33] embodies recognition of the importance of aligning judicial review with the body that made the substantive decision that was challenged. The CFI held that the particular act challenged in the instant case, viz, the cancellation of the tender procedure, was an act that was amenable to judicial review, since it adversely affected the applicant and brought about 'a distinct change in his legal position, since the result is that the applicant can no longer expect to be awarded the contract for which he has submitted a tender.'[34] The power to decide upon tenders for the award of contracts had been lawfully delegated by the Commission to the EAR and it followed that 'decisions which the Commission would have taken cannot cease to be acts open to challenge solely because the Commission has delegated powers to the EAR, otherwise there would be a legal vacuum.'[35] The CFI rejected the EAR's argument that the case should have been brought as an indirect action in the national court via Article 234 EC: while the contracting authority was the Serbian Ministry of Capital Investments, it was the EAR that cancelled the tender procedure, and the national court did not have jurisdiction to assess the legality of that decision.[36]

The CFI then iterated that 'as a general rule, actions must be directed against the body which enacted the contested measure, in other words, the Community institution or body from which the decision emanated'**.**[37] This general rule was applied to the case before the court: the EAR was a Community body established by

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[33] Case T-411/06 *Sogelma* (n 15).

[34] Ibid [38].

[35] Ibid [40].

[36] Ibid [42].

[37] Ibid [49].

regulation and endowed with legal personality; the regulation expressly empowered the Commission to delegate to the EAR the implementation of Community assistance, including invitations to tender and the award of contracts; and it was the EAR that decided to cancel the tender procedure.[38] The Commission played no part in the decision-making process, it was the EAR that enacted the contested measure, and therefore it was the proper defendant in the legal proceedings.[39]

Third, the alignment of judicial review and administrative power is apparent in *Artegodan*,[40] which is in effect the converse to the previous situation. There may be agencies, such as that dealing with medicines, the EMEA, where the formal decision is made by the Commission, but where it is heavily reliant on the views of the agency or one of its committees. The structure of the EMEA regulation is premised on the assumption that the Commission will normally adopt the agency's recommendation. If review is to be effective it is therefore necessary for the Community courts to be able to go behind the Commission decision and consider the agency's reasoning. The reasoning of the agency must be susceptible to review even though it is not the formal author of the decision.

The CFI ensured that this was so in *Artegodan*, which was concerned with withdrawal of authorization to market medicinal products containing 'amphetamine-like' anorectic agents, used in the treatment of obesity by accelerating the feeling of satiety. The Commission had relied on findings made by the CPMP, the Committee for Proprietary Medicinal Products, one of two committees that undertake the scientific work for the EMEA. While the Commission was not bound by its opinion,

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[38] Ibid [50].

[39] Ibid [51].

[40] Cases T-74, 76, 83-85, 132, 137 and 141/00 *Artegodan GmbH v Commission* [2002] ECR II-4945.

the CFI stressed the importance of the mandatory consultation with the CPMP laid down by the relevant Directive. Given that the Commission could not assess for itself the safety or efficacy of the product, consultation with the CPMP was necessary to give the Commission the scientific evidence from which it could make a reasoned decision.[41] The CFI then held that the 'Community judicature may be called on to review, first, the formal legality of the CPMP's scientific opinion and, second, the Commission's exercise of its discretion', in deciding whether to accept that opinion.[42] While the CFI acknowledged that it could not substitute its view for that of the CPMP, it could consider the reasons proffered by it and whether there was an understandable link between the medical evidence relied on by the CPMP and its conclusions. It was moreover incumbent on the CPMP to refer to the main scientific reports on which it had relied and to explain why it disagreed with, for example, divergent scientific opinion presented by the undertakings concerned in the case.[43] The logic of the CFI's reasoning is unassailable: since the Commission would normally follow the opinion of the scientific committee, and had done so in this case, if judicial review was to be meaningful the CFI should be able to consider the CPMP's reasoning.[44]

3 Legitimacy and Political Accountability

There is a vast literature concerning the general issue of political accountability and

[41] Ibid [198].

