

# Shared Administration and Networks: Global and EU Perspectives

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There is an extensive literature in political science concerning policy networks, with divergent interpretations given to this term.<sup>1</sup> This paper does not take sides in this debate. The object of the present inquiry is more limited. It is to examine the way in which networks are used by the EU in policy delivery in the light of the literature concerning networks and the global order, and global administrative law.

The paper begins by examining some of this prominent literature. It will become apparent that such networks can have advantages, but that they can also be problematic from a number of perspectives. In part two the focus shifts to networks concerned with policy delivery in the EU. The terrain is mapped, there is analysis of different types of networks and the reasons why they are chosen. It will be argued in part three that networks are properly regarded as one part of shared administration in the EU.

The discussion in part four considers the rationale for use of networks in relation to policy delivery, to be followed in part five by analysis of the particular features of these EU networks. Part six is concerned with issues of legitimacy and accountability posed by networks in the EU. The paper concludes by considering the lessons that can be learned about networks on the global level from experience within the EU.

## 1. NETWORKS AND THE GLOBAL ORDER

Terrorists, arms dealers, money launderers, drug dealers, traffickers in women and children, and the modern pirates of intellectual property all operate through global networks. So, increasingly, do governments. Networks of government officials – police investigators, financial regulators, even judges and legislators – increasingly exchange information and coordinate activity to combat global crime and address common problems on a global scale. These government networks are a key feature of world order in the twenty-first century, but they are underappreciated, undersupported and underused to address the central problems of global governance.<sup>2</sup>

Thus Anne-Marie Slaughter begins her important work on the way in which networks have transformed the global political order. She explains how networks are a prevalent feature of the global order, ranging from the environment to security, from financial regulation to international trade and from policing to macro-economic policy. The networks are normally horizontal in nature, in the sense that the relevant players are commonly bankers, trade officials or environmental activists from different countries. Networks can however be vertical, existing between players at different levels within a supranational organization. The networks may be free-standing, external to any international organization, but they commonly also feature within such organizations.

Slaughter adopts a broad view of network, using it to capture ‘all the different ways that individual government institutions are interacting with their counterparts either abroad or above them’.<sup>3</sup> She defines a network as a ‘pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the “domestic” from the “international” sphere’.<sup>4</sup>

Slaughter distinguishes three different types of network, while recognizing that some networks may have more than one role. There are enforcement networks, designed to render enforcement more efficacious across international boundaries. There are information networks, aimed at the exchange of information between governmental agencies or the like, on matters as diverse as security, the environment, policing, health,

and fundamental rights. The third category is the harmonization network, designed to foster closer uniformity in regulatory standards.

The purpose of Slaughter's study is not merely descriptive. It is also explicitly normative. Thus she argues that networks can be a positive force for good within the global order. They can foster convergence on an issue, or help to ensure that divergence of view is informed by reasoned dialogue based on understanding of the other side's perspective. Networks can, secondly, improve compliance with international rules. A third benefit is that networks can increase international cooperation.

Slaughter is nonetheless mindful of the problems with networks, which relate both to input and output. Thus decision-making may be dominated by experts and enthusiasts, by technology and passion, to the exclusion of a broader spectrum of views.<sup>5</sup> Networks may lack transparency, which exacerbates the preceding problem. Networks may also circumvent the normal rules of representative democracy, allowing policy to be developed without the imprimatur of the elected legislature.

Slaughter responds by proposing five principles to alleviate these concerns.<sup>6</sup> *Global deliberative equality* is designed to counter the elitism/exclusion that can attend networks. The process of global governance is seen as a collective deliberation about common problems and hence 'all affected individuals, or their representatives, are entitled to participate'.<sup>7</sup> All government networks should therefore adopt clear criteria for participation that will be fairly applied.<sup>8</sup> *Legitimate difference* entails the idea that difference of view 'reflects a desirable diversity of ideas about how to order an economy or society',<sup>9</sup> with willingness to reconsider how an issue is dealt with at home, and respect different choices made by other societies. Thus legitimate difference 'enshrines

pluralism as a basis for, rather than a bar to regulatory cooperation, leaving open the possibility of further convergence between legal systems in the form of mutual recognition or even harmonization, but not requiring it'.<sup>10</sup> The third of Slaughter's principles is *positive comity*, which is a principle of affirmative cooperation between government agencies of different nations. It requires 'regulatory agencies to substitute consultation and active assistance for unilateral action and noninterference',<sup>11</sup> as exemplified by international cooperation in relation to antitrust. The penultimate principle is *checks and balances*, with Slaughter providing the example of the relationship between national courts and the Community courts in the EU, and the hope that 'government institutions of the same type in different systems national and international, and of different types can check each other both vertically and horizontally'.<sup>12</sup> *Subsidiarity* is the final principle: decisions should be taken as closely as possible to the citizen, with the consequence that most decisions should still be taken at national level, or even closer to the citizen if feasible.

Concerns about global and transnational networks are also apparent in the literature on global administrative law. Thus Kingsbury, Krisch and Stewart stress that underlying the emergence of global administrative law is the 'vast increase in the reach and form of transgovernmental regulation and administration designed to address the consequences of global administration'.<sup>13</sup> They note that global administrative bodies include 'formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some regulatory bodies exercising transnational governance

functions of particular public significance'.<sup>14</sup> Thus transnational networks and coordination arrangements are one type of global administration generating interest in global administrative law.<sup>15</sup> The challenge is to consider how far administrative law precepts concerning matters such as procedural participation, transparency, reasoned decision-making, and judicial review, including substantive rationality or proportionality scrutiny, can be applied in such contexts.<sup>16</sup>

## 2. NETWORKS AND THE EU: MAPPING THE TERRAIN

The concept of network will strike a chord with those familiar with the EU, since networks abound.<sup>17</sup> This section analyzes some prominent types of EU network, their rationale and the principal institutional players responsible for their existence.<sup>18</sup>

### **A. Networks and Policymaking: Member State and Commission Initiatives**

It will be seen that horizontal networks have a prominent role in the enforcement of Community law. Networks of national officials also play an important role in the development of Community policy. On some occasions it has been the Member States, acting through the Council, that have driven such developments, while on other occasions the Commission has been the driving force.

The best known example of national network influence on Community policy-making is of course Comitology.<sup>19</sup> The EEC had from its inception to delegate power to the Commission to make regulations, in order to cope expeditiously with changing market circumstances. Thus the Council, through a 'parent' regulation, authorized the Commission to enact more specific regulations within a particular area. The Council was

not, however, willing to give the Commission *carte blanche* to legislate in this manner. It made the exercise of delegated legislative power subject to institutional constraints, in the form of committees on which Member State interests were represented. This was in part because there might be disagreements between the States as to the content of the more detailed norms, and in part because the Council was wary of the Commission's federalizing tendencies, and hence was unwilling to delegate power without the formal representation of Member State interests. The rest as they say is history. The Comitology regime originated in agriculture and customs and rapidly spread to all other areas. Comitology committees are now part of the Community institutional landscape, and rules have been enshrined in Community Decisions.<sup>20</sup> The Commission may be content with advisory committees to help with implementation of EC law, but it has never been happy with the formal powers wielded by management and regulatory committees, regarding them as a constraint on implementation which it regards as its own prerogative, and has striven for changes that would either diminish or bypass their powers.

The Commission is however happy to use national networks in policy-making provided that it, the Commission, has a firm hand on the reins of power and provided also that the national networks do not have formal powers of their own. This is more especially so where the Commission decides that this is the best method of imbuing agreed legislative initiatives with greater specificity. This can be exemplified by the Commission's use of national networks in policy-making in relation to customs.

Thus it is generally agreed that it is desirable to prevent fraud, and protect security at borders. Horizontal networks have been used decide on more specific application of these general principles, as exemplified by the Customs 2013 programme,<sup>21</sup> which gives

the national customs administrations of the EU, together with the European Commission, the opportunity to co-operate in areas of common and high interest. The programme runs from 1 January 2008 to 31 December 2013 and provides a legal and financial base for: reinforcing security within the Community and at the external border; strengthening the fight against fraud; and increasing the competitiveness of European business by speeding up customs procedures. The programme has a budget of 324 million euros.

The Customs 2013 cooperation programme is implemented on the basis of annual work programmes, through which the national customs administrations work together to protect the Community's financial interests from fraud, which requires, *inter alia*, co-operation between national agencies, and exchange of information and best practices, to ensure good quality control throughout the customs territory. The objective of trade facilitation also entails important responsibilities for national customs administrations, requiring them to cooperate to minimize the burdens on trade in relation to customs legislation and procedures, and to facilitate implementation of a paperless customs environment.

This is particularly important since although Community customs operate under a common legal framework and a common customs tariff, implementation depends on individual national administrations with differing national responsibilities which are called upon to act 'as if they were one' when applying Community customs law. It is therefore crucial for there to be equivalent operational capacity of customs administrations including IT architectures, working methods and common training provisions.

## **B. Centralized/Direct Administration: National Networks as an Organizational Choice**

The Financial Regulation 2002 distinguishes between centralized and shared administration.<sup>22</sup> Much Community administration falls into the latter category: the Commission and national administrations are accorded formal rights, powers and duties under the relevant Community legislation, which both must fulfil if the aims of the legislation are to be fulfilled. Networks feature prominently within shared administration, as will be seen.

They can also be used in the context of centralized administration. The Financial Regulation provides that such activities can be: directly managed within the Commission; management tasks can be undertaken by executive agencies; implementation can be entrusted to a Community body or agency; some tasks can be delegated to networks of national agencies; and certain activities can be contracted-out.

We are concerned here with the network option. Centralized management of Community activities can be undertaken by, *inter alia*, ‘national or international public-sector bodies or bodies governed by private law with a public-service mission providing adequate financial guarantees and complying with the conditions provided for in the implementing rules’.<sup>23</sup> Such bodies must be chosen in an objective and transparent manner, following a cost-effectiveness analysis, to match the Commission’s implementation requirements.<sup>24</sup> Where Community policy is implemented in this way the Commission will conclude agreements with such bodies specifying their tasks, the performance conditions and reporting rules.<sup>25</sup> The Commission must inform the relevant national legislative authority annually and justify the use of such bodies.<sup>26</sup>



The Commission can therefore devolve executive responsibilities to a network of national bodies, which are either public or have a public service mission guaranteed by the state.<sup>27</sup> These bodies are collectively referred to as ‘national agencies’, which act as a partner in the implementation of Community policies, but the Commission retains overall responsibility for service delivery.<sup>28</sup> The intention is to devolve detailed implementation to national agencies, where there is no ‘large measure of discretion’<sup>29</sup> on Community policy. The implementing tasks entrusted to such agencies will ‘in no way alter any choices taken by the Commission involving political judgment’.<sup>30</sup> The Commission perceives a number of advantages in using such national ‘agencies’:<sup>31</sup> it facilitates proximity to the beneficiaries of the policy; it fosters complementarity, since there will often be national agencies with experience of a particular policy; and it facilitates flexibility, since such ‘agencies’ can adapt to local circumstance.

