

ly deprived members of society would also seem to be priority areas of investigation".⁴⁸ This claim seems compatible with the principle of protection of the weaker party, which would offer a relevant starting point for the discussion about regulation and heterogeneity.⁴⁹

Another undiscussed concept is that of efficiency. There are only rare references to the maximization of welfare and societal welfare in the volume. Admittedly, both Pareto efficiency and wealth maximization rest on individual preferences (in the latter case as expressed through one's willingness to pay).⁵⁰ Therefore, questioning the normative meaningfulness of individual preferences should also call for a reconsideration of these efficiency concepts. The only interesting use of efficiency is made by Feldman and Lobel: "(a)n understanding of bounded rationality is important because lawmakers can create policies that improve efficiency by helping actors make more rational decisions that maximise their utility".⁵¹ The interest stems for the circumstance that individual utility maximization is not obviously consistent with the traditional law and economics ultimate normative standard, namely, the maximization of some sort of aggregate value.⁵²

Related to the meaning of efficiency there is also a gap in the content of *Nudge and the Law*. That is, among the chapters gathered in Part III there is none focusing on competition law. A chapter on this topic would have fit in Part III, especially if one is convinced that the essays therein fall in the sub-topic of law and market behaviour. Besides, since competition is one of the main policies of EU law, a discussion on behavioural competition law would have been desirable for offering a whole European perspective on behaviourally informed regulation.⁵³

As last point, I would stress the final "s" in law and behavioural sciences. Psychology, on its own as well as in a constructive dialogue with economics, is not the only behavioural science. Indeed, one of the common threads between virtually all chapters of the volume is the claim that culture and social norms matter for the discussion of behaviourally inspired regulation. It follows that sociological and anthropological studies, even if not explicitly discussed in *Nudge and the Law*, find in this book an invitation to join in. It is up to the scholars in these – and other potentially relevant – disciplines to contribute to a more accurate understanding of human behaviour and its regulation.

The Political Accountability of EU and US Independent Regulatory Agencies

by Miroslava Scholten

Leiden: Brill Nijhoff, Nijhoff studies in EU law, volume 6, 2014, 493 pp.

€ 138.00; Hardcover

Gary J. Edles*

Independent regulatory agencies occupy a distinctive, if somewhat imprecise, place in a governmental structure that rests on democratic accountability. Although such government agencies have been around for a long time, there is neither doctrinal cohesion nor broad agreement on precisely what renders such instrumentalities "independent." Nor is there a common understanding of how a desire to bring independent expertise to government regulation should be reconciled with a need for oversight by politically accountable officials. In the circumstances, Dr. Scholten's book fills a gap by describing the structure and operations of independent agencies in the EU, offering a comparison between EU and US independent agencies, making sense of the conflict between a need for autonomy and a requirement of accountability, and providing some recommendations for enhancing accountability in the EU.

The book is composed of six chapters. Chapter 1 is an introduction to the research. Chapters 2 and 3 are devoted to parallel descriptions of the organization of the US and EU. They contain introductions to the overall governmental or supra-governmental

48 Alemanno, "What Can EU Health Law Learn from Behavioural Sciences?", *supra* note 38.

49 See Thomas Wilhelmsson, "Varieties of Welfarism in European Contract Law", 10(6) *European Law Journal* (2008), pp. 712-733, in particular at p. 714, observing how traditional information duties "from the point of view of distributive justice, (...) are problematic, as they tend to improve the position of strong consumers, whilst offering little help to the more vulnerable ones".

50 On the former see Michael J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA: Harvard University Press 1991), at pp. 241-248 while on the latter see Ronald M. Dworkin, "Is Wealth a Value?", 9(2) *The Journal of Legal Studies*, pp. 191-226.

51 Feldman and Lobel, "Behavioural Trade-offs", *supra* note 11.

52 This topic cannot be analysed here for two reasons. First, as just argued, it falls outside the scope of *Nudge and the Law*. Second, it is more relevant for law and economics than for law and behavioural sciences.

53 Please note that a useful list of references regarding competition law and behavioural sciences can be found in footnote 2 of Sibony and Hellinger, "Consumer Law and Behavioural Sciences", *supra* note 21.

* University of Hull Law School, g.j.edles@hull.ac.uk.

structure, including the place of independent agencies within the political organization, a detailed discussion of the methodologies governing the oversight of independent agencies, and even a brief narrative on pertinent elements of the administrative process. Chapter 4 is a comparative study of political accountability in both jurisdictions, noting similarities and differences, while chapters 5 and 6 are a set of specific recommendations for improved accountability of EU agencies and proposals for further study. Also included are valuable appendices setting out the unique characteristics of 35 individual EU agencies and 16 US independent regulatory agencies. The book relies not only on customary written research sources but also on interviews that the author conducted with EU and American officials. Although the book is a comparative study, with the US chosen because of that nation's long history of regulation by independent boards and commissions, it is plainly focused on the EU. That makes sense given the considerable historic and emerging scholarship in America on U.S. independent agencies.

