

# Law and New Environmental Governance in the European Union

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## *Introduction*

This book demonstrates that ‘new governance’ approaches pervade an increasingly wide array of policy spheres. This chapter, as well as that by Karkkainen, suggest that environmental governance provides unusually rich material for the study of new governance in both the European Union and the United States. The profligacy of the available examples,<sup>1</sup> the diversity and novelty of the processes, and the relative longevity of their life-span, all attest to its significance. The insights gleaned are of value beyond the environmental sphere, and in thinking more generally, about the relationship between (constitutional) law and governance. This chapter offers two European examples of new governance in environmental policy. Though these examples form just a small part of the elaborate world of new governance in this area, they offer important insights into this world, and into some of the questions which it poses for law.

The first case study is concerned with environmental assessment, and specifically with the manner in which this concept has evolved. Twenty years after the inception of

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<sup>1</sup> See generally, H. Heinelt, H. Malek, and A.E. Toller (eds.), *European Union Environmental Policy and New Forms of Governance* (Ashgate, 2001).

environmental assessment in the EU, the legislative framework has undergone considerable revision, and its scope of application has been much extended. This incremental process of change rests upon governance processes which bear testimony to the pragmatist ideal of federalism as experimentalism, constituting diverse laboratories for innovation, and linking structures for learning.<sup>2</sup> Contrary to many of the processes under discussion in this book, environmental assessment has a history in the EU.<sup>3</sup> In terms of its evolution, a number of iterations have occurred, leading to repeated instances of revision and review. Consequently, and exceptionally, we are in a position to evaluate ‘whether in practice the back-and-forth between central agencies and local ones’ has been effective.<sup>4</sup>

The second case study is concerned with the implementation of the EU Water Framework Directive (WFD). In the face of intense political disagreement, the obligations laid down in this more recent instrument are characterised by extreme flexibility. The core requirements are ill-defined, and the exceptions open-ended. According to the surface

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<sup>2</sup> This idea has a long history in the United States. See for example *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting): ‘It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory...’.

<sup>3</sup> Of course, it has an even longer history in the United States. A form of environmental assessment was first introduced by the National Environmental Policy Act 1969, s. 102 (a) 42 USC 4321-4361. For a review of the effects of this aspect of the legislation, see S. Taylor, *Making Bureaucracies Think: The Environmental Impact Statement Stargery of Administrative Reform* (Stanford University Press, 1984). For a broader review of NEPA, including its environmental impact assessment strategy, see L. K. Caldwell, ‘The National Environmental Policy Act: Retrospect and Prospect’ (1976) 6 *Envtl L Repr*, 50.

<sup>4</sup> M. Tushnet, *The New Constitutional Order* (Princeton University Press, 2003), p. 169.

language of law, Member States enjoy considerable autonomy in implementation. Yet beneath this surface language, there has emerged, spontaneously, a forum for multi-level collaborative governance. Once again, this is seen to be deeply experimentalist.

Contrary to the previous example, we lack here a history such as would permit an evaluation of outcomes and impact. But, even now, this case study is interesting from the perspective of law. Not only has there emerged – at a descriptive level – a gap between law and the practice of governance, but the premises which underpin the two seem starkly different, even antithetical, in their orientation.

The core claim in this paper is an empirical one. It is suggested that there is emerging in the EU a unique approach to federalism which can readily be called experimentalist. So central is this approach that it is seen to emerge even where it is not explicitly mandated. In environmental assessment it emerged *ab initio* on the basis of the legislative text. In the water domain it has been concealed by a legislative framework which rests on different, and increasingly misleading, premises.

The emergence of experimentalist federalism in the EU stands in contrast to the classic community method. Whereas the former is collaborative and multi-level, laying considerable emphasis upon soft law, the latter is based upon clear divisions of competence and recourse to binding legislation. Yet it has been against the backdrop of this classic community method that (constitutional) law has emerged and evolved in the EU. Consequently, experimental federalism poses stark and difficult questions for law and for lawyers. It is not enough to report the existence of a ‘gap’ between law and the

practice of governance, telling though this may be in thinking about the relationship between law and politics. The challenge lies also in contemplating the role of, and implications for, law in the face of shifting patterns in the practice of governance. The final section of this paper offers some preliminary observations on this relationship in the context of the two environmental examples under discussion here.

### 1. *Environmental Assessment: Federalism as Experimentalism*

Environmental assessment<sup>5</sup> describes a process of predicting the likely effects of a proposed project, plan or policy on the environment prior to a decision being made about whether these should proceed. The significance of the procedure lies in the fact that it forces developers, administrators, and policy makers to think through the consequences for the environment of their decisions. Whilst clearly providing a procedural framework for decision making, environmental assessment does not regulate the substance of the decision - the outcome. Instead, all that is required is that the decision maker is availed of the information derived from the assessment procedure, and that this is taken into account when the decision is being made. This means, for example, that it is quite possible for a harmful (in environmental terms) project to be granted development consent. Importantly though, aspects of the environmental assessment procedure suggest that in practice it is capable of making a difference in favour of environmental protection. One such element having particular relevance for a discussion about new forms of

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<sup>5</sup> Environmental assessment is a collective term, for the environmental impact assessment of projects, and strategic environmental assessment of plans, policies and programmes

governance and their constitutional importance stems from the opportunity that environmental assessment provides for a broad constituency of people and groups to become informed and to some extent engage in the decision making process. This means that environmental assessment allows for the generation of a broad range of information and its exchange between government, industry, environmentalists and the public. Such rights of participation may also bring responsibilities for the provision and assessment of environmental information, particularly on behalf of the proponent of the project or policy. In the EU's form of environmental assessment,<sup>6</sup> this opportunity for participation has recently been enhanced with the result that in environmental assessment there are now many sites and scales of interaction between governmental and non-governmental bodies and some blurring of the traditional divisions between the public regulation of environmental problems, and the role of private actors.

A further important element is the requirement that the decision maker evaluate various options or alternatives to the proposed project or policy. This provides a degree of anticipatory control because environmental harm may be prevented or reduced by identifying possible alternative sites, designs, or technology at an early stage in the consent process. There is some evidence that this requirement has proved to be a forceful one, at least in the context of environmental assessment procedures invoked in cases of

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<sup>6</sup> Directive 85/337/EEC OJ 1985 L175/40. This was amended in 1997 (Directive 97/11/EC OJ 1997 L73/5) and 2003 (Directive 2003/35/EC OJ 2003 L156/17 on participation). See generally, J. Holder, *Environmental Assessment: The Regulation of Decision-Making* (OUP, 2004), ch. 1.

nature conservation.<sup>7</sup> In general, though, the regulatory nature of environmental assessment (that it does not mandate a particular outcome or standard) means that evaluating the *difference* that the procedure has made in terms of environmental protection is notoriously difficult. As Bartlett notes: 'the theorist or analyst who looks only for dramatic impacts or only for obvious direct effects is likely to be unimpressed...Comprehending the significance and potential of EIA requires appreciation of the complexity of ways that choices are shaped, channelled, learned, reasoned and structured before they are officially made'.<sup>8</sup> There are, however, some recent signs that environmental assessment is capable of swaying decision making away from certain development projects. In the United Kingdom, for example, the central reason for the Secretary of State's refusal of development consent for a 'global port'<sup>9</sup> was the planning inspector's consideration of the likely effects of the development on designated conservation sites which had been identified in the course of the environmental assessment process. (Interestingly, the inspector had criticised the 'functional' assessment of these effects and plans for 'compensation' advanced in the developer's environmental statement, submitted as part of the process).

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<sup>7</sup> See case study on the European Commission's assessment of alternative routes for the purposes of the Habitats Directive (Directive 92/43/EEC OJ 1992 L206/7 in Holder, *supra* n. 6, pp. 158-162.

<sup>8</sup> R. V. Bartlett, 'Ecological Reason in Administration: Environmental Impact Assessment and Administrative Theory', in R. Paehlke and D. Torgerson (eds) *Managing Leviathon: Environmental Politics and the Administrative State* (Behaven, 1990), 82.

<sup>9</sup> At Dibden Bay, discussed as a case study in Holder, *supra* n. 6, ch. 6.

Turning to the form of regulation exercised by environmental assessment, though originally out of synch with the European Union's command-and-control approach to regulation, today the procedure looks increasingly typical of the Union's favoured approach. The original instrument, dating originally from 1985, is characterized by broad flexibility and rich proceduralization. Member States retain considerable flexibility in implementation. Framework rules, combined with derogations, opt-outs, and textual ambiguity combine to concede considerable room for Member State manoeuvre. Against this backdrop of flexibility, procedural instruments – transparency, participation requirements and the like – are deployed to enhance accountability in implementation.

The effectiveness of EIA as an instrument of environmental regulation has been much discussed. Views differ starkly, not least between those who regard environmental assessment, instrumentally, as a means of informing decision makers of the possible environmental consequences of a proposed project or action,<sup>10</sup> and those who propose, more fundamentally, that environmental assessment inculcates environmental protection values amongst those taking decisions.<sup>11</sup> The latter consider that environmental assessment contributes to changing the culture in which decisions are made, leading to a type of 'social learning'. Here, we are concerned less with its effectiveness in absolute terms, and more with relative effectiveness, temporally conceived. The EIA Directive has been repeatedly reviewed and revised. Review and revision takes shape within the

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<sup>10</sup> For example, as discussed by L. K. Caldwell, *Between Two Worlds: Science, the Environmental Movement and Policy Choice* (CUP, 1992).

<sup>11</sup> This is the view of Taylor, *Making Bureaucracies Think*, supra n. 3., and, more recently, H. Wilkins, 'The Need for Subjectivity in Environmental Impact Assessment' (2003) 23 EIA Rev 401.

framework of processes constituted by the directive itself. The directive provides the tools for iterative evaluation and adaptation. It is with these processes and tools that this case study is concerned.

Central in this regard is the concept of information exchange.<sup>12</sup> According to this, the Member States and the Commission shall exchange information on the experience gained in applying the Directive. In particular, the Member States shall inform the Commission of the criteria and/or thresholds adopted for selecting projects to be assessed.<sup>13</sup> Concerns about the quality of the information submitted by Member States led, in the strategic environmental assessment directive (SEA),<sup>14</sup> to a demand that Member States ‘ensure that environmental reports are of sufficient quality to meet the demands’ of the directive.<sup>15</sup>

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<sup>12</sup> Supra n. 6, Article 11.