### **C. Shared Administration: Enforcement Networks and Formal Community Legislation**

It is not fortuitous that the most formal networks exist where there is the strongest Community incentive for effective enforcement of EU law across national borders. The Commission will normally be in the driving seat and will press for measures that enhance the enforcement capacities of the relevant national agencies to render the Community regulatory regime more effective. The Commission has pressed for formal law to establish a network of national enforcement agencies and the resultant Community regulations set out their powers and duties in considerable detail. The national agencies

are willing to surrender some enforcement autonomy on their own territory, since they gain reciprocal powers of cross-border enforcement in other Member States.

This is exemplified by the regimes in customs and agriculture, where problems of cross-border fraud have been especially prevalent.<sup>32</sup> The recitals to Regulation 515/97 state that combating fraud in the customs union and the common agricultural policy, CAP, calls for close cooperation between the relevant national authorities, and for close cooperation between them and the Commission. The scope of the investigative and enforcement powers becomes readily apparent from Regulation 515/97.

There are provisions dealing with ‘assistance on request’. Thus an administrative authority in one Member State, the applicant authority, can request the relevant authority in another Member State, the requested authority, to transmit to it any information which may enable it to ensure compliance with the provisions of customs or agricultural legislation.<sup>33</sup> The applicant authority can also ask the requested authority for a special watch to be kept on persons, on storage facilities or on modes of transport where there are reasonable grounds for believing that there may be breaches of customs or agricultural legislation.<sup>34</sup> The requested authority has a duty to make available when asked by the applicant authority any information concerning operations detected or planned which constitute, or appear to constitute, breaches of customs or agricultural legislation,<sup>35</sup> and the requested authority can be obliged to conduct administrative enquiries concerning operations which constitute, or appear to the applicant authority to constitute, breaches of customs or agricultural legislation.<sup>36</sup>

Regulation 515/97 also contains provisions dealing with ‘spontaneous assistance’. Thus the competent national authorities are obliged to assist their counterparts in other

Member States without prior request where they consider it useful for ensuring compliance with customs or agricultural legislation. Such assistance consists of communicating information, including information about their customs/CAP operations, and sharing relevant documentation.<sup>37</sup>

Regulation 515/97 makes provision not only for the horizontal dimension of network cooperation, but also for the vertical dimension concerning relations between the national authorities and the Commission. The national authorities are obliged to communicate to the Commission information concerning both the ‘micro’ dimension of customs/CAP enforcement, data concerning goods that have violated the customs regulations, and also the more ‘macro’ dimension, methods or practices used to breach customs or agricultural legislation, and any information on shortcomings in customs and agricultural legislation that have become apparent,<sup>38</sup> more especially where they might have general Community relevance, or ramifications for other Member States.<sup>39</sup>

#### **D. Shared Administration: Enforcement Networks, Formal Community Legislation and Upgrading Network Powers**

Horizontal networks are not static. The Commission will strengthen a network by upgrading it and granting it formal powers where these are necessary for effective cross-border implementation of EU law. The Commission is once again the principal institutional catalyst for change. It will keep a watchful eye on the way a particular network operates and will not hesitate to strengthen its powers where it feels that this is needed for efficacious enforcement of EU law. The relevant Member State agencies that form the network may lose some autonomy, since the changes will at the very least imbue

existing de facto obligations with a de jure quality lacking hitherto, and will often impose new obligations. This loss of national agency autonomy is nonetheless counterbalanced by the increase in the national agency's power to pursue violations of EU law in another Member State.

An important example is the 2004 Regulation on cooperation between national authorities responsible for enforcement of consumer protection laws.<sup>40</sup> The Regulation was premised on the assumption that existing national enforcement arrangements were inadequate for trans-border infringements of consumer protection laws. While there was a network of national authorities, the Commission felt that it was necessary to formalize the network and to give such authorities common investigation and enforcement powers.

This is made clear in the recitals to the Regulation, which state that existing national enforcement arrangements for consumer protection laws are not adapted to the challenges of the internal market, the consequence being barriers to cooperation between public enforcement authorities. This enabled sellers to evade enforcement by relocating within the Community, led to distortion of competition for law-abiding sellers and undermined the confidence of consumers in taking up cross-border offers. It was therefore necessary to establish a network of public enforcement authorities with common investigation and enforcement powers.

The Regulation accords national authorities in the network extensive powers and duties. Each competent national authority must have the investigation and enforcement powers necessary for the application of the Regulation. These powers, which are to be exercised where there is reasonable suspicion of an intra-Community infringement, include, *inter alia*, the right: to access to documents related to the infringement; to require

the supply by any person of relevant information related to the infringement; to carry out necessary on-site inspections; to request that the seller cease the infringement; to require the cessation of any infringement; and to require the losing defendant to make payments to the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.<sup>41</sup>

The Regulation makes extensive provision for mutual assistance in relation to investigations, imposing obligations on the requested authority to provide information to the applicant authority and to carry out investigations on its behalf.<sup>42</sup> It also empowers the enforcement authorities of one Member State to furnish their counterparts in other Member States with such information where there has been no request.<sup>43</sup>

The Regulation also makes detailed provision for reciprocal enforcement between members of the network. Thus a requested authority is obliged when requested by an applicant authority to take all necessary enforcement measures to bring about the cessation of the infringement, exercising the powers set out above.<sup>44</sup> There are moreover provisions designed to ensure coordination of market surveillance and enforcement activities. It is for the national authorities to coordinate these activities, such that when they become aware that an infringement harms the interests of consumers in more than two Member States, they must coordinate their enforcement actions.<sup>45</sup> In its first 8 months of operations, the network considered approximately 100 cases, and dealt with 20 alerts concerning possible breaches to consumer laws.<sup>46</sup>

In addition to detailed rules concerning investigation and enforcement in particular cases, the Regulation also makes provision for cooperation between network members at a more ‘macro-level’, concerning matters such as consumer information and

advice, support for consumer representatives, support for bodies responsible for the extra-judicial settlement of consumer disputes, and support for consumers' access to justice.

#### **E. Shared Administration: Enforcement Networks, Re-thinking Administration and Extending Network Powers**

The role played by networks can also change because of fundamental re-thinking of the way in which an area of Community law should be administered. Community competition law provides the classic example.

The traditional approach to enforcement of EC competition law was that agreements had, subject to certain exceptions, to be notified to the Commission, and the Commission had a monopoly over exemptions dealt with in Article 81(3) EC. Thus national courts and national competition authorities, NCAs, could apply Articles 81 and 82, which had direct effect, but could not grant an individual exemption under Article 81(3). This approach came under increasing strain, since the Commission did not have the resources to deal with all notified agreements, nor did it have the resources to adjudicate on anything but a handful of individual exemptions. The Commission therefore encouraged national courts to apply Articles 81 and 82. However, in the *White Paper on Modernization*<sup>47</sup> it proposed a thorough overhaul of the enforcement regime, abolishing notification and the Commission's monopoly over Article 81(3). National courts and national competition authorities would be empowered to apply Article 81 in its entirety and Article 82.

The new regime was implemented by Regulation 1/2003,<sup>48</sup> and had a significant impact on individual national enforcement authorities and networks between them. NCAs

and national courts can apply the entirety of Articles 81 and 82.<sup>49</sup> The Commission continues to have enforcement power under the new regime: it can act on a complaint or on its own initiative and find an infringement of Article 81 or Article 82.<sup>50</sup>

There are provisions facilitating co-operation between a NCA and the Commission,<sup>51</sup> and NCAs cannot make rulings in relation to Articles 81 and 82 that are contrary to a decision of the Commission on the same subject matter.<sup>52</sup> There are also provisions facilitating co-operation between NCAs in different Member States,<sup>53</sup> and a European Competition Network has been established for discussion and cooperation between NCAs.<sup>54</sup> Where two or more NCAs have received a complaint or are acting on their own initiative against the same agreement, etc., ‘the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend proceedings before them or to reject the complaint’.<sup>55</sup> The Commission may also reject a complaint on the ground that an NCA is dealing with the matter. Where a case has already been dealt with by an NCA, or by the Commission, any other NCA may reject it.<sup>56</sup>

There are separate provisions dealing with cooperation with national courts.<sup>57</sup> National courts may, in cases concerned with Articles 81 and 82, ask the Commission for information in its possession, or for its opinion on questions concerning the application of Community competition rules.<sup>58</sup> Member States are obliged to send the Commission copies of judgments applying Article 81 or 82.<sup>59</sup> NCAs may submit written observations to national courts in cases concerning Articles 81 and 82, and may submit oral argument with the permission of the national court. The Commission may do likewise where the coherent application of Articles 81 and 82 so requires.<sup>60</sup> National courts cannot make rulings in relation to Articles 81 and 82 that are counter to a Commission decision on the

same subject matter, and they must avoid giving decisions that would conflict with a decision contemplated by the Commission in proceedings which it has initiated.<sup>61</sup>

#### **F. Shared Administration: Support Networks, Community Initiatives and Community Sponsorship**

The preceding discussion provides a natural bridge to that which follows. We saw that network members responsible for enforcement also have obligations to cooperate on matters such as consumer information and advice. It is moreover clear that the EU, in particular the Commission, will support not just horizontal networks of national enforcement agencies, but also networks that support those that the Community legislation is intended to benefit. There are a number of such horizontal support networks, as is apparent from the following three examples.

The Commission was instrumental in establishing the European Consumer Centres Network, ECC-Net, which was created in order to have better informed and educated consumers and also to help them obtain redress for violation of their consumer rights in cross-border transactions. The ECC-Net is an EU-wide network designed to promote consumer confidence by advising citizens on their rights and providing easy access to redress, particularly where the consumer has made a cross-border purchase.<sup>62</sup> There is also the European Consumer Consultative Group, ECCG,<sup>63</sup> which is the main forum for consultation of consumer interests.