[42] Ibid [199].

[43] Ibid [199]-[200].

[44] The CFI's decision was upheld on appeal, but the ECJ did not consider this particular issue, Case C-39/03 P *Commission v Artegodan GmbH* [2003] ECR I-7885.

democratic deficit within the EU,[45] and a large body of work concerning the more specific issue of political accountability of bodies that constitute Community administration at both Community and national level.[46] Space precludes detailed examination of this issue here. Suffice it to make the following two observations.

First, the very concept of political accountability may well be contestable when applied to Community administration. Even if there is agreement at a relatively abstract level as to the meaning of the concept there can nonetheless be different more detailed conceptions of political accountability.

Secondly, it is in any event necessary to consider the issues of political accountability as they arise in relation to different types of Community administration. The nature of the problems and the optimal way of addressing them will not be the same for institutional forms as diverse as agencies, Comitology, social partners, the Open Method of Coordination, direct administration and shared administration.[47]

4 Legitimacy and Substantive/Output Accountability

We are justly concerned with traditional conceptions of legal and political accountability in relation to the complex regime of EU administration. We should nonetheless not think that the resolution of these important issues constitutes the end of our inquiry. We need to consider also what might be termed substantive or output

[45] See, eg, the literature listed in P Craig and G de Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press, 4th ed, 2007) Chap 4, fn 109.

[46] See, eg, the special collection of the *ELJ* devoted to this issue, (2007) 13(4).

[47] Craig (n 1) Chaps 2-7.

accountability, which speaks to the effectiveness of any particular regime of Community administration in discharging the task assigned to it. Output legitimacy was central to the thinking of those who created the EEC, such as Monnet, and central also to the work of the neofunctionalists: the Community was to be justified by the delivery of peace and prosperity that was its central raison d'etre.

The resolution of problems concerning legal and political accountability will not however necessarily ensure a positive conclusion in relation to substantive/output accountability.[48] This can be briefly demonstrated through the following examples.

(a) The CAP and the Structural Funds

The preceding point is powerfully exemplified by the lessons from the the classic regimes of shared administration that apply to the Common Agricultural Policy and the Structural Funds. The principal problems in these areas have been concerned with ensuring the efficacious, accurate and honest application of Community funds by Member State administrations.

It is clear that legislative design is crucial for the successful delivery of these policies, whether one has regard to the criteria for access to the relevant funds, or with management, oversight, audit and the correction of irregularity. The rules contained in the Community legislation embody incentives for compliance, which may be more or less effective depending upon their content. It is equally clear that substantive success in these areas is dependent on adequate implementation and oversight by the Commission. It is clear that many of the past problems concerned with the effective

[48] Unless of course political accountability is interpreted broadly to take account of the very issues addressed within this section.

implementation of administration in areas such as agriculture and the Structural Funds was attributable to the drafting of the legislative scheme in such a way that insufficient checks were imposed on and through the national administration, and that there was insufficient oversight of the obligations cast on national administrations that did exist.

It is not therefore fortuitous that successive amendments to sectoral Community legislation have been designed to improve the substantive effectiveness of policy delivery by dealing with past failings.[49] Nor is it fortuitous that important amendments were made in 2006 to the 2002 Financial Regulation to address just such issues.[50] Thus the amended Financial Regulation now states, without prejudice to provisions in sectoral regulations, that Member States must ensure that shared management funds are used in accordance with the applicable rules and principles. The Member States must take all legislative, regulatory and administrative measures necessary to protect the Communities' financial interests. They must satisfy themselves that actions financed from the budget are actually carried out and implemented correctly; prevent and deal with irregularities and fraud; recover funds wrongly paid or incorrectly used or funds lost as a result of irregularities or errors; conduct checks and shall put in place effective and efficient internal control systems; and produce an annual summary of the available audits and declarations.