<sup>13</sup> The Directive rests upon a distinction between Annex 1 and Annex II projects. Whereas the former are by definition to be subject to assessment, the latter are to be subject to assessment where they are likely to have significant effects on the environment.

<sup>14</sup> Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment OJ 2001 L197/30

<sup>15</sup> Ibid, Article 12(2). This goes on to provide that Member States shall communicate to the Commission any measures they take concerning the quality of these reports. The Strategic Environmental Assessment Directive was to be implemented from the middle of 2004, and the first Commission report is not due until the middle of 2006, and at seven yearly intervals thereafter. Thus, to date, the impact and justiciability of this quality requirement is not yet clear. On the important issue of the quality of environmental reports, see the Institute of European Environmental Policy. A more recent study does not seem to be available.

Information exchange is supplemented by a Commission reporting requirement. On the basis of the information received, the Commission is charged with issuing five-yearly implementation reports, examining the application and the effectiveness of the Directive. The Commission is responsible, on the basis of these, for submitting such additional proposals as are necessary for the amendment of the Directive, with a view to ensuring that it is applied in a ‘sufficiently coordinated manner’.<sup>16</sup> To date the Commission has issued three such implementation reports.<sup>17</sup>

Innocuous though these informational requirements may appear, it is suggested that they underpin an approach to governance which is peculiarly well-suited to conditions of complexity and diversity. This approach makes a virtue out of necessity, harnessing disagreement and diversity as resources for innovation and learning. These tools exemplify, in many important respects, the distinctive character of European federalism, which rests increasingly upon coordination not harmonisation, and upon supervised decentralization.

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<sup>16</sup> Supra n. 6, Article 11(4).

<sup>17</sup> The first report was published in 1993 and covered the period up to the beginning of July 1991 (with some additional information from July 1991 to March 1992). See COM(93) 28 final – volume 12. An update of this report was issued in 1997 and covered the period from 1990 until the end of 1996. A third five year report was published in 2003 (*Report from the Commission to the European Parliament and the Council on the Application and Effectiveness of the EIA Directive: How Successful are the Member States in implementing the EIA Directive?*)

The approach to review and revision which underpins the EIA Directive readily lends itself to analysis according to a democratic experimentalist frame. According to this:<sup>18</sup>

- i.) lower level actors are granted autonomy to experiment with solutions of their own devising within broadly defined areas of public policy:<sup>19</sup>

As noted above, Member States are permitted considerable flexibility in the implementation of the EIA Directive. This extends not only to the range of projects to be assessed<sup>20</sup> and to the nature of the information to be gathered,<sup>21</sup> but also to the manner in which the assessment findings are to be taken into account in the development planning

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<sup>18</sup> This characterization of democratic experimentalism draws *directly* upon Sabel and Gerstenberg's characterization of it in 'Directly Deliberative Polyarchy: an Institutional Ideal for Europe' in Joerges and Dehousse (eds.), *Good Governance in Europe's Integrated Market* (OUP, 2002) pp. 291-292.

<sup>19</sup> As Bill Simon noted in his comments on an earlier version of this paper, this has a strange ring in the EU setting. Here, it is not so much that lower level actors are granted autonomy. Rather, it is the case that higher level actors (the EU) choose not to impede the autonomy of the Member States through the adoption of constitutionally permitted legislation setting out detailed and prescriptive substantive values. In the end the result is the same.

<sup>20</sup> Projects of the kind listed in Annex I must be subject to assessment. Those listed in Annex II (a much longer list) shall be made subject to assessment only where Member States consider that their characteristics so require. This requirement has been read by the European Court alongside Article 2, as requiring assessment wherever projects are likely to have significant effects on the environment.

<sup>21</sup> This is specified in Article 5, and includes today a description of the main alternatives studied by the developer and an indication of the main reasons for his choice. Assessment of the information to be supplied is made on the basis of relevance and reasonableness, the latter having regard, *inter alia*, to current knowledge and methods of assessment.

process.<sup>22</sup> The directive has no substantive core, and even damaging projects may proceed. This flexibility has been somewhat curtailed by the European Court. The Court has held repeatedly that Member States may not exempt in advance entire categories of project, except in so far as this category as a whole is not likely to have significant effects on the environment.<sup>23</sup> Similarly, in ‘screening’ projects for assessment, Member States are obliged to consider not merely their scale, but also their nature and location.<sup>24</sup> Likewise, the environmental effects of the project cannot be determined by reference to the characteristics of that single project. On the contrary, Member States must have regard to their cumulative effects, in order that the objective of the directive not be circumvented by ‘the splitting of projects’.<sup>25</sup> All this notwithstanding, heightened flexibility continues to reign.

- ii.) in return, these lower level actors are required to furnish higher-level units with rich information regarding their goals as well as the progress they are making towards achieving them:

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<sup>22</sup> Article 8 provides that the results of the consultations and information gathered must be ‘taken into consideration’ in the development consent procedure. The directive does not institute any substantive ‘bottom-line’ whereby egregiously negative effects will necessitate a refusal of development consent.

<sup>23</sup> See, for example, Case 72/95 *Kraaijeveld* [1996] ECR I-5403, para. 50. This is a very difficult burden to discharge, and it remains uncertain how this might be achieved in practice.

<sup>24</sup> Case C-392/96 *Commission v. Ireland*, para. 65.

<sup>25</sup> *Ibid*, paras. 73-83.

As noted previously, Member States and the Commission are to exchange information on the experience gained in applying the directive, and the Commission is charged with issuing periodic implementation reports. In practice, the provision of information by Member States is by way of response to a Commission questionnaire. In addition, however – in even the most meagre of the Commission’s three reports (the 1997 update) – the Commission also makes recourse to additional sources of information. To illustrate, the latest (2003) report was prepared by the Impact Assessment Unit of the School of Planning of Oxford Brooks University, in conjunction with a steering committee of staff from DG Environment, and a representative from the Member States. This team sought further (post-questionnaire) clarification from most Member States on key aspects of their implementation processes. This included the circulation of a further set of questions to the Member States, following an initial review of responses received. Secondary literature and data-bases (including the Enimpas data base on EIA in transboundary context) were also examined by the team for further evidence of EIA practices within the Member States.<sup>26</sup> It is in the light of this that the Commission is able to claim that the report is ‘structured around the transposition and implementation of Directive 97/11/EC and the operation of the EIA Directive as a whole, rather than on the basis of the individual questions posed by DG Environment’s questionnaire’, and to conclude that ‘this facilitated a more comprehensive overview of progress on

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<sup>26</sup> Supra n. 17 (third report), ‘Methodology’ at p. 12, and Appendix One for the full text of the relevant questionnaires. See pp. 52, 65, 90 and 96 for instances where secondary literature were used to inform the Commission’s observations.

transposition and implementation and highlighted key issues that warrant further attention'.<sup>27</sup>

Much emphasis is placed by the Commission in the reports upon the difficulties encountered as a result of information deficits which result from a lack of, or inadequate, Member State monitoring of EIA practice.<sup>28</sup> Such gaps are repeatedly highlighted in the reports, in a bid to encourage the collation of more reliable and comprehensive data, and better monitoring and research on the operation of EIA.

- iii.) the lower level actors agree to respect in their actions framework rights of democratic procedure and substance, as these are elaborated in the course of experimentation itself:

The basic claim for participation in environmental assessment is that it contributes to the correctness or validity of decisions, by allowing assertions to be checked against the views of those who have local knowledge of an area, or are interested parties. More fundamental claims for participation now rest upon a deliberative ideal that better outcomes may be arrived at and, furthermore, that the process of deliberation is capable of inculcating environmental values which may encourage an ongoing sense of environmental responsibility for those involved in decision-making (both participants and

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<sup>27</sup> Supra n. 17 (third report), p. 12-13.

<sup>28</sup> See, for example, in the 2003 Report (supra n. 17), pp. 50, 64, 36, 95-96.

authorities). A view of environmental assessment as an expression of ‘local democracy’<sup>29</sup> means that the procedure has become increasingly identified with this deliberative ideal.

The EIA Directive grants individual rights to participate in the assessment process. Article 6 establishes rules for the participation of the public, while also granting Member States discretion to establish the ‘detailed arrangements’ for the provision of information and consultation. The Directive requires that Member States must ensure that any application for development consent and the accompanying environmental statement (compiled by the developer according to guidance in Article 5 and Annex IV) ‘are made available to the public’.

The framework for public participation has been subject to evolution over time, with significant amendments introduced in 1997 and 2003. The former seem attributable largely to the review and revision process under discussion here, and are indicative of the democratic experimentalist idea that process, as well as outcomes, is to be regarded as

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<sup>29</sup> See, in the UK, the most notable example, the decision of the House of Lords in *Berkeley v Secretary of State for the Environment and Fulham Football Club (Berkeley No. 1)* [2000] WLR 420, [2001] AC 603, (2001) 13 JEL 89, as per Lord Hoffmann at 430: ‘the directly enforceable right of the citizen which is accorded by the [EC EIA] Directive...requires the inclusive and democratic procedure prescribed by the Directive in which the public however misguided or wrong headed its views may be, is given the opportunity to express its opinion on the environmental issues’. For an evaluation of the shift from environmental assessment as technical procedure to mechanism for local democracy, see R. McCracken, ‘Environmental Assessment: From Technocratic Paternalism to Participatory Democracy?’ paper given at the Enforcement of EC Environmental Law Seminar, King's College London, June 2003.

provisional, and as subject to continuous improvement on the basis of information pooling on comparative performance and best practice. These include the introduction of obligatory reason giving requirements,<sup>30</sup> greater clarity about timing in terms of information provision and the expression of public opinion,<sup>31</sup> and a strengthening of public participation opportunities in the transboundary assessment of projects.<sup>32</sup> The latter (2003 amendments) reflect, predominantly, developments at the international level, with the entry into force of the Aarhus Convention.<sup>33</sup> These include a broadening of the categories of information to be made available to the public,<sup>34</sup> a requirement that the public likely to be affected by the proposed development, be notified of the arrangements for public participation,<sup>35</sup> and a requirement that the public be given ‘early and effective’ opportunities to participate in decision making procedures.<sup>36</sup> It also revises existing procedures by entitling the public ‘to express comments and opinions when all options

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<sup>30</sup> Supra n. 6, Article 9(1).