In the case of the European Judicial Network, EJM, Community support was forthcoming from the European Council and the Commission, and was then embodied in a formal Community act. The catalyst was the Tampere European Council in 1999, in



which the Heads of State wished the European Commission to take initiatives to improve access to justice in Europe, one of which was the establishment of a network of national authorities responsible for civil and commercial law. The Commission presented a proposal in 2000, which was adopted by the Council in May 2001.<sup>64</sup> The network consists of national judicial and administrative authorities. It meets several times each year to exchange information and experience and boost cooperation between the Member States as regards civil and commercial law. The main objective is to facilitate litigation where there is a transnational element, although it does not provide legal advice about a specific situation.<sup>65</sup>

A third example of what I have termed a horizontal support network is SOLVIT, which has been operational since July 2002.<sup>66</sup> It is an on-line problem solving network in which Member States work together to solve without legal proceedings problems caused by the misapplication of internal market law by public authorities.<sup>67</sup> There is a SOLVIT centre in every Member State (as well as in Norway, Iceland and Liechtenstein). They are part of the national administration and are committed to providing solutions within ten weeks. Using SOLVIT is free of charge. The Commission coordinates the network, provides the database facilities and, when needed, helps to expedite resolution of problems. The Commission also passes formal complaints it receives on to SOLVIT if there is a good chance that the problem can be solved without legal action. When a case is submitted to SOLVIT, the local SOLVIT Centre, known as the 'Home' SOLVIT Centre, checks the application to ensure that it concerns misapplication of internal market rules and that all necessary information has been made available. It then enters the case into an on-line database, and it is forwarded automatically to the SOLVIT Centre in the

Member State where the problem has occurred, known as the ‘Lead’ SOLVIT Centre, which confirms within a week whether or not it will take the case. This depends on whether it considers that the case is well-founded and can be resolved pragmatically. The two SOLVIT Centres work together to resolve the problem and the Home SOLVIT Centre keeps the complainant informed of progress. SOLVIT therefore functions as an alternative dispute resolution mechanism, but if a problem is unresolved, or the complainant considers that the proposed solution is unacceptable, a formal legal action is still possible.

#### **G. Shared Administration: Regulatory Networks, Standardization and the Privatization of Standard Setting**

The role played by networks in the regulatory process of standard setting has been as important as the role played by Comitology networks in the policy-making process. The story here is well-known and can be briefly related.

The revitalization of the single market in the 1980s required not only reform in the legislative process, which was achieved through the Single European Act 1986, but also a new approach to harmonization to facilitate the passage of these measures. Traditional Community harmonization techniques were slow, and generated excessive uniformity.<sup>68</sup> The Commission recognized these shortcomings in its White Paper,<sup>69</sup> and proposed a New Approach to Technical Harmonization and Standards.<sup>70</sup> There was to be mutual recognition through the *Cassis de Dijon* principle;<sup>71</sup> national rules which did not come within the mandatory requirements would be invalid. Legislative harmonization

was to be restricted to laying down health and safety standards; and there would be promotion of European standardization.<sup>72</sup>

The principal bodies responsible for standardization are the European Committee for Standardization (CEN),<sup>73</sup> the European Committee for Electrotechnical Standardization (CENELEC),<sup>74</sup> and the European Telecommunications Standards Institute (ETSI).<sup>75</sup> These bodies are private organizations, with CEN and CENELEC being non-profit technical organizations established under Belgian law in 1961 and 1973 respectively, and ETSI being a non-profit organization set up under French law in 1986.

The detailed organizational structure varies as between the three bodies, but there are nonetheless common features. Thus, for example, in CEN there are 30 national members, which are the national standards organizations of the respective countries; they have voting rights in the General Assembly and Administrative Board of CEN and provide delegations to the Technical Board which defines the work programme. The precise status of the national standards organizations varies, but many are private enterprises.<sup>76</sup> It is the responsibility of the CEN National Members to implement European Standards as national standards, to distribute and sell them and to withdraw any conflicting national standards. There are 7 associate members, which are European organizations, representing particular sectors of industry as well as consumers, environmentalists, workers, and small and medium-sized enterprises. They do not have voting rights in the CEN General Assembly, but can participate in policy discussion and sit on Technical Boards.

The essence of the standardization process is as follows. A directive passed pursuant to the new approach to harmonization will establish in general terms the health

and safety requirements that the goods must meet. The setting of standards helps manufacturers prove conformity to these essential requirements. The relevant standardization organ will formulate the technical standards, on the basis of which industry needs to manufacture products complying with the directives. These technical specifications are not binding as such and retain their character as voluntary European standards, but, the governments must assume that products manufactured in accordance with the European standards comply with the 'fundamental requirements' stipulated in the directive, thereby enhancing free market access. Thus, when a standard has been approved by the Commission and published in the Official Journal all Member States must accept goods which conform to it. If a Member State disputes whether the standard conforms to the directive's safety objectives, the burden of proof will be on the State to prove that this is so. While a manufacturer can still produce goods according to other standards, it has the burden of proof of showing that the goods meet the essential requirements in the directive. The Commission may request the standardization organizations to develop standards in support of their policies by issuing formal 'mandates', but these bodies can also proceed without such a mandate.

The attractions of the new approach to harmonization for the EU are considerable. Directives can be drafted more easily since they are less detailed. The manufacturers retain some choice as to whether to comply with the standards, but if they choose not to do so they have the burden of proving that their goods nonetheless comply with the essential health and safety requirements of the directive. The technical work of standard-setting can be delegated to private bodies such as CEN, CENELEC and ETSI, which constitute networks of the national standardization bodies and hence have technical

expertise. Thus far approximately thirty such directives have been enacted based on the new approach or principles analogous thereto.<sup>77</sup> This may seem a small number, but each measure deals with a general product area, such as personal protective equipment, toys, construction products, explosives, medical devices and the like, and can therefore apply to hundreds or thousands of products that fall within the generic category.

There have been concerns as to the standardization process, relating to matters such as the efficiency of the standardization bodies, and the representation of consumer interests.<sup>78</sup> It is however clear from a political perspective that the EU continues to regard standardization as central to the attainment of the single market<sup>79</sup> and indeed for other Community policies.<sup>80</sup> There have been numerous initiatives designed to increase its effectiveness, including, *inter alia*:<sup>81</sup> expediting the standardization process; improving the effective participation of all interested parties, which is recognized to be inadequate at EU level and within Member States;<sup>82</sup> addressing the financing of the standardization bodies; and dealing with the relationship between EU and global standards.

#### **H. Shared Administration: Regulatory Networks, Agency Creation and the Instrumental View of Networks**

We have seen from the preceding discussion that the Commission is often supportive of national networks, nurturing them as the optimal way to enforce Community law. It should however also be acknowledged that the Commission's view of networks is 'instrumental' in two respects. Thus, on the one hand, if the agencies that constitute the network are perceived to have deficiencies then the Commission will not hesitate to intervene via formal legislation to strengthen them. On the other hand, if the network is

not doing its job as identified by the Commission then it may be incorporated into an agency structure; the network may continue to exist, but it will be do so within a modified legal and political environment.

This is exemplified by developments in the energy sector. The regime for electricity is embodied in Directive 2003/54,<sup>83</sup> which replaced the earlier provision dating from 1996. The main aim of Directive 2003/54 is to complete the internal market in electricity and to expedite market liberalization. The Directive therefore establishes common rules for the generation, transmission, distribution and supply of electricity. It lays down rules for the functioning of the electricity sector, access to the market, the criteria and procedures for tenders, the granting of authorizations and the operation of the system. The market-orientation of the Directive is qualified by public service obligations to protect the customer.<sup>84</sup> National regulatory authorities have a central role in applying the Directive.

There were, however, real difficulties in breaking down barriers to trade between Member States and reforms introduced in 2007 were designed to remedy this problem. There were also institutional changes to reduce deficiencies in the national decision-making structure.<sup>85</sup> The powers of the national regulators are to be strengthened, and a new agency is to be created.

The rationale for the reforms relating to the national regulatory agencies is the variation between them across the Member States, with some being relatively weak, while others they were strong. The Commission regarded strong regulators as necessary for a properly functioning internal market, and the reforms are directed towards ensuring

that such authorities exist within the Member States, with the requisite financial independence to perform their tasks and increased powers overall.

The strengthening of national regulatory authorities is but one part of the 2007 reforms. The other is the creation of a new agency at EU level. There were, prior to the 2007 reforms, certain networks to foster discussion of cross-border issues, the Florence Forum for electricity<sup>86</sup> and the Madrid Forum for gas.<sup>87</sup> There was in addition an advisory group established in 2003, the ‘European Regulators Group for Electricity and Gas’ (EREG),<sup>88</sup> composed of representatives of the national regulatory authorities. The EREG facilitates coordination and cooperation between the national regulatory authorities, and between them and the Commission.

The Commission was positive about the contributions of these self-regulatory networks, but it felt nonetheless that they had not produced common standards necessary to make ‘cross-border trade and the development of first regional markets, and ultimately, a European energy market a reality’.<sup>89</sup> The Commission considered differing organizational options to cope with this problem. It rejected the idea that the matter should be done by the Commission itself, since it did not possess the requisite expertise. The Commission concluded that the tasks could be best undertaken by a separate entity, 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 the established mould for EU agencies. The powers given to ACER are therefore to complement the tasks performed by national regulatory authorities. In more specific terms,<sup>90</sup> 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 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. ACER is also to have individual decision powers in certain types of case, and a general advisory role, with the power to issue non-binding guidelines on good practice.

### **I. Shared Administration: Information Networks and Efficient Pooling of Knowledge**

We have seen from Slaughter's analysis that information networks are common in the international arena. The EU provides many examples of this same phenomenon. Two examples from among many will suffice for present purposes.