The inclusion of these new provisions in the amended version of the Financial

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[49] Craig (n 1) Chap 3.

[50] Council Regulation (EC, Euratom) 1995/2006 of 13 December 2006 amending Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [2006] OJ L390/1, adding a new Art 53b to Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002.

Regulation bears testimony to their centrality for the substantive success of these sectoral regimes of shared administration. It means that irrespective of whether such obligations are written into sector specific legislation dealing with shared administration, such obligations will nonetheless apply by and through the Financial Regulation, since the legal precepts contained therein are applicable in all areas. These precepts may be fine-tuned by sector specific legislation. The absence of any such obligations within the sectoral legislation will not however mean that the national administration is freed from such responsibilities, since the obligations incumbent on Member State administrations in the Financial Regulation will nonetheless apply.

(b) Utilities Regulation

The issues of substantive/output accountability, legislative design and institutional interaction are apparent once again in the area of shared administration dealing with utility regulation, where the EU functions in its 'classic mode' as regulatory state.[51]

The regulatory goal in relation to energy was to enhance cross-border competition. There were however both substantive and institutional difficulties with the realization of this regime. In substantive terms, the 2003 legislative scheme was simply not tough enough in certain crucial respects, thereby enabling established firms to avoid the full rigours of cross-border competition. In institutional terms, there were weaknesses in the structure and powers of national regulatory agencies, which

[51] G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77; G Majone, *Regulating Europe* (Routledge, 1996); G Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 *Jnl of Public Policy* 139.

administered the regime within the Member States. There were moreover coordination problems between national regulatory authorities. This led to new reform initiatives in 2007 designed to address these problems.

The regime for electricity was embodied in Directive 2003/54,[52] which replaced the earlier provision dating from 1996.[53] The main aim of Directive 2003/54 was to complete the internal market in electricity and to speed up the process of liberalization in this area. Thus the recitals to the Directive were phrased in terms of completing the liberalization of the energy markets, the principal remaining obstacles being issues of access to the electricity network, tariff issues and the different degrees to which markets had been opened between Member States.[54] The principal provisions of the Directive were therefore directed towards addressing these obstacles to the completion of the internal market.

The Directive therefore established common rules for the generation, transmission, distribution and supply of electricity. It laid down rules relating to the organization and functioning of the electricity sector, access to the market, the criteria and procedures applicable to calls for tenders, the granting of authorizations and the operation of the system. The Directive was also designed to ensure network access and non-discriminatory transmission and distribution tariffs. The market-orientation

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[52] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92 [2003] OJ L176/37; Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment [2005] OJ L33/22.

[53] Directive 96/92 of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market of electricity [1996] OJ L27/20.

[54] Directive 2003/54/EC (n 52) recitals 1-5.

of the Directive was qualified by detailed provisions setting out public service obligations designed to ensure protection of the customer, and Member States had a duty to inform the Commission of measures adopted to fulfil these obligations.[55] The public service provisions varied, both in terms of their content and as to whether they were discretionary or mandatory.

The regime in the Directive was overseen at national level by regulatory authorities. Article 23 stipulated that these must be wholly independent from the interests of the electricity industry. The national regulatory authorities were responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market, and the Directive detailed a series of more specific monitoring functions. The national regulatory authorities were assigned a central role in ensuring that the principal aims of the Directive were fulfilled, both in relation to the liberalization of the market and in relation to the universal service obligations specified in the Community legislation. The energy sector was therefore a prominent example of shared administration, wherein the EU operated as regulatory state, the force of which was manifest not through direct disbursement of funds, but rather through the enactment of regulatory goals that were to be administered at national level through national regulatory authorities.

Progress towards attainment of the core objective of market liberalization was however slow. Meaningful competition was still absent in many Member States, and often customers did not have any real possibility of opting for an alternative supplier.[56] There was moreover much evidence that energy suppliers from other

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[55] Ibid Art 3(9).