<sup>31</sup> Supra n. 6, Article 6(2).

<sup>32</sup> Supra n. 6, Article 6(3).

<sup>33</sup> *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters* at: <http://www.unece.org/env/pp/>

<sup>34</sup> Article 3(4) amending Article 6(2) and (3). In addition to the information gathered by the developer in the form of an environmental statement, and the main reports and advice issued to the competent authority or authorities at the time the public is informed of the request for development consent, information which comes to light after this initial notification and which is considered relevant to the final decision must also be conveyed to the public. This suggests that the framers of the directive conceive of environmental assessment as a process, with participation a feature of several stages of this.

<sup>35</sup> Article

<sup>36</sup> Article 3(4) amending Article 6.

are open to the competent authority or authorities before the decision on the request for development consent is taken'.<sup>37</sup> This potentially engages the public in the consideration of alternatives, before options have become fixed. Also significant is the requirement that the main reasons and considerations on which the decision is based must include information about the public participation process, and be articulated 'having examined the concerns and opinions expressed by the public'.<sup>38</sup> This requirement potentially requires the decision maker to internalise the participatory elements of environmental assessment.

The formal framework for participation has then been strengthened in a number of important respects. Today,<sup>39</sup> the provisions aim at a more inclusive, less technicist environmental assessment procedure, with public involvement in decision making expressed in the manner of an entitlement to participate, and to access to the courts to enforce its provisions. This is an advance on the more restricted information disclosure and consultation provisions of current forms of assessment. However, deficiencies still remain. There are no legal requirements for public participation at the initial screening stage,<sup>40</sup> or in respect of the 'scoping' of the assessment to be conducted. Consultation at

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<sup>37</sup> Article 3 amending Article 6(4).

<sup>38</sup> Article 3(6) amending Article 9.

<sup>39</sup> In fact, the 2003 reforms are not due to take effect until 25 June 2005, but analysis here pre-supposes these changes.

<sup>40</sup> *Supra* 17 (third report) , p. 49 where the Commission observes that only three Member States currently consult the public before arriving at a screening decision on Annex II projects. The Commission finds in

these stages is merely encouraged by way of the Commission's guidance notes.<sup>41</sup>

Nonetheless, the previously weak provisions have been significantly strengthened to encourage active public participation.

- iv.) the periodic pooling of information is intended to reveal the defects of parochial solutions, and allows for the elaboration of standards for comparing local achievements. It exposes poor performers to criticism from within and without, making good ones (temporary) models for emulation:

The implementation reports are stated to be part of a process for identifying the strengths, weaknesses, costs and benefits of EIA and implementation practices, and for identifying where improvements could be made and/or where the provisions of the directive or its implementation could be clarified or strengthened.<sup>42</sup> It is telling in this respect that in the United Kingdom there have been disagreements between central government and the devolved 'authorities as to the scope of the information to be submitted. This is said to reflect fears on the part of the relevant central government department that to highlight

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its latest implementation report that consultation in respect of scoping takes place in around half of the Member States, it being legally required in only some cases (p. 53).

<sup>41</sup> See DG Environment website: <http://europa.eu.int/comm/environment/eia/home.htm>

See, for example, the scoping guidance which provides a consultations 'checklist' (p. 23) and emphasises that '[c]onsultations will help to ensure that all the impacts, issues, concerns, alternatives and mitigation which interested parties believe should be considered in the EIA are addressed' (p. 11). Further guidance is given on how and who to consult.

<sup>42</sup> *Supra* n. 17 (third report) , p. 15.

differences in implementation would serve also to highlight weaknesses in its preferred approach.: precisely the point of information pooling and peer review.

The reports seek to do more than identify shortcomings and weaknesses in Member State implementation, and also to highlight examples of good practice. The Commission observes in its most recent report.

This review has produced a great deal of information on the operation of EIA in the Member States of the EU. It has reviewed ‘best practice’ and practice that is less than good. A Member State may have arrangements in place that are at the ‘cutting edge’ of best practice in one respect and in others display only a weak commitment to the EIS processes as a whole.<sup>43</sup>

Self-evidently the reports examine the legal framework for implementation. But they do more. They include also analysis of implementation practices within the Member States, including those which may be considered supererogatory having regard to the legal requirements of the directive. Thus, ‘best practice’ includes practice which is better than that which is legally required, and the reports engage with implementation practices and not merely with legal norms. So, for example, to take up the theme discussed above, the latest report examines mechanisms and measures for facilitating and promoting public participation in EIA, including those which go beyond those legally required.<sup>44</sup>

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<sup>43</sup> Supra n. 17 (third report) , p. 96.

<sup>44</sup> Supra n. 17 (third report), p. 78.

Moving on, there can, more generally, be no doubt that these experimentalist processes of review have generated far-reaching revision and strengthening of assessment obligations. Three of the most important amendments introduced in 1997 have their origins in the Commission's implementation reports.<sup>45</sup> The evolution of the public participation requirement has already been discussed. Also, additional instruments have been deployed in an attempt to steer Member State implementation. Included among these are frequent recommendations for Member States to make more use of existing Commission guidance. A range of detailed guidance notes have been produced on the basis of the findings included in the five-year reports. In the latest report, for example, the Commission notes that 'it envisages preparing *interpretative and practical oriented guidance* with the involvement of experts from the Member States as well as other stake

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<sup>45</sup> See the table at pp. 27-28 of the 2003 report (supra n. 17) which summarises the amendments introduced and locates their origin. This shows that the other main sources for amendments include the case law of the European Court, international conventions, and the introduction of new, related, Community legislation. The three amendments in mind here concern a.) the requirement that all projects subject to EIA require development consent (Article 2(1); b.) the introduction of screening selection criteria in Annex III (See also Article 4(3) requiring that these be taken into account). Screening is defined in the relevant Commission guidance document as that part of the EIA process which determines whether an EIA is required for a particular project; and c.) the introduction of a formalised 'scoping' procedure (Article 5(2)). Scoping is defined in the relevant Commission guidance document as: 'the process of determining the content and extent of the matters which should be covered in the environmental information to be submitted to the competent authority for projects which are subject to EIA'.

holders like NGOs, local and regional authorities and industry', as well as considering what further amendments should be introduced.<sup>46</sup>

Before moving on, three more points merit observation:

*First*, there is an increasing awareness that one function of these experimentalist processes is to consider the scope of environmental assessment. Thus, in the SEA directive, the Commission is explicitly invited to consider the possibility of extending the scope of the Directive to other areas/sectors and to other types of plans and programmes.<sup>47</sup>

*Second*, it is striking that the insights gleaned in the course of review of this instrument have been applied also in articulating new obligations, in new instruments. There has been spill-over from instrument to instrument. This is particularly apparent in the case of the SEA Directive which applies to plans and programmes, rather than to individual projects.<sup>48</sup> This instrument is powerfully imbued with the lessons learned in the course of

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<sup>46</sup> Supra 14, p. 8. For the text of the various guidance documents, see the DG Environment website at: <http://europa.eu.int/comm/environment/eia/eia-support.htm>

<sup>47</sup> Supra n. 14, Article 12(3). This is placed in the context of efforts to further integrate environmental protection requirements in accordance with Article 6 EC. See also, Article 5 of Directive 2003/35/EC on public participation. This provides, again, that the Commission will consider the possibility of extending its scope to cover other (than those currently listed in Annex I) plans and programmes relating to the environment.

<sup>48</sup> Supra n. 14.

repeated review of the earlier EIA Directive. To give just one example:<sup>49</sup> Analysis of alternatives is considered a key element of environmental assessment, perhaps even the most important,<sup>50</sup> because it encapsulates a preventive approach. In the original EIA Directive, consideration of alternatives formed no more than an adjunct to the central but basic body of information to be provided by the developer.<sup>51</sup> ‘The failure on the part of the developers to take account of alternatives where this would be justified’<sup>52</sup> was recognised by the European Commission as a major deficiency in the quality of environmental statement during the first implementation phase. The amending directive was drafted in the light of these concerns, and elevated the status of this category of information to a mandatory requirement.<sup>53</sup> The information to be provided shall include ‘an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects’.<sup>54</sup> Still, however, the onus of considering alternatives remains on the developer, with no requirement on the

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<sup>49</sup> One could also draw here upon the example of public participation, where the 1997 EIA amendments were mirrored almost exactly, except for an additional reference to the public being given an early and effective opportunity to give their opinion on the draft plan or programme (which in turn spilt-over to the 2003 amending directive).

<sup>50</sup> M. Hertz, ‘Parallel Universes: NEPA Lessons for the New Property’ (1993) Col. R. Rev. 1668 at 1679, considers analysis of alternatives to be at ‘the heart of the environmental impact statement’.

<sup>51</sup> This fell in to the subsidiary category of ‘additional information’ to be provided only when the Member State considered it relevant, and only where the developer might reasonably be required to compile the information. See Article 5(1) in conjunction with Annex III, para. 2 of Directive 85/337/EC, supra n. 6.

<sup>52</sup> Report from the Commission on Implementation of Directive 85/337/EEC COM(93) 28,p. 43.

<sup>53</sup> Supra n.,14, Article 5(3).

<sup>54</sup> Supra n. 14, Article 5(3)

part of the authorities to show that alternatives have been considered, and to make this available to the public, such as exists in the case of the consideration of mitigating measures.<sup>55</sup>

In theory, in itself, the development of strategic environmental assessment considerably extends the alternatives which may be considered in a decision making process by allowing a broad range of criteria to be incorporated by the assessment of different options at an earlier stage.<sup>56</sup> Certainly a notable feature of the SEA directive is the potential for enhanced attention to be given to the consideration of alternatives. The Commission was keenly aware – by dint of its reporting activities – of the continuing deficiencies underlying the EIA directive in this regard. Insights from EIA spilled over to SEA, with the result that where an environmental assessment is required, the environmental report must identify, describe and evaluate the likely significant effects on the environment of implementing the plan or programme, and ‘reasonable alternatives’ to it, taking into account the objectives and the geographical scope of the plan or programme.<sup>57</sup> There is also a requirement to describe the ‘zero-option’ or the do-nothing

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<sup>55</sup> Supra n. 14, Article 9(1).