EU-OSHA provides a classic example of a Community agency with responsibility for information and coordination that works with and through a network of national agencies. In order to encourage improvements in the safety and health of workers the agency is charged with providing the Community, Member States, the social partners and those involved in the field with technical, scientific and economic information on



workplace health and safety.<sup>91</sup> The information is intended to identify risks and good practices. The agency supplies the Community and Member States with such information as they require to implement effective policies to protect workers' health and safety, and provides such information to the Commission when it is preparing legislation.<sup>92</sup> In order to attain its goals EU-OSHA is instructed to set up a network comprising the main elements of national information networks, including national social partners' organizations, national focal points and what are called future topic centres. Member States must inform the agency of their national health and safety information networks.<sup>93</sup>

The European Network and Information Agency, ENISA,<sup>94</sup> functions in a similar way. It was established because of the increased importance of communication networks and information systems, and to prevent them from being jeopardized by accident, attack and mistake. ENISA is therefore charged with provision of information concerning such risks and analysing ways of dealing with them, and assists the Commission with Community legislation. The enabling Regulation emphasizes that ENISA should facilitate coordination between the Community and Member States on network security.<sup>95</sup> This is reflected in the organizational structure of ENISA, which works through two types of administrative network. There is a Permanent Stakeholders' Group, PSG, which is composed of national experts representing the relevant stakeholders, such as the Information and Communication Technologies industry, consumer groups and academic experts. The PSG advises the Executive Director as to ENISA's work programme.<sup>96</sup> The other network used by ENISA is the ad hoc working group, which gives advice on more technical and scientific issues. The framework for such working groups is in a decision of ENISA's management board.<sup>97</sup>

## **J. Shared Administration: Policy Formation, Policy Execution and the Open Method of Coordination**

Networks are also a central feature of the Open Method of Coordination, OMC, which although it did not begin in 2000, was nonetheless given prominence by the Lisbon Summit in March 2000.<sup>98</sup> The EU was ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’.<sup>99</sup> The plan was in part economic, and in part social. There was to be education and training for those in the knowledge society, the development of an active employment policy, modernisation of social protection, and the promotion of social inclusion.

The implementation of this strategy was to be by ‘improving the existing processes, introducing a new open method of coordination at all levels, coupled with a stronger guiding and coordinating role for the European Council to ensure more coherent and strategic direction and effective monitoring of progress’.<sup>100</sup> The OMC was to be a decentralized process, with the Member States, regional and local government, the social partners and civil society actively involved.<sup>101</sup>

The general features of OMC were said to be:<sup>102</sup> fixing EU guidelines plus timetables for achieving the goals; establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world to compare best practice; translating these European guidelines into national policies by setting targets and adopting measures; and periodic monitoring, evaluation and peer review organized as mutual learning processes.

The Lisbon approach was developed further at the Nice European Council in December 2000,<sup>103</sup> and was re-launched at the Brussels European Council in the March 2005 Summit.<sup>104</sup> Networks are integral to the OMC methodology. The emphasis on fostering deliberation, learning and discourse through exchange of best practice has generated formal and informal networks in the areas where the OMC technique has been applied.

### 3. SHARED ADMINISTRATION AND NETWORKS

There is an extensive literature on administrative interaction in the EU. It is generally agreed that much of this should be regarded in terms of shared administration, mixed administrative proceedings or composite administration, with little turning on the precise nomenclature adopted.<sup>105</sup> The discussion thus far has been agnostic about the utility of the label ‘network’ to evaluate forms of administrative interaction in the EU. My view is that most such networks are best regarded as a sub-part of shared Community administration, as is apparent from the preceding discussion. This view is reinforced by the fact that the language of networks is embedded in the very nomenclature of certain EU organizations, and in EU primary law and official documentation, as well as being prominent in the secondary literature on political science.

It has been argued in the context of international administrative interaction that the concept of composite administration is a better lens through which to view forms of administrative interaction, and that it is preferable to both multi-level governance, which implies a top-down hierarchy, and network, which implies the absence of hierarchy.<sup>106</sup>

This analysis relates to administrative interaction at the international level. It nonetheless warrants some comment when thinking about networks at the EU level.

There is however no *a priori* reason why the concept of multi-level governance necessarily insinuates a top-down hierarchy, or why the network concept connotes the absence of hierarchy. They may have such a connotation in literature concerning the disposition of power within Germany, but the concepts are not used predominantly in this way in the literature on international relations, or political science.<sup>107</sup> The concept of multi-level governance, whether at the international or EU level, is agnostic as to which players have the major input into policy development, and debate about the primary locus of this power for any particular policy area is often the subject of vibrant debate.<sup>108</sup> Nor is the literature on networks, whether at international or EU level, premised on an absence of hierarchy. The nature of power relations, *de jure* and *de facto*, within any particular network is a matter for analysis.<sup>109</sup>

Any disagreement on this issue is nonetheless more formal than substantive.<sup>110</sup> It is certainly true that mere invocation of the network concept tells one little about the kind of network, the rationale for its establishment, and the disposition of power therein. These are matters for inquiry and analysis of the kind undertaken in the previous section. This is however equally true of concepts of shared administration, mixed administrative proceedings or composite administration. The reality is therefore that the same issues need to be considered whether through the language of network, or that of shared, mixed or composite administration. My own preference is, as stated above, to regard networks as a sub-part of the more general conception of shared or mixed administration.

## 4. NETWORKS AND THE EU: RATIONALE

### **A. Administrative Efficacy**

An important rationale for EU networks is administrative efficacy. Many important parts of EU law are formally dependent upon shared administration, with the Commission and national authorities having complementary rights, powers and duties laid down by Community regulation and where both sides must fulfil their assigned role for the effective discharge of the relevant Treaty scheme. The efficacy of such regimes will depend upon close collaboration between national agencies, more especially where there is a significant cross-border dimension, and this is facilitated by a network.

Administrative efficacy and networks may also be pertinent where centralized administration prevails. The fact that the Commission is accorded centralized responsibility for a certain task does not mean that it will undertake the entirety in-house. It may use an executive agency, or decide that the optimal administrative strategy is a network of national agencies, which explains why the Financial Regulation makes provision for this option.<sup>111</sup>

### **B. Efficiency**

A second rationale for the prevalence of networks is efficiency, which is closely related to the first, but nonetheless distinct. There are areas where the EU's competence is limited and where its actions will be confined to supporting or coordinating action taken by the Member States. There are other areas where even though the EU's competence is greater the tasks assigned to a particular branch of the Community administration, such as

a Community agency, are limited. Thus, as seen from the preceding analysis, many Community agencies perform what are primarily information gathering and coordination roles, to help both the Commission and the Member States.

Networks are a prominent feature of such institutional regimes. Thus EU-OSHA will work through a network of national agencies to improve standards of health and safety at work, and it is common for there to a network of national officials working with Community agencies to provide and coordinate information.

The sharing of information is clearly an efficient way to combat collective problems, whether those relate to security, health, racism or fundamental rights. It also enhances efficiency by facilitating the sharing of expertise in the salient area, enabling network members to draw on the experience of others as to ways of dealing with a specific problem, which is significant given the differential experience of national regulators, and the advent of new Member States.

### **C. Power**

It would nonetheless be mistaken to assume that the rationale for networks is captured wholly by administrative efficacy or efficiency. We should recognize that power has also been an important factor for certain networks, the most prominent example being Comitology committees. Now to be sure it can be accepted that collaboration between the Commission and national experts may be helpful for the efficacious implementation of secondary Community norms produced by the Comitology process. It would however be blinkered to see this as constituting the entirety, or indeed, even the principal theme, of

the Comitology story. If it were then the Member States might have rested content with advisory committees.

The rationale for management and regulatory committees was primarily because the Member States wished to influence the content of secondary norms in a way not provided for in the original Treaty. This was perfectly rational from the Member States' perspective, given that policy choices are not infrequently made or fine-tuned in such Comitology regulations. The fact that the committees' formal powers are used relatively rarely does not undermine their significance, since committee decision-making will take place in the shadow of these formal powers. This is so even if one subscribes to the view that Comitology decision-making is best regarded in terms of deliberative supranational governance. The bottom line is still that the creation, retention and extension of the Comitology regime have been markedly influenced by the disposition of power between the Member States in the Council, and the Commission.

#### **D. Rational Delegation**

There is an extensive literature on the rationale for delegating certain tasks to bodies outside the traditional bureaucracy:<sup>112</sup> it facilitates use of experts who are not part of the normal bureaucratic structure; it frees up the parent department to concentrate on strategic policy; it insulates resolution of technical regulatory issues from the vagaries of day to day political change and hence increases the credibility of the choices thus made.

There is moreover an emerging literature concerning the rationale for choosing a private agent as the delegate,<sup>113</sup> which is relevant for the delegation of standard setting to private networks in the EU. The primary reason is that the public body will often lack the

requisite expertise, which would be costly to acquire, and even more costly to maintain. A further rationale for choosing a private agent is that it facilitates ‘blame avoidance’ and the ‘shifting of responsibility’ by the public authority, since delegation to a private agent creates a distance between it and the public authority. Thus the political benefits foregone by the public authority not being able to claim direct credit for a successful standard will often be outweighed by the fact that it will avoid some of the blame if the relevant stakeholders are dissatisfied with the resultant standard.

### **E. Inclusion**

A further rationale for networks is that they facilitate inclusion. Thus networks are viewed as one way of promoting inclusion in Community deliberation. This operates to varying degrees in the areas where the Open Method of Coordination applies. It is also a factor that explains what were termed Community support networks, the positive Community sponsorship for networks, such as those concerning consumer protection, which support Community policies.

Networks can foster such inclusion not only in instrumental terms, by enabling the relevant national players to participate with the expectation that the resultant Community norm will be better as a result, but also for non-instrumental reasons, by providing such players with some ‘voice’ in decision-making within the Community polity, irrespective of the precise causal relationship between their input and the resulting output.

## **5. NETWORKS AND THE EU: FEATURES**



The identification of the rationales for networks in the EU is important; so too are the features of such networks.

#### **A. ‘Institutional Orchestrator’**

It is axiomatic that networks require creation. They do not spontaneously ‘emerge’ by magic or nature. Networks in the global order may nonetheless develop from a less-structured form of meeting between the participants, as the result of the initiative of a particular state, from institutional needs within an international organization or doubtless in a number of other ways.

There is however some contrast with the EU in this respect. This is because there will normally be an ‘institutional orchestrator’ within the EU, which will be the prime mover behind the establishment of a particular network, or even if the network existed hitherto the institutional orchestrator will have a considerable impact on its role. This is readily apparent from the preceding discussion.

The Commission has been the principal mover behind the establishment of many EU networks, especially the classic enforcement networks. It was the Commission that had first-hand experience of the difficulties of cross-border fraud and recognized the need for more formal collaboration between national agencies. The Commission’s incentive for improvement was heightened because it was regularly criticized by the Court of Auditors when loss to Community funds was revealed.

The Commission’s role as institutional orchestrator is also evident in other contexts. Thus the Commission has significant input into the creation of what was termed

Community support networks. It has done much to orchestrate regulatory networks in the context of standardization, determining the role played by the standardization bodies. It was moreover the Commission that took the instrumental view of particular regulatory networks, not hesitating to enhance the network's powers by creating a new Community agency. The significance of the institutional orchestrator role played by the Commission is no surprise, given its role within Community decision-making and its overall responsibility for implementation of EU law.