[56] Prospects for the Internal Gas and Electricity Market, COM(2006) 841 final, 2. See also, Sector Inquiry under Article 17 of Regulation (EC) 1/2003 on the Gas and Electricity Markets (Final Report),

Member States could not compete equally with the existing national companies in certain states.[57] The national regulatory authorities did a reasonable job in protecting universal service obligations, but there were nonetheless doubts as to the independence and commitment of some such bodies to market liberalization.

It was these concerns that spurred the reforms, discussion of which was initiated in 2007.[58] This culminated in the passage of Directive 2009/72.[59] The changes are especially significant when viewed through the lens of substantive/output legitimacy. Thus there were changes made to the relevant rules designed to foster competition and facilitate single market integration. There were also institutional amendments designed to strengthen national regulatory agencies and to create a new EU agency for this area.

National regulatory agencies were, as we have seen, central to the 2003 regime. The Commission noted however the variation as between national regulatory agencies across the Member States, and that in some Member States the regulatory authority was relatively weak, while in others regulatory authority was dispersed. Strong regulators were, said the Commission, necessary for a properly functioning internal market.[60] This was reiterated in the recitals to the new Directive, which stated that experience had shown that the effectiveness of regulation was frequently

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COM(2006) 851.

[57] Ibid 7.

[58] Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, COM(2007) 530 final.

[59] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.

[60] COM(2007) 530 (n 58) 8.

hampered through a lack of independence of regulators from government, and insufficient powers and discretion.[61]

The objective was therefore to bolster strong and independent regulatory authorities within the Member States. This was to be done by requiring each Member State to designate a single national regulatory authority, guarantee its independence and ensure that it exercised its powers impartially and transparently.[62] The regulatory authority must be legally distinct and functionally independent from any other public or private entity, and cannot seek or take instructions from any government or other public or private entity. In order to protect the independence of the regulatory authority, the Member State must ensure that it has legal personality, budgetary autonomy, and adequate human and financial resources to carry out its duties. The management must be appointed for a non-renewable fixed term of at least five years, and can only be relieved from office during its term if it no longer fulfills the preceding conditions, or has been guilty of serious misconduct.

The changes to the 2003 regulatory regime were also designed to enhance the powers of the regulatory authorities over the amended regulatory scheme. The powers of the regulator were, more specifically, to be strengthened in relation to:[63] monitoring compliance of transmission and distribution system operators with third party access rules, unbundling obligations, balancing mechanisms, congestion and interconnection management; reviewing the investment plans of the transmission system operators, and assessing whether they are consistent with the European-wide 10-year network development plan; monitoring network security and reliability, and reviewing network

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[61] Directive 2009/72 (n 59) recital 33.

[62] Ibid Art 35.

[63] Ibid Arts 36-37.

security and reliability rules; monitoring transparency obligations; monitoring the level of market opening and competition, and promoting effective competition, in cooperation with competition authorities; and ensuring that consumer protection measures are effective.

The emphasis placed on having strong regulatory authorities is apparent once again in provisions stipulating that Member States must ensure that their regulatory authorities have the requisite powers to enable them to carry out their newly expanded range of duties 'in an efficient and expeditious manner'.[64] Thus they must have the power: to issue binding decisions on electricity undertakings; to carry out in cooperation with the national competition authority investigations of the functioning of electricity markets, and to decide, in the absence of violations of competition rules, of any appropriate measures necessary and proportionate to promote effective competition and ensure the proper functioning of the market, including virtual power plants; to request any information from electricity undertakings relevant for the fulfilment of its tasks; to impose effective, appropriate and dissuasive sanctions to electricity undertakings not complying with their obligations under this Directive or any decisions of the regulatory authority or of the Agency; to have rights of investigations; and to approve safeguards measures.

The strengthening of the national regulatory authority was but one part of the institutional change introduced by the 2007 reforms. The other was the creation of a new agency at EU level. There were, even prior to the 2007 reforms, certain mechanisms designed to foster discussion of cross-border issues, the Florence Forum in relation to electricity[65] and the Madrid Forum in relation to gas.[66] There was in

[64] Ibid Art 37(4).