<sup>56</sup> M. Partidario, ‘Strategic Environmental Assessment – Principles and Potential’ in J. Petts (ed.), *Handbook of Environmental Impact Assessment: Vol. 1 Processes, Methods and Potential* (Blackwell, 1999), p. 67.

<sup>57</sup> Article 5(1) to be read in conjunction with Annex I of the SEA Directive, supra n. 12.

alternative.<sup>58</sup> When a plan or programme is adopted, the authority must provide a statement of how the assessment was conducted and the reasons for not adopting the alternatives considered.<sup>59</sup> This suggests that the authority must more fully internalise the ‘alternatives’ requirement, rather than paying lip service to it.

*Third*, there is some evidence of cross-level experimentation. Within the European Commission, environmental assessment is being expanded, so that a form of policy appraisal now operates to review the internal formulation of European-level legislative and policy proposals, taking into account social, economic and environmental factors.<sup>60</sup> This builds upon the idea of environmental assessment, but extends it to encompass a broader sustainability assessment. This involves the amalgamation of existing sectoral assessment procedures into a single, standardised, procedure. Crucially, for the purposes of this paper, the emergence of European level sustainability (or impact) assessment offers an example of a feedback loop in law and policy making. The Commission’s current development of this assessment regime for its *internal* procedures, is viewed as providing a testing ground for the future application of a similar system in the Member States. The Commission has recognised that it would not be tenable to expect Member States to endorse an expanded conception of assessment, except in so far as this already applies to its own procedures. In particular, DG Environment foresees that the

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<sup>58</sup> Annex I(b) states that information shall be provided by the developer on, inter alia, ‘the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme’.

<sup>59</sup> *Supra* n. 14, Article 9.

<sup>60</sup> See COM(2002) 272 final.

experience of applying a broad-ranging impact assessment procedure to its internal activities means that ‘we will have the practical experience of operating the Commission’s own integrated assessment procedures and will thus also have the moral high ground’ when it comes to promulgating a similar model for Member States.<sup>61</sup> Thus, we see the Commission embracing and building upon the concept of environmental assessment as originally applied to the Member States. In turn, we see it preparing for a fundamental re-drawing of the concept as it currently applies to the Member States; on the basis of experience gained in the conceptualization and application of the concept at the European level.

## *2. Implementing the Water Framework Directive: Looking Beneath the Surface*

The second case study has something in common with the first. It too may be conceived in experimentalist vein. Here again we have a directive (the Water Framework Directive - WFD) which leaves considerable autonomy to the Member States.<sup>62</sup> Like the EIA Directive, this contains a plethora of information pooling and reporting requirements. But there is more. Though not self-evident on the basis of the text of the Directive, there has emerged a WFD governance forum, which is committed to the pooling of information

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<sup>61</sup> See J. Holder, *supra* n. 6, p. 166.

<sup>62</sup> Directive 2000/60/EC establishing a framework for Community action in the field of water policy OJ 2000 L327/1. This was adopted in 2000 after many years of embattled negotiation.

and experience, and to the elaboration of standards for comparing local achievements. It represents a radical and, in some ways surprising, instance of experimentalism in the EU.

The WFD provides a legislative framework for the protection and improvement of water quality in the EU, and for sustainable water use. It applies to all kinds of water resources such as rivers, lakes, ground water, estuaries and coastal waters. The legislative framework is complex, providing for a range of procedural and substantive obligations, and a wide array of exceptions. The details need not detain us here. Suffice it to say, for the purpose of this paper, that the Directive aims at the integrated river basin management of waters, with the ultimate goal that Member States achieve ‘good’ surface water and groundwater status by the end of 2015.<sup>63</sup> For groundwater, ‘good’ is defined in terms of its quantitative and chemical status. For surface water, chemical status combines with ecological status. The concept of ‘good’ remains open-ended. This is notably the case for groundwater, and as regards the ecological status of surface water.

It has been said that the ‘incorporation of ecological considerations into the meaning of good status is, perhaps, the most progressive aspect of the strategy’.<sup>64</sup> Yet the concept of good ecological status is barely defined. Annex V identifies the quality elements which

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<sup>63</sup> Ibid, Article 4(1)(1) for surface water, and Article 4(1)(b) for groundwater. The obligation is somewhat qualified in the case of artificial or heavily modified bodies of surface water (See Article 4(1)(a)(iii)).

<sup>64</sup> W. Howarth, ‘Environmental Quality Standards and Ecological Quality Standards’ (manuscript on file with authors)

will make up an assessment.<sup>65</sup> It also provides, at a very general level, a normative definition of ecological status in each of the status classes (for example, good and moderate). These are supplemented by definitions of the conditions of the specific quality elements in each status class, for each water category. Implementation will require the establishment of methods and tools for ecological assessment, the establishment of parameters (metrics) for assessment, and of values (and value ranges within a given class). As William Howarth puts it:

The exercise of applying Annex V of the Directive in practice is of considerable technical complexity, given the range of water categories that are involved and the diverse range of parameters that need to be taken into account in determining the status of any particular water. This is clearly an undertaking demanding a high level of relevant scientific expertise and common understanding across the Member States.<sup>66</sup>

It is immediately apparent in the light of the above that the implementation phase is all important. The Directive constructs a number of implementation ‘routes’: legislative (requiring the adoption of European level ‘daughter directives’);<sup>67</sup> executive (implying

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<sup>65</sup> These fall into three groups of elements: biological, hydromorphological and chemical and physico supporting elements.

<sup>66</sup> *Supra* n. 64, p. 20.

<sup>67</sup> See, for example, *supra* n. 62, Article 16 which provides for the adoption of legislation concerning pollutants which present a significant risk, and Article 17 which provides for the adoption of legislation to

the empowerment of the European Commission within the framework of ‘comitology’ structures);<sup>68</sup> and Member State (conceding Member State autonomy in implementation).<sup>69</sup>

According to surface appearance, these three routes are emphatically different, both in terms of their decision-making mechanics, and their underlying constitutional premises. Put crudely, by way of illustration, the legislative route would appear to be premised upon centralization, and the Member State route upon barely mitigated decentralization. In the former, it is for the Community institutions to act, in accordance with the classic community method. In the latter, it is for the Member States to act, in accordance with the precepts of their domestic political and legal order.

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prevent and control groundwater. See Decision 2055/2001 establishing the list of priority substances in the field of water policy OJ 2001 L331/1.

<sup>68</sup> See supra n. 62, Article 20 which provides for the technical adaptation of the directive, and empowers the Commission to adopt guidelines on the implementation of Annexes II and V. The comitology system allows the Commission to exercise delegated powers, except in so far as its proposed actions do not accord with the opinion of a European level committee, comprising representatives of the Member States. Where the committee view is out of synch with that of the Commission, the matter under consideration will pass from the Commission to the Council; that is to say from the executive back to (one part of) the legislative branch (the European Parliament being the other part, which is all but excluded). See Council Decision 1999/468/EC, and on the controversy over the European Parliament’s (lack of) involvement see:

<sup>69</sup> This is the default position. The Member States are bound to implement the WFD into national law by 22 December 2001, and to achieve the objectives within the timeframes specified.

Yet, it is the argument of this paper that, in the case of the WFD, surface appearance is misleading in the extreme. In particular, the concept of Member State autonomy in implementation does little to capture the practice of governance in this sphere. The formal picture of Member State autonomy belies a complex reality which is characterised by multi-level, experimentalist, governance. This rests upon informal structures and recourse to soft law. As will be seen below, it is the argument also that there is greater convergence, and fluidity, as between the different implementation routes than the text of the Directive might imply. Critical to these arguments is an understanding of the practical framework for Member State implementation.

In practice, Member State implementation takes shape against the backdrop of the so-called *Common Implementation Strategy* (CIS).<sup>70</sup> Nowhere mentioned in the directive,

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<sup>70</sup> ‘Common Implementation Strategy for the Water Framework Directive: Strategic Document’ (Strategy Document). See also the follow-up document: ‘Common Implementation Strategy for the Water Framework Directive: Carrying Forward the Common Implementation Strategy for the Water Framework Directive – Progress and Work Programmes for 2003 and 2004’ (1<sup>st</sup> review) and the more recent: ‘Moving to the Next State in Common Implementation Strategy: Progress and Work Programme for 2005 and 2006’ (as agreed by the Water Directors on 2/3 December 2004) (2<sup>nd</sup> review). For these and other related information go to: <http://europa.eu.int/comm/environment/water/water-framework/implementation.html> or to the CIRCA site:

[http://forum.europa.eu.int/Public/irc/env/wfd/library?l=/framework\\_directive&vm=detailed&sb=Title](http://forum.europa.eu.int/Public/irc/env/wfd/library?l=/framework_directive&vm=detailed&sb=Title) See the very useful ‘resource document’ issued by the European Environmental Bureau in 2004. (‘‘Tips and Tricks’ for Water Framework Directive Implementation’ (2004) at:

[http://www.eeb.org/activities/water/200403\\_EEB\\_WWF\\_Tips&Tricks.pdf](http://www.eeb.org/activities/water/200403_EEB_WWF_Tips&Tricks.pdf) A second useful report: ‘EU

this provides an informal forum for Member State co-operation in implementation.<sup>71</sup> The CIS provides for ‘open co-operation’ between the Member States, and between the Commission and the Member States, in the implementation of the WFD. It reflects a ‘new partnership working method’, involving scientific as well as political actors, creating networks of specialists from different Member States and different levels of governance.<sup>72</sup> Against the backdrop of a dauntingly ambitious and complex framework directive, CIS provides for collaboration in implementation and in environmental problem solving.

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Water Policy: Making the Water Framework Directive Work’ (2005) may be found at:

<http://www.eeb.org/activities/water/making-WFD-work-February05.pdf>

<sup>71</sup> The WFD Common Implementation Strategy represents just one example of informal Member State co-operation in implementation in the environmental sphere. A similar pattern emerges as a result of the wide-ranging activities of IMPEL – the European Union Network for the Implementation of Environmental Law. See: <http://europa.eu.int/comm/environment/impel/>

This is an informal network of European regulators concerned with the implementation and enforcement of environmental legislation. Note also that the CIS structures are being used even in respect of areas falling outside of the WFD. Thus, an initiative on flood prediction and prevention has been launched under its auspices, headed by the Netherlands and France, and charged with preparing ‘best practice’ documents, drawing on experiences in the Member States.