The book provides an especially good discussion of the differences between and among the 35 EU agencies deemed to be independent. Both the text and the appendices set out the details regarding each agency's organization, the appointment, tenure, and removal provisions, if any, contained in each agency's founding act, and the key accountability and independence features applicable to each agency. One appendix provides a list of which EU parliamentary committees oversee particular agencies. Overall, the book provides a useful reference point for anyone interested in the structure and role of any of the 35 EU agencies.

A special virtue of the book is its appeal to readers on several levels. It addresses doctrinal and theoretical issues sufficiently to satisfy seasoned academics without forgetting those pragmatic problems that are uppermost in the minds of practitioners or government officials. It is suitable for both the expert and the novice observer of the field. Although largely a law book, it will be understandable and useful to political scientists and public administrators.

The choice of the United States for comparative purposes is reasonable. The U.S. does have more than a century long history of regulation by independent agencies so most of the accountability issues Scholten addresses in the European context have been confronted in the US, although clearly not en-

tirely resolved. But despite this longevity, the accountability mechanisms that have evolved in the US are not fundamentally different from those in the EU, although, as Scholten asserts, they may be a bit more developed.

As a threshold matter, there is no universally accepted definition of "independent agency" in either jurisdiction. What makes regulatory agencies independent can and does depend on various elements, not a single, simple criterion. The question of independent from whom may be somewhat different in a supra-governmental as compared with a governmental setting. On both sides of the Atlantic, though, indicia of independence typically, although not always, include a separate institutional status unconnected to any other ministry or department, some form of security of tenure for agency members (seen by many scholars in the US as essential), a degree of budgetary autonomy, and a level of control by the agency members over their agency's internal operations.

The historic oversight roles of the two politically accountable elements of the EU – the Council and the European Parliament – have evolved in somewhat the same way as the roles of the U.S. Congress and the President, although the European Commission is also now involved somewhat at the EU level. The political dynamics of control – the tug and tussle for dominance by the political entities – have some parallels. Scholten points out, for example, that there has been a gradual shift in responsibility for the accountability of EU independent agencies from the Council to the European Parliament in somewhat the same way as power over U.S. independent agencies has shifted over time from the U.S. President to Congress. Scholten indicates that oversight is rigorously enforced with regard to budget matters in the EU, except for the handful of agencies that are self-funded. That is equally true in the US, as she notes. The European Court of Justice had to develop the *Meroni* doctrine, permitting the delegation of power to agencies despite the lack of express authority in the treaties, but placing limits on such delegation, in much the same way as the U.S. Supreme Court developed the so-called *non-delegation doctrine* that permits Congress to delegate authority to independent (and other) agencies, with certain limitations, in the face of constitutional imprecision. Although the two courts have not taken precisely the same approach when answering somewhat the same ques-

tion, in both jurisdictions the courts appear to have permitted considerable freedom to delegate.

None of this similarity should be surprising in a democratic environment that recognizes that there is a need for some independent expertise in regulatory decision making but that this need must be balanced against the requirement of democratic accountability. The development of independent agencies in the US has been evolutionary and highly pragmatic. Not all U.S. agencies have the same level of formal or functional independence. Although formal arrangements for congressional oversight of all agencies may be similar, as Scholten maintains, the degree of accountability depends not simply on the terms of individual enabling or appropriations statutes, but on the history and culture of the particular independent agency – some are more highly regarded by Congress than others or have responsibilities less subject to political sensitivity. The personality of the member or members of Congress (or their staffs) chiefly charged with an agency's supervision can be important. As Scholten observes, "congressional oversight by the elected members themselves (...) [is] selective and *ad hoc*, rather than general and continuous," and can

depend on the political affiliation of the majorities in Congress vis-a-vis the President.

The relationship between independent agencies and the politically accountable branches of the U.S. government owes as much to history and experience as to theory or doctrine. Through various examples and illustrations, and thoughtful description and analysis, Scholten makes an important contribution to our understanding of a comparable phenomenon in the European context. Scholten also makes a solid case that the availability of accountability mechanisms, their design, and their practical application in the EU can be improved. There are clearly elements of the U.S. system that might usefully be imported into the EU context. There are also plainly things that should be avoided. However, if US history is any guide to what is likely in the EU, Scholten's desire for significantly increased uniformity of oversight may be difficult to achieve. As Professor and former Federal Communications Commissioner Glen Robinson has correctly pointed out, the history of U.S. institutions and programs is more the result of "eclectic confusion than of single-minded purpose." That may turn out to be true in the EU as well.