It should not however be thought that it has a monopoly in this respect. The Council was the principal catalyst behind the creation of the networks that constitute Comitology. The European Council has also been of importance. The Lisbon strategy that developed the OMC originated in the European Council, and became an important topic for subsequent European Council meetings. The European Council and the Council have also taken a keen interest in some Community support networks, such as the European Judicial Network.

The fact that an institutional orchestrator will often exist does not imply that its power will be the same for all networks. That would be counter-intuitive given the heterogeneity that characterizes this overall area. It does mean that the institutional orchestrator is able to: initiate changes in network relations where these are not working optimally, as exemplified by developments in the energy sphere; significantly alter the enforcement regime, with consequential implications for the powers of national networks, as in the case of competition; be proactive in the creation of support networks, as attested by the establishment of the EJN; and press for the formalization of network powers in order to increase their efficacy, as exemplified by developments in consumer protection.

## **B. Formal and Informal**

A second noteworthy feature of EU networks is that they vary considerably concerning their degree of formality.

At one end of the spectrum are networks formally established by Community regulation, with the members given formal legal powers to achieve the ends of the relevant enforcement or regulatory regime. The enforcement networks that exist in agriculture, customs and consumer protection exemplify this type of network regime.

At the other end of the spectrum are networks that may have no formal basis in Community law, where the establishment of the network and its powers are dependent on soft law. This typifies some, although by means all, of the networks which operate pursuant to the OMC.

There are moreover networks which fall somewhere along the preceding spectrum. Thus, for example, Community regulation may make provision for information networks within a particular area, while leaving much unsaid as to their more precise role. Or the existence and powers of the network may be recognized to some extent within formal Community law, while still leaving much of the network's practical operation to be supplemented by soft law, as with some other areas to which the OMC applies.

## **C. Public and Private**

It is also clear that the members of the network may be public or private bodies, subject to constraints imposed by Community law, in particular through the 2002 Financial Regulation.

In many areas, the network members will be national public bodies. Thus the members of the enforcement networks which operate in relation to customs, agriculture, and consumer protection are national public authorities. This is also the case with many regulatory networks that apply Community law concerning utilities and telecommunications at national level. The paradigm once again is a national regulatory authority, which will be a public body in its own right.

In other areas, the network members will be private undertakings per se, or private undertakings with a public service mission. This captures, for example, the networks that administer the standardization regime pursuant to the new approach to harmonization. It also captures some of the Community support networks, such as ECC-Net, which have been sponsored by the Commission because they further the aims of important Community policies.

#### **D. Community Courts**

The Community courts may well be regarded as part of an enforcement network with national courts.<sup>114</sup> The very existence of an institutionalized system of adjudication is also of more general significance for the networks considered above, since it shapes the very way in they operate. This is so for a variety of reasons, three of which are presented here.

Thus at the most basic level, the Community courts will adjudicate on formal legal networks to ensure that their powers are exercised in compliance with the precepts of judicial review. It should moreover be recognized that judicial review has a Janus-like quality. It can be used to ensure that network members remain within their assigned power. It also offers the ECJ and CFI the opportunity to interpret the relevant powers teleologically in order to effectuate the aims of the Community legislation.<sup>115</sup>

The Community courts will also play a role in deciding on the legitimacy and *modus operandi* of particular networks. Comitology would never have become the regime that it is today had the ECJ not rejected an early challenge to such committees.<sup>116</sup> The ECJ, while willing to consider the legality of the choice between management and regulatory committees, also boosted the Comitology regime by adopting a broad concept of implementation. Thus while the ECJ insisted that the primary norm should embody the ‘essential elements’ of the relevant matter, it interpreted this relatively loosely, thereby allowing a broad range of implementing measures to be adopted through regulations according to Comitology procedures from which the EP was effectively excluded.<sup>117</sup>

The ECJ’s judgments can moreover have a significant impact on the way in which networks operate, even if they are not given in the context of those networks. Thus the ECJ has held that the right to be heard does not apply to the making of legislative-type norms. They have therefore denied consultation rights unless they are expressly provided by a Treaty article, regulation, directive or decision governing the area.<sup>118</sup> This has important consequences for the operation of, for example, standardization. There have been continuing problems about consumer groups, small and medium-sized enterprises and NGOs being able to contribute to the standardization process, but they are precluded

by the ECJ's jurisprudence from claiming that they ought to be accorded such consultation rights.

## 6. NETWORKS AND THE EU: LEGITIMACY AND ACCOUNTABILITY

It is important to reflect on legitimacy and accountability concerning network governance and administrative interaction in the EU. Limits of space preclude detailed treatment of these issues, since this could occupy a paper in its own right. The objective is to convey the nature of the legitimacy and accountability issues applicable to the different kinds of networks.

### **A. Formal Networks and Formal Powers: Enhancing Legitimacy and Accountability**

A paradox, which is more apparent than real, should be acknowledged at the outset: the most powerful networks, which include the classic enforcement networks, may be the most legitimate and accountable. The reason is not hard to discern. These networks were established by Community legislation, which specifies in detail the powers and duties of network members.

Thus judged in terms of input legitimacy, such networks fare well. The classic enforcement networks operating in customs, agriculture, consumer protection and competition were established by formal Community legislation enacted by the European Parliament and the Council. Thus insofar as input legitimacy is determined by legislative assent in the manner specified by the particular legal system, these networks have it. They have received the imprimatur of the Community legislature.

These networks also fare relatively well in terms of accountability. The fact that the network regime is contained in a Community regulation normally renders it easier to understand the powers of network members, which are commonly specified in detail, hence promoting legal clarity, this being important features of the rule of law. The formal legal foundation for such networks also facilitates legal accountability and judicial review. It is clear in principle that acts of network members can be legally challenged for compliance with the Treaty, the enabling regulation, and general principles of EU law.

This does not of course mean that the regulations embodying such networks are immune from criticism. A commentator might feel that the powers given to network members are too extensive, or indeed that they do not go far enough. It might be argued that the powers are ineffective for the task at hand. This does not however alter the preceding point, which is that formal Community regulations foster both input legitimacy and accountability.

## **B. Formal Networks and Formal Powers: Embedding Controversial Criteria**

It should however also be acknowledged that the existence of formal networks with formal powers will not necessarily guarantee legitimacy or accountability. The reasons are instructive, as the Comitology example will make clear.

The Comitology regime enjoys input legitimacy, as judged by the criterion used above. Comitology committees will be established by an article in the enabling regulation that governs the particular area. Thus the common format is that where Community legislation regulates a new area it will make provision for a Comitology committee, which will oversee implementing regulations enacted by the Commission. This formal

input legitimacy is further enhanced by the Comitology Decisions,<sup>119</sup> which contain the rules that govern advisory, management and regulatory committees, and provide indicia as to when each should be used.

The Comitology regime nonetheless remains controversial in terms of legitimacy. A legislative norm may well have input legitimacy in the formal sense that it is enacted in accord with the rules for the passage of that kind of legal norm, but it may embody and embed criteria that are open to criticism.

Thus the continuing debate concerning input legitimacy and Comitology is explicable in part because of the controversial nature of the criteria that govern committee deliberations in the Comitology Decisions of 1987 and 1999. The 1987 Decision<sup>120</sup> largely excluded the European Parliament from any significant role in the passage of implementing regulations, since the technocrats on the committees were national appointees, and the EP had little say over the resulting measures. This was irksome to the EP, more especially after the creation of the co-decision procedure in the Maastricht Treaty, since it saw its victories from increased input into the making of primary Community norms being undermined by the fact that it had so little impact over implementing regulations. The 1990s was therefore a stormy decade, with numerous battles and skirmishes waged by the EP over this issue.<sup>121</sup> The 1999 Comitology Decision<sup>122</sup> improved the EP's input into implementing regulations, but it was still dissatisfied and pressed for further reforms that were finally forthcoming in 2006. The legal reality even now is that the EP is not an equal partner with the Council in relation to such measures.



The accountability of Comitology decision-making composed of networks of national technocrats working with the Commission has also been questioned. There have been longstanding concerns as to transparency. Many have questioned the role assigned to national technocrats in the framing of implementing regulations, contending that the issues are often as much political/social as they are technical, and that choices proffered by the technocrat incumbents may well conceal values that are implicit.<sup>123</sup> It remains unclear who is the agent and who is the master in these deliberations. The fact moreover that participation by interested parties in the shaping of Comitology norms is not fostered by the Community political or legal process, reduces the possibility of reinforcing legitimacy and accountability from the ‘bottom’, via consultation.<sup>124</sup>

### **C. Informal Networks, Hard Law and Soft Law: The Tension between Aspiration and Reality**

There are, as seen above, networks that do not have a formal legal foundation, being the product of political choice from the EU political organs, and operating through soft law. The resultant issues concerning legitimacy and accountability may well vary between such networks, and their significance will be affected by the tasks that they undertake.

The concerns about legitimacy and accountability can nonetheless be exemplified in relation to the OMC. It should be noted at the outset that while OMC deliberations will normally take the form of recommendations rather than hard-edged legal norms, the picture of OMC as being purely soft law is nonetheless flawed. The governing instruments that frame the OMC will normally take the form of hard law. The framework for OMC in economic and employment policy is found in Treaty articles combined with

Community legislation, and the same is true for the provisions on social exclusion, the difference being that the relevant Treaty article does not embody the OMC regime, this being set out in the form of a binding Community Decision.<sup>125</sup> The Treaty articles and Community legislation will often be couched in mandatory terms in relation to the procedure for coordination.<sup>126</sup>

The most pressing concern in relation to input legitimacy has been the marginalization of the EP. It has been supportive of this mode of policy delivery, but has nonetheless voiced concerns about its use. Thus the Committee on Employment and Social Affairs stated that leaving aside employment, the areas where the OMC was to be preferred to other executive instruments were not specified by the Treaty, by other regulatory provisions or by an interinstitutional agreement.<sup>127</sup> The choice of the OMC was ‘taken on a case-by-case basis by the Council acting on a proposal from the Commission or on its own initiative’.<sup>128</sup> It felt that the EP was ‘at risk of being marginalized or sidelined by these new political procedures’.<sup>129</sup> The Committee noted that the EP’s role in OMC procedures was unspecified, with the exception of the EES, where it had a right to be consulted, but that its role in this area was severely constrained by time constraints.<sup>130</sup> It proposed that the OMC procedure should only be used in any policy area after the EP and the Council had given their approval. Similar concerns were voiced by the Committee on Economic and Monetary Affairs.<sup>131</sup>

There have also been concerns as to accountability. Limits of space preclude detailed treatment, but some issues can be touched on here. There has been disquiet as to transparency, which is clearly central to the OMC, both in itself and as a pre-condition for fostering participation, debate and the like. Doubts have been raised concerning

transparency in relation to the employment and pensions OMC,<sup>132</sup> and more generally as to the transparency or opacity of the decision-making process itself.<sup>133</sup> It has been suggested that there should be an obligation that the OMC should be conducted as transparently as possible, so as to ensure the fullest participation of all relevant bodies.<sup>134</sup> Analogous concerns have been raised as to participation, which is once again central to the ideal of the OMC, connoting the idea that the process should be inclusive, not exclusive. Empirical evidence in the context of the European Employment Strategy has however found participation to be limited,<sup>135</sup> and the EP's Committee on Employment and Social Affairs voiced the opinion that 'as things stand, the open method of coordination is, in many cases, a process conducted between and on behalf of elites, the outcome of intergovernmental negotiation and bargain'.<sup>136</sup> There are also significant question marks as to the susceptibility of the OMC to judicial review, and this is so notwithstanding the willingness of the Community courts to review Community norms in the form of guidelines and the like that are not formally binding.