<sup>72</sup> Supra n. 70 (strategy document) , p. 2. It remains to be seen to what extent this new partnership approach will spillover to the area of compliance, with the Commission coming to adopt a more deliberative, consensual, approach to enforcement. Further research is needed on this key issue of compliance in this setting.

With CIS, we find a dramatic and unexpected expression of new governance, nestling beneath the surface of Member State autonomy or sovereignty in implementation. The collaborative governance which this spawns is strongly imbued with the characteristics of experimentalism and resembles, in many important respects, the archetypal experimentalist tool, the Open Method of Coordination.<sup>73</sup> Like the OMC, it is committed to information sharing and the benchmarking of best practice. The Commission also deploys a ‘scoreboard’ approach, charting progress on implementation in respect of the WFD.<sup>74</sup>

The CIS was agreed by the Commission and the Member States (and Norway) in May 2001. It was reviewed and adjusted in 2003, and again in 2005.<sup>75</sup> This CIS was conceived by the EU Water Directors in appreciation of the substantial and shared challenges confronting Member States in the implementation of the WFD. The Water Directors are Member State representatives, with overall responsibility for water policy. In most cases, a Water Director will be the head of a Member State’s water division,

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<sup>73</sup> For an up-to-date account of the vast literature on this subject see the OMC forum at:

<http://eucenter.wisc.edu/OMC/> See, in particular the recent contributions by Jonathon Zeitlin for an excellent overview (in particular ‘Introduction: The Open Method of Coordination in Question’ and ‘The Open Method of Coordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy’). Like certain of the OMCs, WFD also uses a ‘scoreboard’ to assess and publicise Member State progress on transposition and reporting. See: <http://europa.eu.int/comm/environment/water/water-framework/transposition.html>

<sup>74</sup> See: <http://europa.eu.int/comm/environment/water/water-framework/scoreboard.html>

<sup>75</sup> Supra n. 70.

situated within the ministry for environment. Informal meetings of the Water Directors and the Commission are a regular, biannual, event, and are hosted by the Member State holding the Presidency of the European Council. They are co-chaired by the Commission and the Council President.

CIS proceeds on the basis of three working levels. Working Groups are charged with the preparation of technical, non-binding, guidance documents, and with ensuring necessary consultation at a technical level. The Strategic Coordination Group is chaired by the Commission and comprises participants from each Member State. It is charged with discussing the activities of the working groups, and with seeking to ensure coordination as between their different activities. It also prepares the necessary documentation for the Water Directors. The Water Directors steer and drive the process.

There is some vagueness on questions of participation.<sup>76</sup> Emphasis is laid upon the importance of ‘active involvement’ on the part of ‘stakeholders, NGOs and civil society’; it is stated that the strategy should ‘be based on the principles of openness and

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<sup>76</sup> See the CIS public participation guidance document. Again, all relevant documents may be accessed at CIRCA:

[http://forum.europa.eu.int/Public/irc/env/wfd/library?!=/framework\\_directive&vm=detailed&sb=Title](http://forum.europa.eu.int/Public/irc/env/wfd/library?!=/framework_directive&vm=detailed&sb=Title)

See also the criticisms of the EEB regarding the insufficiency of involvement of environmental NGOs in the Pilot River Basin integrated testing exercise (supra n. 70, pp. 59-60). In the United Kingdom, participation also raises the question of the involvement of representatives from the devolved authorities. Sharon Turner, in her comments on a draft, observes that ‘Scotland has been very proactive in insisting it has appropriate representation and Northern Ireland is becoming more assertive’.

transparency encouraging creative participation of interested parties'.<sup>77</sup> The European Environmental Bureau (EEB) and WWF 'welcome the commitment of the European Commission, the Member States and Norway to transparency and public participation shown by the introduction of the Common Implementation Strategy for the Water Framework Directive', and note that their participation 'has been positive and very informative'.<sup>78</sup> 'For the first time stakeholders' and environmental NGOs' opinions and positions were sought to gather a broad range of views and ideas on implementing EU water laws.'<sup>79</sup> Involvement is to be decided on a case by case basis, depending on the scope and topic of the relevant process or working group. 'By identifying the kind of involvement needed for each situation..., the Commission and the Member States intend to ensure both the effective participation of and contribution from the interested parties and to enhance their understanding of the different elements related to the process. The basic idea is to promote an open and clear exchange of views and concerns between all the parties directly responsible for the implementation of the Water Framework Directive and those who will be interested in, or affected by, it'.<sup>80</sup> As regards the strategic coordination group, it provided that alongside the Commission Chair, and Member State participants, 'NGO's and stakeholders may be invited as observers and/or consulted'.<sup>81</sup> As regards the working groups, '[p]articipants from stakeholders and NGO's should be

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<sup>77</sup> Supra n.70 (strategy document), p. 14.

<sup>78</sup> Supra n. 70 (EEB).

<sup>79</sup> Supra n. 70 (EEB), p. 64.

<sup>80</sup> Supra n. 70 (strategy document), pp. 14-15.

<sup>81</sup> Supra n. 70 (strategy document), p. 12.

invited when they can contribute to the work with a specific expertise'.<sup>82</sup> As regards the working groups, all Member States (and other participating countries), stakeholders and NGOs may nominate experts to the groups.

To give just one example, the working group on ecological status comprises more than 70 participants (compared to an average size of 30-40). The vast majority are drawn from relevant Member State ministries and agencies.<sup>83</sup> This includes some 'regional' representation.<sup>84</sup> A small number of additional participants are drawn from a variety of European<sup>85</sup> and international organisations,<sup>86</sup> industry,<sup>87</sup> and civil society.<sup>88</sup>

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<sup>82</sup> Supra n. 70 (strategy document), p. 13.

<sup>83</sup> Working Group 2A, 'Overall Approach to the Classification of Ecological Status and Ecological Potential'. The final version was agreed by the Water Directors on 24/25 November 2003, Annex II.

<sup>84</sup> For example, the Scottish Environmental Protection Agency (SEPA) fields two representatives, and the Agence de l'Eau Rhône-Méditerranée-Corse a single representative. The term 'regional' is used as a convenient shorthand for the sub-state level, and does not imply any judgment on the credibility of any people's claim to nationhood.

<sup>85</sup> EEA (European Environmental Agency), CEN (the European Centre for Harmonisation), JRC (the Joint Research Council).

<sup>86</sup> ICPDR (International Commission for the Protection of the Danube River), ETC/WTR (the European Topic Centre on Water, an international consortium brought together to assist the EEA in providing environmental information to the Member States, and to develop an environmental information network (EIONET: European Environmental Information and Observation Network)).

<sup>87</sup> ECPA (European Crop Protection Industry), EUREAU (Union of Water Supply Associations)

<sup>88</sup> The European Environmental Bureau fields two participants, and the STAR project (a transnational research project under the auspices of the 5<sup>th</sup> framework programme) fields one.

CIS comprises four key activities or modules: information sharing; the development of guidance on technical issues; information and data management; and application, testing and validation.

CIS leads to the production of guidance documents.<sup>89</sup> These documents are to be ‘developed in a pragmatic way based on existing practices in Member States’. They are based on best available knowledge at the time, but conceived as ‘living documents’, to be subject to on-going review and updating.<sup>90</sup> They shall be ‘practical, operational and policy and implementation oriented’ and ‘practical testing [in pilot river basins] should be part of the development of the guidance document’.<sup>91</sup> To take just one, singularly important example, the WG on Ecological Status (Ecostat) has issued guidance which elaborates indicators and values for measuring water status, and for defining the nebulous concept of ‘good’ water status.<sup>92</sup> This confirms:

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<sup>89</sup> For details of the guidance documents adopted see the CIRCA Information Exchange Platform at: <http://europa.eu.int/comm/environment/water/water-framework/information.html> See also the EEB report at supra n. 70, where the EEB offers advice to environmental NGOs as to how they should use the CIS guidance documents. They ‘must challenge well-trodden paths and suggest alternatives’; ‘improve the guidance documents by critically participating in the Pilot River Basin testing exercise’ and ‘[h]ighlight issues that have been overlooked...’; and ‘request that there is public participation as early as possible in the WFD implementation process’ (p. 12).

<sup>90</sup> Supra n.70 (strategy document), p. 14

<sup>91</sup> Supra n. 70 (strategy document), p. 5.

<sup>92</sup> Supra n. 83.

Much of the guidance document is based on Member States' existing national experiences of assessing and classifying surface waters or on the interim outcomes of some of the development work currently underway. As implementation progresses and Member States begin to monitor and assess the ecological status of water bodies, the richness of Member States' practical experiences with ecological classification in relation to surface water categories will increase. New ways of dealing with some of the technical challenges, such as controlling the risk of misclassification, may be identified. The sharing of this growing body of experience among Member States will benefit all and should be encouraged.<sup>93</sup>

This working group is also responsible for coordinating an intercalibration exercise<sup>94</sup> and for reporting the results. This is intended to ensure that the class boundaries (for good ecological status) are consistent with the normative definitions laid down in the directive, and are comparable across the Member States.<sup>95</sup>

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<sup>93</sup> Ibid, forward.

<sup>94</sup> Intercalibration is one of the most politically sensitive aspect of the WFD/CIS process. The CIS dimension is seen as paving the way for a formal Commission decision pursuant to Article 21 comitology procedures. Intercalibration is concerned with ensuring the comparability of Member State assessments as regards the boundaries between ecological quality classes. As the EEB puts it: the 18 month intercalibration exercise is intended to 'establish a common understanding on status quality assessment and harmonized class boundaries that is consistent with the WFD normative definitions' (Supra n. 70, p. 51).

<sup>95</sup> See especially: 'Guidance on the Intercalibration Process' available at CIRCA.

The EEB observes that ‘CIS guidance documents can be effective in helping to achieve the WFD objectives’, but that ‘[n]evertheless, in a few cases the guidance documents deviate from “best practices” and potentially undermine WFD requirements’.<sup>96</sup> This is attributed to the consensual nature of CIS decision-making, and to the danger that this generates a lowest common denominator type approach. For this reason the EEB urges environmental NGOs and other stakeholders to engage critically but constructively in the formulation and re-formulation of guidance documents.