[65] http://ec.europa.eu/energy/electricity/florence/index_en.htm

addition an advisory group established in 2003, the 'European Regulators Group for Electricity and Gas' (ERGEG),[67] which was composed of representatives of the national regulatory authorities. The ERGEG facilitates coordination and cooperation between the national regulatory authorities in the Member States, and between these authorities and the Commission.

The Commission was positive about the contributions made by these self-regulatory forums, but it felt nonetheless that they had not resulted in the development of common standards necessary to make 'cross-border trade and the development of first regional markets, and ultimately, a European energy market a reality'.[68] The Commission considered differing organizational options to cope with this problem. It rejected the idea that the matter should be done in-house by the Commission itself, since it did not possess the requisite expertise. It was, said the Commission, necessary and desirable to draw on the specialist expertise in the 27 national regulatory agencies in order to amend their national grid codes. The Commission therefore concluded that the tasks required could be best fulfilled by a separate entity, independent and outside the Commission. This view was endorsed by the European Council and the European Parliament. The Commission was careful to ensure that the new Agency for the Cooperation of Energy Regulators, ACER, fitted within the established mould for EU agencies.[69] Such agencies cannot be accorded autonomous power to make regulatory norms, nor can they have independent authority over discretionary choices. Such agencies can however make detailed recommendations to the Commission concerning

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[66] http://ec.europa.eu/energy/gas/madrid/index_en.htm

[67] http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG

[68] COM(2007) 530 final (n 58) 9-10.

[69] Ibid 10-11.

such regulatory provisions, and the Commission will normally adopt these and transform them into hard law where so desired. They can also be accorded power to make individual decisions that are binding on third parties, provided that the relevant criteria pursuant to which such decisions are made are clearly laid down in advance.

The Regulation establishing ACER was duly enacted in 2009.[70] The powers given to ACER are to complement the regulatory tasks performed by national regulatory authorities. In more specific terms,[71] ACER provides a framework for national regulators to cooperate in order to improve the handling of cross-border situations, increase the exchange of information and the apportionment of competence where more than one Member State is involved. ACER is to exercise regulatory oversight of the cooperation between transmission system operators. The Agency will have responsibility for monitoring and reviewing the activities of the European Network of Transmission System Operators for Electricity and of the European Network of Transmission System Operators for Gas. In relation to technical and market codes, the Agency will be empowered to ask transmission system operators to modify their drafts, or address issues in greater detail. ACER can recommend that the Commission make these codes legally binding where voluntary implementation by transmission system operators does not suffice or is ill-suited to certain issues. The aim is therefore for a constructive dialogue between the Agency, transmission system operators and the Commission. ACER is also to have individual decision powers in certain types of case, such as the decision on the regulatory regime applicable to infrastructure within the territory of more than one Member State, and on individual

[70] Regulation (EC) 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1.

[71] Ibid Arts 5-9.

technical issues. ACER is, in addition, given a general advisory role, with the power to issue non-binding guidelines on good practice and, at the request of the Commission, or on its own initiative, provide an opinion on all issues for which it was established.

5 Conclusion

The different senses of legitimacy adverted to above should clearly not be considered in zero-sum terms. There is no reason why we should not seek to ensure legitimacy judged by all the criteria examined in this chapter. It is however equally true that successful attainment of one of the senses of legitimacy considered above will not thereby guarantee that a different conception of legitimacy has been secured. There is in that sense no necessary connection between, for example, realization of legal and substantive legitimacy. The effective discharge and implementation of EU administration, substantive legitimacy, requires far more than susceptibility to judicial oversight or the effective targeting of judicial review. This is readily apparent from the discussion of the CAP/Structural Funds and of Utilities Regulation. If lawyers wish to make a contribution to such output aspects of legitimacy then they must perforce understand the relevant area and the problems that have beset it. This is not an easy task, but there is no shortcut.