#### **D. Private Networks and Standardization: Competing Visions**

It should also be recognized that discussion of legitimacy and accountability may well be dependent upon prior assumptions as to how a particular area should be conceptualized. This may be contested by those who hold competing visions, with consequential implications for legitimacy and accountability. This can be exemplified by three contrasting views of private networks and standardization.

We can begin with the Commission's 'official view'. The Commission emphasizes its role in ensuring the efficiency, accountability and transparency of the

standardization process, which satisfies the needs of all stakeholders, while stressing that it does not determine the detailed content of the resulting standards. It accepts that governments do not have the requisite expertise to influence the content of standards, while stressing the governmental role in establishing the objectives and targets, leaving it to the standardization bodies to decide on the content of the standards and the best way of meeting the governmental objectives.<sup>137</sup>

A second view regards the official regime as deficient in terms of legitimacy and accountability. It is argued that the regulatory regime is suspect since it entails delegation of power to private bodies, subject only to vague legislative standards, and hence violates the *Meroni* non-delegation doctrine,<sup>138</sup> a claim voiced most strongly by German authors.<sup>139</sup> The problem is then said to be compounded by: scant public control over the standardization bodies; concerns over the lack of internal democracy therein;<sup>140</sup> and difficulties of rendering standards amenable to judicial review since they do not form an integral part of the directive. On this view the Commission's Green Paper from 1990,<sup>141</sup> while not perfect, was nonetheless a step in the right direction, since it proposed a Community institutional structure on the standardization bodies to define the role of participants at national and EU level and allow for greater transparency and participation of interested parties. The Green Paper was however defeated by an admixture of opposition from the standardization bodies, and national governments.<sup>142</sup>

A third view is premised on different assumptions, with consequential implications for legitimacy and accountability. Proponents of this view reject what they regard as the unduly hierarchical and formalistic assumptions about legitimacy and accountability integral to the view adumbrated above. They maintain that while

standardization may be too important to be left entirely to the standardization community, it is too complex a mixture of ‘cognitive, normative and political aspects’ to be taken over by administrators.<sup>143</sup> They do not contend that the existing regime is perfect, but argue that it is best conceived in terms of deliberative supranationalism.<sup>144</sup>

This is not the place to ‘resolve’ the debate between these contending views. Some comment is however warranted. The ‘official view’ is premised on the distinction between specification of essential objectives, to be determined by the Community legislature, and the delineation of standards to comply with those objectives. Subject to this, the Commission does not regard itself as setting the standards; in fact it goes out of its way to asseverate that it is not doing so.<sup>145</sup> The corollary is that although the ‘new approach directives’ allow Commission intervention in relation the standard set by CEN etc, this is not a power that the Commission uses often, so that emphasis is placed on process-based constraints on the standardization bodies, rather than substantive control.

This is, from one perspective, predictable from the principal/agent literature. The Commission does not have the expertise to undertake standard setting, delegation to a private agent becomes rational, and the desire to ‘avoid blame’ is echoed in the Commission’s forceful statement that it does not set the standards. The legitimacy of this conceptualization is however crucially dependent on two variables.

There is the extent to which the Community legislature really does specify the essential objectives in the enabling directive. Such directives do contain a section or annex on such matters. But the devil is truly in the detail. A glance at ‘new approach’ directives indicates that the essential objectives are specified at some level of generality. Thus the essential requirements in the Construction Directive stipulate that construction

must be carried out to prevent ‘major deformations to an inadmissible degree’, ‘damage to an extent disproportionate to the original cause’, ‘the presence of dangerous particles or gases in the air’ and the like.<sup>146</sup> The meaning of such phrases is necessarily open to a range of interpretations. The particular substantive meaning will be chosen by the standardization body, and will embody a view as to what risks are deemed acceptable. Technical expertise may be a necessary component in this evaluation, but it is not sufficient, since the level of acceptable risk is not a purely technocratic inquiry. Nor is this conclusion altered if one views standardization in deliberative supranational terms: even if one assumes that experts reach their decision in this manner, this does not alter the fact that they are making a choice concerning societal risk.

There is on the other hand the extent to which the standard-making procedures really are open to a wide constituency of stakeholders. Let us assume that the Community legislature could not realistically be more specific in stipulating the essential requirements. This nonetheless leaves considerable interpretative discretion to the standardization bodies, and thereby increases the importance of transparency and procedural input from affected stakeholders. However in 2004 the Commission accepted that effective participation of interested parties did not yet exist at the EU standardization level,<sup>147</sup> or within all Member States, and this was echoed in its latest Communication.<sup>148</sup> The difficulties of ensuring such access, and that certain players do not dominate the standard-setting process, should not therefore be underestimated.<sup>149</sup>

## 7. CONCLUSION

It is interesting to reflect by way of conclusion on the desiderata identified by Anne-Marie Slaughter for global networks in the light of EU experience with networks. Two points stand out in this respect.

First, there are clearly features of the EU that facilitate attainment of these desiderata. The enactment of hard law through an established legislative process enables deliberation as to the nature of the powers that should be afforded to network players, and greater transparency as to the result which is embodied in a formal Community norm. The Community courts are important to the system of checks and balances, and can impose administrative law constraints on network players. There are moreover features of EU law that allow legitimate difference to be taken into account, whether through differentiation, minimal harmonization or by giving Member States choice of form and methods of implementation of a directive.

Second, there are however also aspects of the EU experience that give more pause for thought. Community legislation may well embody criteria for network inclusion that are controversial in terms of deliberative equality, as exemplified by Comitology and standardization. More informal networks can lead to difficulties of transparency and uncertainty as to the nature of the network's role in decision-making. The existence of an 'institutional orchestrator' may well have benefits, but it gives the holder of such power considerable influence in shaping EU networks. Moreover, while the Community courts can have a beneficial impact by imposing principles of administrative law on network players, judicial decisions can also reinforce questionable power hierarchies embodied in particular networks, either by, for example, legitimating such networks even though there

may be shortcomings in terms of deliberative participation, or by refusing to accept that participation in rulemaking comes within general principles of Community law.

What is clear is that networks are an important feature of the administrative landscape in the EU. They are recognized in formal Community norms, and in much official Community documentation, as well as secondary literature. They are properly to be regarded as a sub-part of the shared administration/mixed proceedings/composite administration, which characterizes much of the interaction between the EU and the Member States. The challenge is to ensure that such networks are legitimate and accountable within the overall scheme of EU governance.

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\* Professor of English Law, St John's College, Oxford. I am grateful for comments on an earlier version of this paper from a seminar held in Paris in 2008, and from Carol Harlow.

<sup>1</sup> For an excellent overview, T. Börzel, 'What's So Special about Policy Networks? An Exploration of the Concept and Its Usefulness in Studying European Governance', *European Integration online Papers (EIoP)*, 1 (16), <http://eiop.or.at/eiop/texte/1997-016a.htm> ; T. Börzel, 'Organising Babylon. On the Different Conceptions of Policy Networks'. (1998) 76 *Pub. Adm.* 253.

<sup>2</sup> Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004), at 1.

<sup>3</sup> *Ibid.* at 14.

<sup>4</sup> *Ibid.* at 14.

<sup>5</sup> P. Alston, 'The Myopia of Handmaidens: International Lawyers and Globalization' (1997) 8 *EJIL* 441; M. Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2001) 8 *Indiana Jnl of Global Legal Studies* 369; M. Shapiro, "Deliberative", "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the EU' (2005) 68 *LCP* 341.

<sup>6</sup> Slaughter, *supra* n. 2, Chap. 6.



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<sup>7</sup> Ibid. at 246.

<sup>8</sup> Ibid. at 246.

<sup>9</sup> Ibid. at 248.

<sup>10</sup> Ibid. at 249.

<sup>11</sup> Ibid. at 250.

<sup>12</sup> Ibid. at 254.

<sup>13</sup> B. Kingsbury, N. Krisch, R. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *LCP* 15, at 16.

<sup>14</sup> Ibid. at 17.

<sup>15</sup> Ibid. at 21, 24, 25.

<sup>16</sup> Ibid. at 37-41. See also, S. Shapiro, 'International Trade Agreements, Regulatory Protection and Public Accountability' (2002) 54 *Admin LR* 415; A. Aman, 'Globalization, Democracy and the Need for a New Administrative Law' (2003) 10 *Indiana Jnl of Global Legal Studies* 125; R. Stewart, 'Administrative Law in the Twenty-First Century' (2003) 78 *NYULRev* 437; R. Stewart, 'US Administrative Law: A Model for Global Administrative Law?' (2005) 68 *LCP* 63; S. Cassese, 'Global Standards for National Administrative Procedure' (2005) 68 *LCP* 109; A. von Bogdandy and P. Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' (2008) 9(11) *German Law Jnl* 2013.

<sup>17</sup> R. Dehousse, 'Regulation by Networks in the European Community: the Role of European Agencies' (1997) 4 *JEPP* 246.

<sup>18</sup> For discussion of the way in which courts and Ombudsmen in the EU can be seen in terms of networks, see, C. Harlow and R. Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *ELJ* 542.