CIS is an informal process, leading to results which are non-binding on the Member States. Nonetheless, it operates within a framework intended to enhance Member State accountability in implementation. Pivotal in this respect is the elaborate reporting regime which the WFD constructs. Member States are required, on a regular basis, to submit a variety of far-reaching reports to the Commission.<sup>97</sup> These are to include copies of river basin management plans, together with updates, and interim progress reports with respect to measures planned. Member States are to include also summary reports of their programmes for the monitoring of water status,<sup>98</sup> thereby enabling the Commission to monitor Member State arrangements for monitoring. The Commission, in turn, is required to follow-up with the publication of its own reports. These are intended to review progress in implementation. In the case of the Commission’s regular implementation report, it shall also review the status of surface water and ground water in

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<sup>96</sup> Supra n. 70, p. 64.

<sup>97</sup> See generally supra n. 62, Article 15.

<sup>98</sup> See generally supra n. 62, Article 8 and Annex V.

the EU, and a survey of Member State river basin management plans, including suggestions for the improvement of future plans.<sup>99</sup>

Given the informal nature of the CIS, it is unsurprising that there is nothing in the WFD which makes it imperative for Member States to organize their reporting activities in the light of CIS guidance. There is nothing which makes it obligatory for Member States to measure and report performance according to CIS indicators and values. In practice, however, two features of the reporting regime create space for reporting, and review of performance, to proceed on the basis of CIS derived benchmarks. First, in practice, Member State implementation reports of this kind are issued by way of response to a Commission questionnaire. Thus, the Commission is free to draft its questions in such a way to elicit information framed in these terms. Second, as noted, it is incumbent upon the Commission to evaluate progress in implementation, and to incorporate its assessment, together with proposals for future improvements, in a report to be submitted to the European Parliament and the Council. Here again, there is ample scope for the Commission to measure performance relative to CIS benchmarks. As in the OMC, review by reference to shared targets and indicators, will operate to enhance transparency by facilitating cross-comparison of performance, and comparison relative to evolving best practice.

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<sup>99</sup> See generally, *supra* n 62, Article 18. The first implementation report is to be submitted by the Commission in 2012 and subsequent reports on a six year cycle thereafter.

It is notable that CIS institutional arrangements are themselves regarded as provisional, and as subject to revision in the light of experience. The implementation strategy proceeds in phases. The first phase came to an end in 2002 and was followed by a review of progress and the elaboration of a work programme for the next phase. This review led to a major re-drawing of the organizational frame for implementation. One central concern in the re-organization was the need to induce better integration as between the different implementation activities. This led to a revised institutional structure, designed to streamline the work, and to address cross-cutting issues more effectively.<sup>100</sup> A second review was conducted in December 2004, setting out a work programme for the years 2005/06.<sup>101</sup> This includes a detailed overview and analysis of the make-up and activities of the CIS working groups. In looking back at earlier reforms, it concludes:

...the results of the CIS WP 2003/2004 are impressive and useful. In addition, the planning and management of the activities under the work programme improved considerably. Building on these positive experiences, the CIS process should continue to further ameliorate its operation in order to continue to deliver results of high quality and value for the WFD implementation during the work period 2005/2006.<sup>102</sup>

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<sup>100</sup> Whereas previously there existed eight working groups and three Expert Advisory Fora, the activities of two of the three advisory fora have been shifted to working groups, and the number of working groups reduced from eight to four. From eleven groups in total, there are now five. The integration theme was also concerned with inter-linkages between the WFD and other areas of EU environmental policy.

<sup>101</sup> *Supra* n. 70 (2<sup>nd</sup> review).

<sup>102</sup> *Ibid.*, p. 6.

Significant also from a re-organization perspective, is the emphasis placed upon learning from experience. CIS has taken shape not only on the basis of prior planning, but also in the light of the pragmatic demands of problem-solving. Thus, for example, ‘[c]ertain pragmatic working experiences and procedures have been established in 2001/2002 which were necessary so that the Guidance Documents could be prepared. The former working groups have thereby established a number of additional groups such as steering groups, drafting groups and expert groups’. These organic working procedures have received formal endorsement in the course of review, and will be continued as best practice during the second phase. However, the endorsement is not uncritical. There is recognition of a danger that, with the new concentrated structure, these additional groups will emerge as de facto working groups, leading once more to an increase in the number of such groups, and to related co-ordination problems. Efforts are therefore made to clarify the nature, function and working methods of ‘additional groups’, and to specify more closely the relationship between these and the formal working groups.<sup>103</sup> The strategic coordination group is charged with monitoring the establishment of such groups,

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<sup>103</sup> See in particular, supra n. 70 (1<sup>st</sup> review), Annex A. This provides for the following ad-hoc structures: steering teams (the team of WG leaders is sometimes joined by other members who would like to be more actively involved in the preparation of the meetings and the steering of the work); drafting teams (a number of active members a WG invited to prepare a specific document for a meeting, in order to assist the team of WG leaders); expert networks or expert workshops (external experts gathered on an hoc basis if and when the necessary in-depth knowledge on a specific subject is not available in the WG. The WG defines the task for the experts and the members of the WG are invited to nominate the appropriate expert).

and with ensuring that a balance between the need to create small efficient units, and the risk of creating a fourth working level, is maintained.<sup>104</sup>

There is then evidence of an interesting dialectic as between ‘bottom’ and ‘top’ in the evolution of the strategy. Unanticipated solutions have emerged to meet practical need, and have received formal endorsement at a later stage. At the same time, with formalisation has come critical engagement, and a concerted attempt to anticipate and offset the kinds of difficulties to which these practical solutions might give rise.

This reflexivity as regards institutional form has generated a high degree of self-consciousness as regards the division of authority as between the three working levels (the working groups, the strategic coordination group, and the meeting of the water directors). The process of review of working methods led not only to a consolidation of existing lines of authority, but also to attempts to re-enforce the accountability of lower level actors to those at a higher level, and of the technical branch to the political branch. Thus, the new working groups are to report regularly on their progress to the strategic coordination group.<sup>105</sup> Whereas the strategic coordination group is to be empowered – within the framework of ongoing review of the work programme – ‘to decide upon refinements and changes in the mandates, timetables and priorities’, any such changes must ‘recognise the overall agreed priorities in the work programme’. ‘New working

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<sup>104</sup> Supra n.70 (1<sup>st</sup> review), p. 9.

<sup>105</sup> Where relevant, the chairs of the working groups participate in the meetings of the strategic coordination group.

areas, substantial changes to the work programme and the establishment of new working groups will need to be decided by the Water Directors'.<sup>106</sup>

This self-consciousness as regards questions of accountability is reflected also in the new criteria for the establishment of supporting groups.<sup>107</sup> These groups are to operate on the basis of a precise mandate or terms of reference drawn up by the umbrella working group.<sup>108</sup> They are to work with the highest possible level of transparency, in order to enable the working group to follow and to contribute to their activities. Considerations of effectiveness and accountability underpin the design and reform of CIS.

#### *Law and New Approaches to Governance*

We have presented here two cases studies in 'new' environmental governance. It is suggested that these studies attest to the emergence of a unique form of federalism in the EU. This federalism, by contrast to the classic community method, is experimentalist and multi-level, and is seen to emerge regardless of whether it is contemplated by the legislative frame. These two examples, like the other examples discussed in this volume, raise profound and difficult questions for law and for constitutionalism. This paper will conclude with some tentative comments on the legal dimension of the new environmental governance discussed above.

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<sup>106</sup> See generally supra n. 70 (1<sup>st</sup> review), pp. 11-12.

<sup>107</sup> Supra n. 70 (1<sup>st</sup> review), Annex 1.

<sup>108</sup> See also supra n. 70 (2<sup>nd</sup> review) pp. 17, setting out criteria for ad-hoc supporting structures.

In many respects environmental assessment offers a classic illustration of the changing nature and function of law in new governance. As Supiot puts it, ‘...the law is relinquishing the job of establishing substantive rules, but is instead concentrating on affirming principles and laying down procedures’.<sup>109</sup> Environmental assessment relies upon procedural techniques to bring about a change in behaviour, such that the underlying principles (especially that of sustainable development) may be better respected. However, in the European example, this does not exhaust the role of law. Additionally, law provides a framework for the evaluation and evolution of the procedures and principles which underpin environmental assessment. Law provides a framework for the scrutiny of existing practices, and for their continuous improvement.

We have presented the story of the evolution of environmental assessment as an experimentalist one. Revision and spread of environmental assessment are seen to rest upon an iterative process of information pooling and comparison of best practice. There has emerged a sustained and organized system for on-going law reform which is embedded in experience, and positively harnesses the pluralism of the EU in the name of learning on the basis of diverse experience. Here, the multiplicity of sites and levels of European governance emerge as opportunity not threat. The processes and mechanisms for revision imply the construction of a relationship between state and federal level which is collaborative, not hierarchical, and which is premised upon the positive value of

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<sup>109</sup> A. Supiot, ‘Governing Work and Welfare in the Global Economy’ in J. Zeitlin and D.M. Trubek (eds.), *Governing Work and Welfare in the New Economy*, p. 388.

diversity, experimentation and learning. The institutional arrangements in question depend upon, rather than resist, political fragmentation. Member States (or sub-state units) are not passive recipients of federal ordinances, but active co-equal participants in the iterative process of reform.

The core mechanisms under consideration in this example – namely, the information pooling and reporting requirements – provide a framework for experimentalist revision. This framework is constituted by law. It is set out in ordinary legislation. In the environmental sphere, the framework has been consolidated through the enactment of legislation ‘standardizing’ and ‘rationalizing’ the information pooling and reporting requirements.<sup>110</sup> Pervasive in environmental law, these processes are also evident in many other policy spheres.<sup>111</sup> It is not an exaggeration to state that the underlying approach to governance has emerged as a key characteristic – or hallmark – of European law-making and of a distinctively European approach to federalism. Still, the processes have failed even to ripple the constitutional surface of the EU. Embedded in, and regulated by, ‘ordinary’ legislation, these processes are nowhere acknowledged as constitutionally salient. They do not feature in the EC treaties, nor in the as (as yet unratified) European Constitution. They merit not a mention in treatises examining the

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<sup>110</sup> Council Directive 91/692/EEC OJ 1991 L377/48. The Commission questionnaires are drawn up on the basis of an established committee procedure, and are published in the form of Commission decision. For two recent examples see, Commission Decision 2004/461/EC laying down a questionnaire to be used for annual reporting on ambient air quality assessment under Council Directive 96/62/EC.

<sup>111</sup> By way of example, one can find equivalent processes in the areas of sex discrimination, and consumer protection.

constitutional law of the EU, remaining the little noticed preserve of the specialist substantive lawyer.

In explaining this lack of constitutional visibility, it may be that the concept of ‘hybridity’ will help. In this example, as in many of the others discussed throughout this volume, new governance comes together with old. The new supplements but does not supplant the old. Thus, these novel processes for experimentalist revision take shape in a framework which is all too familiar. This familiar framework rests upon recourse to conventional, binding, instruments (directives<sup>112</sup>) and conventional legislative procedures (in this case, the co-decision procedure<sup>113</sup>). This familiar frame both diverts attention from the novel processes under discussion, and facilitates their smooth accommodation. The processes do not provoke any formal transformation in constitutional law, but nor do they meet resistance in constitutional law terms. On the surface, little has changed. Beneath the surface, the practice of governance is much altered.

It is this kind of example which may be thought to have spawned an approach to constitutionalism in the EU which has been characterized as ‘constitutional

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<sup>112</sup> As suggested in an earlier piece, ‘new’ and ‘old’ in terms of governance are situated on a spectrum. Framework directives exhibit features of both old and new and have been previously characterized as ‘new, old, governance’.

<sup>113</sup> See Article 251 EC for a description of this. The Commission enjoys the right of legislative initiative here, with the Council and the European Parliament being co-equal partners in the adoption of legislation.

processualism’ or ‘constitutional materialism’.<sup>114</sup> According to this view, ‘constitutional discourse and practice within the European Union should not be seen exclusively or even mainly as a matter of Treaties and self-styled constitutional documents’. On the contrary, these grand constitutional moments are just a part of a broader constitutional canvas which includes governance processes which are not acknowledged or regulated by the treaties, but which ‘are viewed by dint of the pervasiveness of their practice and/or their transformative effect upon the general structural and cultural template of European regulation, as vital constitutional processes which are in danger of being obscured by the focus on surface activity’.<sup>115</sup> Of course the concept of the constitutional is much contested, and there is no self-evident threshold according to which constitutional import may be assessed. Ultimately, as Walker concedes, the construction of the concept implicates values and preferences, and constitutes a battle-ground for the advancement and/or denigration of new forms of governance.

With the Water Framework Directive (and CIS), the picture with regard to law is yet more complex and unsettled. Here we find elaborate collaborative processes, spanning sites and levels of governance. By contrast to the previous example, these processes appear to be neither constituted nor regulated by any recognizably *legal* act. An exhaustive reading of the treaties and of relevant legislation would give no hint of the existence or operation of CIS. Bearing in mind the formal sources of EU law, these

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<sup>114</sup> N. Walker, ‘After the Constitutional Moment’ Federal Trust Paper 32/93 at:

<http://www.fedtrust.co.uk/main.asp?pageid=267&mpageid=67&subid=277&groupid=6>

<sup>115</sup> Ibid, p. 6.

processes seem to operate entirely beneath the legal radar, invisible to ‘ordinary’ as well as to constitutional law. This lack of visibility may be attributed, at least in part, to the informal and voluntary nature of multi-level collaboration in CIS, and to the ‘softness’ of the instruments which ensue.

To say in the water domain that new governance is invisible to law is to highlight just one aspect of the relationship between law and new governance. It is not simply that law neither constitutes nor captures the practice of governance. It is also that the premises of governance are, in many respects, at odds with the premises of law. There is a palpable tension – or a gap<sup>116</sup> - between law and the practice of governance. Whereas the former is based upon a settled vertical and horizontal division of competences, the latter is experimentalist, collaborative, fluid and multi-level.

According to the legal (WFD legislative) framework, implementation powers are parcelled out between distinct authorities, operating at different levels of governance. Most notably, the powers are divided between the Member States on the one hand, and the European Union institutions on the other. According to this framework, this division of power represents a zero sum game. The European institutions are deprived of those powers which the Member States enjoy. Conversely, powers are vested at the European level at the direct expense of the Member States. The legal picture is characterized by a

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<sup>116</sup> The existence of such a gap has been previously noted. See Scott and Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the EU’ (2002) 8 ELJ 1, and G. de Búrca, ‘The Constitutional Challenge of New Governance in the EU’ (2003) 28 ELRev. 814.

division of clearly circumscribed blocks of implementation authority to distinct levels of governance, operating on the basis of divergent institutional configurations and decision making procedures.

In practice, however, we find that there is considerable convergence as between the EU (legislative) and Member State implementation routes. There is also considerable fluidity between them. Surface appearances conceal a vastly more interesting, if vastly more complex, reality.

As seen, CIS exemplifies a collaborative, participatory, partnership-based approach to environmental governance. Accordingly, Member State implementation takes shape in a multi-level setting which is strongly experimentalist in tone. European-level legislative implementation appears, by contrast, to rest upon the ‘classic community method’, by virtue of its emphasis upon the adoption by the Community institutions of legally binding ‘daughter directives’. In practice, however, the Commission is committed to developing its legislative proposals in ‘a spirit of open consultation’. To this end, and in ‘in parallel with the activities under the Common [Implementation] Strategy’, it has established multi-stakeholder consultative fora, comprising Member State and Commission representatives, NGOs, industrial associations and outside experts.<sup>117</sup> These bodies – Expert Advisory Fora (EAFs) – strongly resemble CIS working groups in form, and have

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<sup>117</sup> Supra n. 70 (strategy document) pp. 6-9.

come to constitute the key bodies preparing the way for legislative implementation.<sup>118</sup> Institutionally, there are striking similarities.

Likewise, the line between the two routes is not, in practice, emphatically drawn. CIS review led to the transformation of two of the EAFs (groundwater and reporting) into CIS working groups; implying a *de facto* transfer from the legislative (European level) to the Member State branch.<sup>119</sup> One critical factor motivating this change was a recognition of the need to integrate better the activities of the Working Groups and the EAFs. This had proved difficult in practice, with the ‘cross-implications between policy development

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<sup>118</sup> Three such bodies were established during the first phase (2001/02): EAF on Priority Substances and Pollution Control, EAF on Groundwater, and the EAF on Reporting. To take the activities of the EAF Groundwater as an example: The Commission established this to assist in the preparation of a proposal for a groundwater daughter directive pursuant to Article 17 WFD. At a first meeting the EAF discussed a position paper prepared by the Commission, and provided guidance on the lines to be followed when developing a legislative proposal on groundwater. An extended issue paper was discussed at a second meeting, and the first elements of a legislative proposal presented at a third. At a fourth meeting, on 25 June 2002, the main draft outline of a proposal for a groundwater directive was presented. ‘Overall, the proposal received a positive response from member States’. Thus, indisputably, preparation of this proposal proceeded on the basis of open co-operation between the Commission and the Member States, in the context of a multi-national, multi-actor, implementation network.

<sup>119</sup> Of course, there is nothing to prevent the Commission drawing up a formal proposal for a daughter directive, in accordance with the terms of the WFD. But even in areas where further implementing legislation is not explicitly envisaged by the WFD, the Commission could anyway put a formal proposal, simply relying upon a legal basis in the EC Treaty rather than a secondary basis in WFD.

[legislation] and ongoing implementation [Member State] ...only discussed in the last stages of Guidance development'.<sup>120</sup>

The failure of law to perceive CIS would seem to cast doubt upon law's capacity to steer and constrain its operation. CIS seems to take shape in a legal black hole. Yet, it would be wrong to conclude that it operates on a basis which is normatively fickle and unconstrained. On the contrary, it operates on the basis of institutional arrangements and working procedures which are routinized. In reality, CIS spawns (provisionally) settled practices, and (provisionally) settled normative expectations. Examples cited would include the establishment and role of supporting groups, and the manner in which the respective authority of the three working levels has been defined and circumscribed.

The explicit regularization of form and procedure, and the self-conscious settling of normative expectations around these, is justified in the language of accountable as well as effective governance. These normative expectations are not entrenched in any recognizably legal form, but they are (provisionally) entrenched in the reflexive practice of governance.

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<sup>120</sup> Supra n. 70 (1<sup>st</sup> review), p. 6. There is fluidity too as between the executive (comitology) and Member State route. Thus, the recently published CIS guidance on reporting (30 November 2004) is self-consciously presented as a first step in developing a comprehensive guidance document on reporting, to be adopted in accordance with the WFD Article 21 committee procedure. This reflects the broader CIS perspective that guidance documents produced under its auspices may form the basis for guidelines adopted under the Article 21 comitology procedure (Supra n. 70 strategy document, p. 2).

On this account, CIS represents something of an enigma in legal terms. On the one hand, formally, it is invisible to (and at odds with) law, and unconstrained by legal norms. On the other, it is notably 'law-like' in its character. It is born of agreement between the Commission and the Member States. It is encapsulated in documentary form (the strategy document), this being subject to formal amendment over time, on the basis of settled consensual procedures. This document sets out the institutional arrangements for CIS, as well as identifying its underlying values, and the means to ensure respect for them. In many ways, the constitutive and regulatory framework 'look' distinctly legal albeit, as observed, the relevant documents are not packaged in any recognizably legal form.

Thus, we find with CIS a strange constellation; in formal terms a legal vacuum, but in material terms a high degree of formalization and regularization. In the light of this, it is possible to think of CIS as representing an example of what we might call *embedded constitutionalism*. The practice of governance has spawned a process of constitutionalization from within, and a settling of expectations around certain core values; transparency, participation, accountability and the like. This process of constitutionalization in CIS rests upon an uncertain combination of continuity and change. Procedures and practices coalesce around the relevant values but, as seen, they are subject to continuous scrutiny and revision in the light of rational self-criticism and reflection. Experimentalism emerges as a key value in the immanent constitutionalization of governance.