<sup>19</sup> R. Pedler and G.F. Schaefer (eds), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (European Institute of Public Administration, 1996); D. Rometsch and W. Wessels (eds), *The European Union and Member States, Towards Institutional Fusion?* (Manchester University Press, 1996); C. Joerges, K-H Ladeur and E. Vos (eds), *Integrating Scientific Expertise into*

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*Regulatory Decision-Making: National Traditions and European Innovations* (Nomos, 1997); C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999); *Third Report of the House of Lords' Select Committee on European Legislation: Delegation of Powers to the Commission: Reforming Comitology* (HL 23; 1999); E. Vos, *Institutional Frameworks of Community Health and Safety Legislation: Committees, Agencies and Private Bodies* (Hart, 1999); M. Andenas and A. Turk (eds), *Delegated Legislation and the Role of Committees in the EC* (Kluwer Law International, 2000); C. Bergstrom, *Comitology, Delegation of Powers in the European Union and the Committee System* (Oxford University Press, 2005); P. Craig, *EU Administrative Law* (Oxford University Press, 2006), Chap. 4; P. Strauss, T. Smith and L. Bergkamp, *Rulemaking* (ABA, 2008).

<sup>20</sup> Council Decision 87/373/EEC of 13 July 1987, Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, OJ 1987 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, OJ 1999 L184/23.

<sup>21</sup> [http://ec.europa.eu/taxation\\_customs/customs/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/index_en.htm)

<sup>22</sup> Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the General Budget of the European Communities, OJ 2002 OJ L248/1, Art. 54(2)(c), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2006 L390/1.

<sup>23</sup> Ibid. Art. 54(2)(c).

<sup>24</sup> Commission Regulation (EC, Euratom) 2342/2002 of 23 December 2002, Laying Down Detailed Rules for the Implementation of Council Regulation 1605/2002, OJ 2002 L357/1, Art. 39, as amended by Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2007 L111/13.

<sup>25</sup> Ibid. Art. 41.

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<sup>26</sup> Ibid. Art. 39(4).

<sup>27</sup> Communication from the Commission, Management of Community Programmes by Networks of National Agencies, COM(2001) 648 final.

<sup>28</sup> Ibid. at 3.1.

<sup>29</sup> Reg. 1605/2002, *supra* n. 22, Art. 54(1).

<sup>30</sup> COM(2001) 648 final, *supra* n. 27, at 5.2.

<sup>31</sup> Ibid. at 4.1.

<sup>32</sup> Council Regulation (EC) 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ 1997 L82/1, replacing earlier provisions dating from 1981. The Regulation was promulgated under Art. 308 EC, since the Commission felt that the Treaty articles dealing specifically with customs and agriculture did not empower the Community to establish the system covered by the Regulation.

<sup>33</sup> Ibid. Art. 4(1).

<sup>34</sup> Ibid. Art. 7.

<sup>35</sup> Ibid. Art. 8.

<sup>36</sup> Ibid. Art. 9(1).

<sup>37</sup> Ibid. Arts. 14-15.

<sup>38</sup> Ibid. Art. 17.

<sup>39</sup> Ibid. Art. 18.

<sup>40</sup> Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ 2004 L364/1.

<sup>41</sup> Ibid. Art. 4.

<sup>42</sup> Ibid. Art. 6.

<sup>43</sup> Ibid. Art. 7.

<sup>44</sup> Ibid. Art. 8.

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<sup>45</sup> Ibid. Art. 9.

<sup>46</sup> [http://ec.europa.eu/consumers/enforcement/index\\_en.htm](http://ec.europa.eu/consumers/enforcement/index_en.htm)

<sup>47</sup> White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme 99/27, 28 Apr. 1999; R. Wesseling, 'The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options' [1999] *ECLR* 420; C.-D. Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 *CMLRev* 537; A. Schaub, 'Modernisation of EC Competition Law: Reform of Regulation No. 17', in B. Hawk (ed.), *Fordham Corporate Law Institute* (Fordham University, 2000), Chap. 10; R. Whish, and B. Sufrin, 'Community Competition Law: Notification and Exemption—Goodbye to All That', in D. Hayton (ed.), *Law's Future(s): British Legal Developments in the 21st Century* (Hart, 2000), Chap. 8.

<sup>48</sup> Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

<sup>49</sup> Reg. 1/2003, *supra* n. 48, Arts. 5 and 6.

<sup>50</sup> Ibid. Art. 7.

<sup>51</sup> Ibid. Arts. 11-12, 16.

<sup>52</sup> Ibid. Art. 16(2).

<sup>53</sup> Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C101/43; Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, available at [http://ec.europa.eu/comm/competition/ecn/more\\_details.html](http://ec.europa.eu/comm/competition/ecn/more_details.html) ;

<sup>54</sup> [http://ec.europa.eu/comm/competition/ecn/more\\_details.html](http://ec.europa.eu/comm/competition/ecn/more_details.html)

<sup>55</sup> Reg. 1/2003, *supra* n. 48, Art. 13(1).

<sup>56</sup> Ibid. Art. 13(2).

<sup>57</sup> Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54.

<sup>58</sup> Reg. 1/2003, n. 48, Art. 15(1).

<sup>59</sup> Ibid. Art. 15(2).

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<sup>60</sup> Ibid. Art. 15(3).

<sup>61</sup> Ibid. Art. 16(1).

<sup>62</sup> [http://ec.europa.eu/consumers/redress\\_cons/index\\_en.htm](http://ec.europa.eu/consumers/redress_cons/index_en.htm)

<sup>63</sup> Commission Decision 2003/709/EC of 9 October 2003 setting up a European Consumer Consultative Group, OJ 2003 L258/35.

<sup>64</sup> Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ 2001 L174/25.

<sup>65</sup> [http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm)

<sup>66</sup> Effective Problem Solving in the Internal Market ("SOLVIT"), COM(2001) 702 final.

<sup>67</sup> <http://ec.europa.eu/solvit/>

<sup>68</sup> J. Pelkmans, 'The New Approach to Technical Harmonization and Standardization' (1987) 25 *JCMS* 249, 252–253; M. Egan, *Constructing a European Market* (Oxford University Press, 2001), at 78-81; N. Burrows, 'Harmonisation of Technical Standards: Reculer Pour Mieux Sauter?' (1990) 54 *MLR* 597.

<sup>69</sup> COM(85) 310, para. 64.

<sup>70</sup> Bull. EC 1–1985; <http://www.newapproach.eu/>.

<sup>71</sup> Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

<sup>72</sup> Commission, Enhancing the Implementation of New Approach Directives, COM(2003) 240; Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, OJ 1985 C 136/1; Green Paper on the Development of European Standardisation: Action for Faster Technological Integration in Europe', COM(90) 456 final.

<sup>73</sup> <http://www.cen.eu/cenorm/homepage.htm>

<sup>74</sup> <http://www.cenelec.eu/Cenelec/Homepage.htm>

<sup>75</sup> <http://www.etsi.org/WebSite/homepage.aspx>

<sup>76</sup> See, e.g., in the UK, British Standards Institute, <http://www.bsigroup.com/en/About-BSI/About-BSI-Group/BSI-History/> ; in Germany, Deutsches Institut für Normung e. V. (DIN) <http://www.din.de/cmd?level=tpl-home&contextid=din> ; in Italy, Ente Nazionale Italiano di Unificazione

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(UNI), <http://www.cen.eu/cenorm/members/national+members/italy/index.asp>; in Denmark, Dansk Standard, <http://www.ds.dk/en-GB/Sider/default.aspx>.

<sup>77</sup> <http://ec.europa.eu/enterprise/newapproach/standardization/harmstds/reflist.html>

<sup>78</sup> B. Farquhar, 'Consumer Representation in Standardisation' (1995) 3 *Consumer Law Journal* 56; K. Armstrong and S. Bulmer, *The Governance of the Single European Market* (Manchester University Press, 1998), 157–163; E. Vos, *Institutional Frameworks of Community Health and Safety Regulation: Committees, Agencies and Private Bodies* (Hart, 1999); C. Joerges, H. Schepel and E. Vos, *The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislation Processes: The Case of Standardisation*, EUI Working Paper 99/9; European Association for the Coordination of Consumer Representation, ANEC, *Consumer Participation in Standardisation* (ANEC, 2000); H. Schepel, *The Constitution of Private Governance* (Hart, 2005); The Broader Use of Standardization in Community Policy, COM(95) 412 final; General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and EFTA, OJ 2003 C91/04.

<sup>79</sup> [http://ec.europa.eu/enterprise/standards\\_policy/index\\_en.htm](http://ec.europa.eu/enterprise/standards_policy/index_en.htm)

<sup>80</sup> On the role of European standardization in the framework of European policies and legislation, COM(2004) 674, at 4; [http://ec.europa.eu/enterprise/standards\\_policy/role\\_of\\_standardisation/index.htm](http://ec.europa.eu/enterprise/standards_policy/role_of_standardisation/index.htm)

<sup>81</sup> COM(2004) 674, *supra* n. 80; Towards an increased contribution from standardisation to innovation in Europe, COM(2008) 133; 2891<sup>st</sup> Competitiveness Council Meeting, 25 September 2008, available at [http://ec.europa.eu/enterprise/standards\\_policy/standardisation\\_innovation/index.htm](http://ec.europa.eu/enterprise/standards_policy/standardisation_innovation/index.htm)

<sup>82</sup> COM(2004) 674, *supra* n. 80, at 9; COM(2008) 133, *supra* n. 81, at 8. The standardization bodies are certainly keen to present themselves as fostering transparency and participation, <http://www.cen.eu/cenorm/homepage.htm>, but compare the views of ANEC, the body that represents consumer interests, <http://www.anec.eu/anec.asp>

<sup>83</sup> 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, OJ 2003 L176/37. See also, 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, OJ 2005 L33/22. The

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analogous provision relating to gas is Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30, OJ 2003 L176/57.

<sup>84</sup> Dir. 2003/54, Art. 3(9).

<sup>85</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity, COM(2007) 528 final; 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.

<sup>86</sup> [http://ec.europa.eu/energy/electricity/florence/index\\_en.htm](http://ec.europa.eu/energy/electricity/florence/index_en.htm)

<sup>87</sup> [http://ec.europa.eu/energy/gas/madrid/index\\_en.htm](http://ec.europa.eu/energy/gas/madrid/index_en.htm)

<sup>88</sup> [http://www.ergeg.org/portal/page/portal/ERGEG\\_HOME/ERGEG](http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG)

<sup>89</sup> COM(2007) 530 final, *supra* n. 85, at 9-10.

<sup>90</sup> Ibid. draft Arts. 5-8.

<sup>91</sup> Council Regulation (EC) 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work, OJ 1994 L216/1, Arts. 2, 3(1)(a)-(d), as amended by Council Regulation (EC) 1112/2005 of 24 June 2005, Amending Regulation 2062/94 establishing a European Agency for Safety and Health at Work, OJ 2005 L184/5.