This concept of embedded constitutionalism is resonant of much thinking on constitutionalism in the United Kingdom, with its emphasis upon ‘political’ as opposed to ‘legal’ constitutionalism.<sup>121</sup> Martin Loughlin, for example, in a recent contribution to this debate, presents a conception of public law as practice.<sup>122</sup> According to this, ‘public law is generated through usage’, and not just simply laid down from above. ‘Standards of conduct are internal to the practice’, there being ‘no ultimate standard of correctness’; ‘the way that it is generally done within the practices supplies its own justification’.<sup>123</sup> As such, Loughlin argues, ‘the subject of public law cannot be grasped without having regard to a myriad of informal practices concerning the manner in which the activity of governing is conducted’.<sup>124</sup> For Loughlin, public law includes, but extends beyond, positive law, and positive public law is seen as acquiring meaning through the practice of governance.

Of course, this idea of embedded constitutionalism begs many, difficult, questions. Not least, accountability questions loom large. Presented by one practitioner as a deeply unconstitutional, pragmatic response to a hopelessly over-ambitious directive, CIS is conceived as sanctioning legislation by committee.<sup>125</sup> First, decision making is seen to take shape within a virtual normative vacuum, the WFD failing even to specify the most

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<sup>121</sup> For a discussion and further references see A. Tomkins, *Public Law* (OUP, 2003).

<sup>122</sup> M. Loughlin, *The Idea of Public Law* (OUP, 2003). See generally chapter 2, especially pp. 29-30 and points 8-16 of the concluding chapter.

<sup>123</sup> *Supra* n. ,122, p. 15-16.

<sup>124</sup> *Supra* n. 122, p. 30.

<sup>125</sup> Interview with national official in UK.

essential elements of policy.<sup>126</sup> Second, accountability to government, and via government to parliament, may seem attenuated in CIS. Doubts may arise as to the capacity of the Water Directors – government officials representing the Member States - to exercise effective and continuing oversight in areas of immense density, technical complexity and rapid change. It is notable also that the European Environmental Bureau presents a mixed, though improving, picture on the provision of opportunities for public participation in the implementation of the WFD within the Member States.<sup>127</sup>

There also arises the question of the relationship between embedded and formal constitutional law. At a descriptive level we would point to the possibility for spillover as between embedded and formal constitutionalism. One sees in the new governance prototype – comitology – a crystallization in law of the immanent practices and values of governance. Comitology, like CIS, started life in a virtual legal vacuum; not constituted

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<sup>126</sup> The need for the legislative act to define essential elements has long been recognized by the European Court as an element of lawful delegation to the executive branch. Of course, formally, this requirement would not apply here as there is no delegation as such, merely collaboration in the drawing up of non-binding guidance notes.

<sup>127</sup> Article 14 WFD requires that governments should encourage active involvement of interested parties in the implementation of the Directive, and obliges them to allow for public information and consultation in the development of River Basin Management Plans. The second EEB report (supra n. 70) notes examples of good as well as bad practice, and some improvements in the quality of public participation during the year 2004. Still, it concludes that ‘most Member States follow a minimalist legal approach’. (p. 31).

and only barely regulated by law.<sup>128</sup> Today, by contrast, it is embodied in, and regulated by, (constitutional) law.<sup>129</sup> The formal legal framework – legislative and judicial – is, however, in substance, strongly derivative of the practice of governance; be it in terms of the enforcement of internally generated, increasingly regularized, rules of procedure,<sup>130</sup> or in terms of its formal entrenchment of inter-institutional political settlements on comitology.<sup>131</sup> There is a fascinating story to be told here. Suffice it for now, however,

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<sup>128</sup> For the early ECJ case-law sanctioning ‘comitology’, albeit requiring that the ‘basic elements’ be laid down in the delegating legislation, see Case 23/75 *Rey Soda* [1975] ECR 1279, Case 5/77 *Tedeschi* [1977] ECR 1555 and, for a later example, Case 16/88 *Commission v. Council (Fisheries)* [1989] ECR 3457.

<sup>129</sup> See Article EC, and Council Decision 87/373/EEC OJ 1987 L197/33, as amended by Council Decision 1999/468/EC OJ 1999 L184/23. See also, for a discussion of the copious case law of the ECJ, C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, 1999), and especially the chapters by Vos and St Clair Bradley therein.

<sup>130</sup> Case C-263/95 *Germany v. Council (Construction Products)*. Also, establishing Standard Rules of Procedure Council Decision, see 1999/468 OJ 2001 C38/3.

<sup>131</sup> It is equally important to observe that the EU constitutional framework played an important role in shaping these political settlements. In particular, the institution of the co-decision procedure greatly enhanced the role of the European Parliament in the legislative procedure, and concomitantly empowered the parliament in its long-standing quest for a more significant role in comitology (see the chapter by St Clair Bradley, *ibid*). To appreciate the derivative nature of formal rules on comitology, compare the *Modus Vivendi* between the Council, European Parliament and Commission, initialed on 20 December 1994 OJ 1996 C102/1, and the European Parliament’s Resolution of 18 January 1995 (OJ 1995 C43/37) on the one hand, with Council Decision 1999/468/EC *supra* n. 129 on the other. Not only is the formal framework strongly based upon the *modus vivendi*, but it is subsequently fleshed out by a similar Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC OJ 1999 L256/19. Practice informs the formal framework both before and after its

to emphasize the existence of a powerful link between formal law and the practice of governance, and of a marked spillover as between embedded and formal constitutionalism.

This is not to suggest that there is no role for law independent of the practice of governance, or that constitutionalism should be conceived solely as enforceable self-regulation in the constitutional domain. On the contrary, the comitology story is suggestive of an interesting constitutional hybrid. It is the role of formal constitutional law to bring to bear certain values which are constitutionally entrenched, and to protect certain rights which are constitutionally guaranteed. In comitology, the vindication of the principle of transparency (conceived in terms of access to documents) would be a good example.<sup>132</sup>

In developing this argument, it is useful to draw upon the work of Henry Monaghan, writing in a U.S. constitutional setting many years ago.<sup>133</sup> He argues in favour of a distinction between ‘true constitutional rules’ and ‘constitutional common law’.<sup>134</sup> For

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enactment. The 1987 Decision (supra n. 129) consolidated the comitology procedures which had grown up in practice, and was fleshed out by the Resolution on the modification of the procedures for the exercise of implementing powers conferred upon the Commission – ‘comitology’ OJ 1998 C313/101. To complete the picture, see, finally, the Proposal for a Council Decision amending Decision 1999/468/EC COM(2002) 719 final.

<sup>132</sup> For example, T-188/97 *Rothmans v. Commission*, judgment of 19 July 1999.

<sup>133</sup> H. P. Monaghan, ‘Foreward: Constitutional Common Law’ 89 *Harvard L. Rev.* 1.

<sup>134</sup> *Ibid.*, p. 33.

Monaghan only the former should be conceived as judicially protected constitutional exegesis, whereas the latter should be regarded as constitutional common law, and consequently as reversible by the political branch. He offers the example of the constitutionally guaranteed due process fair hearing requirement. Whereas this constitutionally compelled requirement must be shielded from political intrusion, not ‘all the specific components of the right to hearing cases embody fundamental, immutable constitutional principles’.<sup>135</sup> On the contrary, ‘a considerable portion of the details of implementation consist of minutiae below the threshold of constitutional concern...If details may vary from one jurisdiction to another, it is because they do not materially diminish the effectiveness of the implementation which is constitutionally guaranteed’.<sup>136</sup> Against this backdrop, Monaghan contemplates the appropriate role for courts. Whereas the Supreme Court must protect those rights which are constitutionally compelled (the fair hearing requirement), it should exhibit greater deference in enforcing requirements which are constitutionally inspired but not constitutionally compelled (the minutiae giving effect to this requirement). As regards the latter, Monaghan suggests, the Court might perform a dual function. On the one hand, it might check that the variable procedures and practices giving effect to constitutional requirements are ‘minimally adequate’. On the other, it might ‘proceed on a frankly experimental basis in the hope of achieving the ‘best implementing rule on a cost-benefit analysis’.<sup>137</sup>

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<sup>135</sup> Ibid, p. 25 (footnotes excluded).

<sup>136</sup> Ibid, p. 26.

<sup>137</sup> Ibid.

Leaving aside the detail of Monaghan's rich and prescient analysis, it will be apparent that his argument is suggestive for the EU. Indeed already one could give examples of such an approach. The European Court, interpreting the EC Treaty, takes it upon itself to ensure that remedies available in the event of a breach of EU law not be such to preclude the effective vindication of rights guaranteed in EU law.<sup>138</sup> With some exceptions, it does not insist upon a harmonized approach to remedies, but is tolerant of diversity, subject to the variable Member State resolutions being considered minimally adequate having regard to the constitutionally guaranteed requirement of effectiveness. Similarly, the CFI has adopted an approach to the constitutionally compelled principle of democracy which is susceptible to variation in institutional form, according to the established practice of governance.<sup>139</sup>

More generally, this distinction between constitutionally compelled requirements and mechanisms for their implementation might usefully inform the European courts' approach to new governance. It offers a means of embracing embedded constitutionalism, and the experimentalist advantages which this entails. At the same time, it offers a guarantee of minimum adequacy as regards compliance with constitutionally compelled rights and values. Significantly, and in keeping with the

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<sup>138</sup> See, for a full discussion, M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing, 2004).

<sup>139</sup> Case T-135/96 *UEAPME v. Council*, judgment of 17<sup>th</sup> June 1998. It is possible to be critical of the CFI's concept of 'representativity' as democracy in this case, while still applauding the more general notion of diversity in institutional form in the realisation of core constitutional values. Note that the principle of democracy is not explicitly laid down in the Treaty.

experimentalist spirit underpinning Monaghan's own analysis, it might additionally be appropriate for courts to check upon the adequacy of procedures for securing reflexivity in the practice of governance.

New governance poses hard questions for law. The observations here are preliminary and tentative. What at least, we hope, is clear is that the study of constitutional law in the EU necessitates also the study of the practice of governance. The pure, unadulterated, study of constitutional law is less troubled and less untidy. But, equally, it is less exhilarating. The EU represents a remarkable and innovative experiment in federalism. Beneath the surface of apparently obscure areas of policy, there lie many surprises which pose daunting conceptual and practical challenges for law and for lawyers.