<sup>92</sup> Ibid. Art. 3(1)(e).

<sup>93</sup> Ibid. Arts. 3(1)(f), 4.

<sup>94</sup> Regulation (EC) 460/2004 of the European Parliament and of the Council of 10 March 2004, Establishing the European Network and Information Agency, OJ 2004 L77/1.

<sup>95</sup> Ibid. Arts. 2(1)-(3), 3.

<sup>96</sup> [http://www.enisa.europa.eu/pages/01\\_02.htm](http://www.enisa.europa.eu/pages/01_02.htm) ; The PSG Vision for ENISA (2006), available at <http://www.enisa.europa.eu/doc/pdf/news/psgvisionforenisafinaladoptedmay2006version.pdf>

<sup>97</sup> [http://www.enisa.europa.eu/doc/pdf/management\\_board/decisions/ad\\_hoc\\_wg.pdf](http://www.enisa.europa.eu/doc/pdf/management_board/decisions/ad_hoc_wg.pdf)

<sup>98</sup> Lisbon European Council, Presidency Conclusions, 23-24 March 2000.

<sup>99</sup> Ibid. at para. 5.

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<sup>100</sup> Ibid. at para. 7.

<sup>101</sup> Ibid. at para. 38.

<sup>102</sup> Ibid. at para. 37.

<sup>103</sup> Nice European Council, Presidency Conclusions, 7-9 December 2000.

<sup>104</sup> European Council, Presidency Conclusions, 22-23 March 2005.

<sup>105</sup> S. Cassese, 'Il sistema amministrativo europeo e la sua evoluzione' (1991) *Rivista Trimestrale di Diritto Pubblico* 769; C. Franchini, 'L'impatto dell'integrazione comunitaria sulle relazioni al vertice dell'amministrazione. Poteri governativi e poteri amministrativi' (1991) *Rivista Trimestrale di Diritto Pubblico* 775; E. Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft' (1996) *Europarecht* 270; S. Cassese, 'La signoria comunitaria sul diritto amministrativo' (2002) *Rivista Italiana di Diritto Pubblico Comunitario* 291; E. Chiti and C. Franchini, *L'Integrazione Amministrativa Europea* (Il Mulino, 2003); C. Franchini, 'I principi applicabili ai procedimenti amministrativi europei' (2003) *Rivista Italiana di Diritto Pubblico Comunitario* 1037; S. Cassese, 'Diritto amministrativo europeo e diritto amministrativo nazionale: signoria o integrazione?' (2004) *Rivista Italiana di Diritto Pubblico Comunitario* 1135; S. Cassese, 'European Administrative Proceedings' (2004) 68 *LCP* 21; M. Chiti, 'Forms of European Administrative Action' (2004) 68 *LCP* 37; G. della Cananea, 'The European Union's Mixed Administrative Proceedings' (2004) 68 *LCP* 197; C. Franchini, 'European Principles Governing National Administrative Proceedings' (2004) 68 *LCP* 183; E. Chiti, 'Administrative Proceedings involving European Agencies' (2004) 68 *LCP* 219; P. Craig, *EU Administrative Law* (Oxford University Press, 2006), Chaps. 1-7; S. Cassese, 'Diritto amministrativo comunitario e diritti amministrativi nazionali', in M. Chiti, and G. Greco (eds), *Tratatto di diritto amministrativo europeo* (Giuffrè, 2007), Volume I, at 1-13; H. Hofmann and A. Türk, 'The Development of Integrated Administration in the EU and its Consequences' (2007) 13 *ELJ* 253; E. Schmidt-Aßmann, 'Introduction: European Composite Administration (*Verwaltungsverbund*) and the role of European administrative law', in O. Jansen and B. Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia, 2008), Chap. 2; Craig, 'Community Administration, History, Typology and Accountability' (forthcoming).



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<sup>106</sup> von Bogdandy and Dann, *supra* n. 16, at 2018, 2034.

<sup>107</sup> It may be that the concepts have this connotation.

<sup>108</sup> See, e.g., G. Marks, L. Hooghe and K. Blank, 'European Integration from the 1980s: State-Centric v. Multiple-Level Governance' (1996) 34 *JCMS* 341; M. Pollack, 'Regional Actors in Intergovernmental Play: The Making and Implementation of EC Structural Policy', in C. Rhodes and S. Mazey (eds), *The State of the European Community, Vol. 3: Building a European Polity* (Longman, 1995); T. Risse-Kappen, 'Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union' (1996) 34 *JCMS* 53; J. Golub, 'State Power and Institutional Influence in European Integration: Lessons from the Packaging Waste Directive' (1996) 34 *JCMS* 313; J. Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-Modern' (1996) 34 *JCMS* 29; F. Scharpf, 'The Problem Solving Capacity of Multi-Level Governance' (1997) 4 *JEPP* 520.

<sup>109</sup> See, eg, Slaughter, *supra* n. 2; Kingsbury, Krisch and Stewart, *supra* n. 13; M. Pollack and G. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Rowman and Littlefield, 2001/3).

<sup>110</sup> The general analysis provided by von Bogdandy and Dann, *supra* n. 16, is a valuable addition to the literature.

<sup>111</sup> COM(2001) 648 final, *supra* n. 27.

<sup>112</sup> D. Epstein and S. O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under the Separation of Powers* (Cambridge University Press, 1999); M. Thatcher and A. Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1; M. Pollack, *Engines of European Integration: Delegation, Agency and Agenda-Setting in the European Union* (Blackwell, 2003); W. Mattli and T. Büthe, 'Global Private Governance: Lessons from a National Model of Setting Standards in Accounting' (2005) 68 *LCP* 225.

<sup>113</sup> Mattli and Buthe, *supra* n. 112, at 230-231.

<sup>114</sup> Harlow and Rawlings, *supra* n. 18.

<sup>115</sup> See, eg, Craig, *supra* n. 19, at 277-279.

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<sup>116</sup> Case 25/70, *Einfuhr- und Vorrasstelle für Getreide und Futtermittel v Köster, Berodt & Co* [1970] ECR 1161. See also, Case 23/75, *Rey Soda v Cassa Conguaglio Zuccherio* [1975] ECR 1279; Case 5/77, *Carlo Tedeschi v Denavit Commerciale Srl* [1977] ECR 1555.

<sup>117</sup> Case C-156/93, *European Parliament v Commission* [1995] ECR I-2019, at paras. 18-22; Case C-417/93, *European Parliament v Council* [1995] ECR I-1185, at para. 30.

<sup>118</sup> Case C-104/97 P, *Atlanta AG v Commission* [1999] ECR I-6983; Craig, *supra* n. 19, Chap. 10.

<sup>119</sup> *Supra* n. 20.

<sup>120</sup> Dec. 87/373, *supra* n. 20.

<sup>121</sup> Bergstrom, *supra* n. 19.

<sup>122</sup> Decision 99/468, *supra* n. 20.

<sup>123</sup> Shapiro, *supra* n. 5; C. Harlow, *Accountability in the European Union* (Oxford University Press, 2002), at 175; R. Dehousse, 'Towards a Regulation of Transnational Governance? Citizen's Rights and the Reform of Comitology Procedures', in C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999), at 111-114; J. Weiler, 'Epilogue: "Comitology" as Revolution – Infranationalism, Constitutionalism and Democracy', in Joerges and Vos (eds), at 342-349.

<sup>124</sup> Craig, *supra* n. 19.

<sup>125</sup> Decision 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, OJ 2002 L10/1.

<sup>126</sup> See, e.g., Arts. 99 and 128 EC.

<sup>127</sup> Committee on Employment and Social Affairs, Report on Analysis of the Open Coordination Procedure in the Field of Employment Social Affairs and Future Prospects, Rapporteur, Miet Smet, A5-0143/2003.

<sup>128</sup> *Ibid.* Rec. D.

<sup>129</sup> *Ibid.* Rec. G.

<sup>130</sup> *Ibid.* Rec. I.

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- <sup>131</sup> Committee on Economic and Monetary Affairs, On the Commission Communication on Streamlining the Annual Economic and Employment Policy Coordination Cycles, Rapporteur, Othmar Karas, A5-0400/2002, at 7, 10-11.
- <sup>132</sup> C. de la Porte and P. Nanz, 'The OMC – A Deliberative-Democratic Mode of Governance? The Cases of Employment and Pensions' (2004) 11 *JEPP* 267, at 276-277.
- <sup>133</sup> D. Hodson and I. Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination' (2001) 39 *JCMS* 719.
- <sup>134</sup> G. de Búrca and J. Zeitlin, 'Constitutionalising the Open Method of Coordination: What Should the Convention Propose?' (2003) Centre for European Policy Studies Brief No. 31.
- <sup>135</sup> De la Porte and Nanz, *supra* n. 132, at 278-279.
- <sup>136</sup> Committee on Employment and Social Affairs, *supra* n. 127, at 13.
- <sup>137</sup> DG Enterprise, Vademecum on European Standardisation, Standardisation and Governance (November 2003), available at [http://ec.europa.eu/enterprise/standards\\_policy/vademecum/index.htm](http://ec.europa.eu/enterprise/standards_policy/vademecum/index.htm)
- <sup>138</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v. High Authority* [1958] ECR 133; Craig, *supra* n. 19, Chap. 5.
- <sup>139</sup> See also, Previdi, 'The Organization of Public and Private Responsibilities in European Risk Regulation: An Institutional Gap Between Them?', in C. Joerges, K.-H. Ladeur & E. Vos, (eds.), *Integrating Scientific Expertise into Regulatory Decision-Making-National Traditions and European Innovations* (Baden-Baden 1997), 225.
- <sup>140</sup> Joerges, Schepel and Vos, *supra* n. 78, at 11.
- <sup>141</sup> Commission Green Paper on the Development of Standardization: Action for Faster Technical Integration in Europe, COM(90) 456 final.
- <sup>142</sup> Joerges, Schepel and Vos, *supra* n. 78, at 20-24.
- <sup>143</sup> *Ibid.* at 43.
- <sup>144</sup> *Ibid.* at 40-63; K.-H. Ladeur, 'Towards a Legal Concept of the Network in European Standard-Setting', in Joerges and Vos, *supra* n. 19, Chap. 9.
- <sup>145</sup> *Supra* n. 137.

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<sup>146</sup> Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, OJ 1989 L40/12, Annex 1.

<sup>147</sup> COM(2004) 674, *supra* n. 80, at 9.

<sup>148</sup> COM(2008) 133, *supra* n. 81, at 8-9.

<sup>149</sup> Mattli and Büthe, *supra* n. 112.