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ARTICLE

Laws in Progress? Reconceptualizing Accountability Strategies in the Era of Framework Norms

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Abstract
EU law is teeming with framework norms – 'laws in progress'. They provide little clarity for those to whom they apply, engendering rule-making in networks to assist those charged with implementing and applying laws at the national level. Taking as its specific focus the particular process through which the concept of an 'article' was constructed and constituted in a set of negotiations around the EU Chemicals Regulation, REACH, this article shows that networks not only make framework norms operational but also transform them in the process. The fact that networks have an important role in laying out what the law says throws the effectiveness of traditional forms of accountability in doubt. In particular, judicial control is in need of rethinking in order to accommodate norms that change and the networks that change them. This article suggests looking at the connections between internal peer control and externally operating judicial control as a way to keep up with the progress of laws in progress.

Keywords: Framework Norms, Environmental Networks, EU Courts, Implementation, Accountability, Chemicals Regulation, Post-Legislative Rule-making

1. INTRODUCTION

It is no news for contemporary European Union (EU) law scholars that wherever they look, they will find framework norms. Examples are legion; in the area of environmental

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law alone an observer is virtually spoilt for choice. The Water Framework Directive,[1] air policy instruments,[2] and even the EU's new Chemicals Regulation REACH,[3] although being technically a Regulation,[4] build a framework. They are laws in progress, providing little explicit guidance about the conduct of those they govern. Their framework rules require specification and interpretation. This activity for the purpose of filling gaps takes place after legislation has been enacted, hence the name 'post-legislative' rule-making.[5]

Framework laws deserve a closer look for three reasons. Firstly, framework laws that offer an overarching regulatory system yet demand much detail to be filled in later are of growing importance in the regulatory world where relentless change is best controlled by keeping options open. Secondly, following from this indeterminacy, framework laws come with an implementation challenge. Determined to tackle problems before they develop, framework norms create the need for guidance,[6] and in the transnational context such guidance is often developed through networks. Thirdly, the dynamics born in the thick of activities enmeshing framework norms and network actors raise a set of new questions of public accountability. Networks are a special test for EU public law, especially in terms of their judicial control as traditional accountability structures seem to be unfit for keeping networks under control.[7] This article argues that networks are important in the EU and, contrary to what might be assumed from the limited research in the area,[8] network accountability is not a marginal problem.

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1 Directive 2000/60/EC establishing a Framework for Community Action in the Field of Water Policy [2000] OJ L 327/1.

2 R. Lidskog and G. Sundqvist (eds), *Governing the Air: The Dynamics of Science, Policy and Citizen Interaction* (The MIT Press, 2011).

3 Regulation (EC) No. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European ECHA, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L 396/1.

4 F. Fleurke & H. Somsen, 'Precautionary Regulation of Chemical Risk: How REACH Confronts the Regulatory Challenges of Scale, Uncertainty, Complexity and Innovation' (2011) 48(2) *Common Market Law Review*, pp. 357–93, at 365.

5 For the term, see J. Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law' (2011) 48(2) *Common Market Law Review*, pp. 329–55.

6 Note the terms 'guidance' and 'post-legislative rules' are used here interchangeably.

7 H. Hofmann, 'Constitutionalising Networks in EU Public Law', University of Luxembourg Law Working Paper Series, 2009–09, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403968.

8 Exceptions exist, though they are few and far between. For environmental networks and their legitimacy challenges, see B. Lange, 'Procedure and Legitimacy in Environmental Networks', in O. Dilling, M. Herberg & G. Winter (eds), *Transnational Administrative Rule-Making: Performance, Legal Effects and Legitimacy* (Hart, 2011) pp. 41–76. For an analysis of implementation networks in international environmental law, see V. Heyvaert, 'Levelling Down, Levelling Up, and Governing Across: Three Responses to Hybridization in International Law' (2009) 20(3) *European Journal of International Law*, pp. 647–74. Finally, for a representative example of political science literature on networks, see B. Eberlein & A.L. Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union' (2008) 20(1) *Governance: An International Journal of Policy, Administration, and Institutions*, pp. 25–52.

Although fleshing out the argument with reference to the implementation of the complex framework of REACH, this article addresses two related issues that have diagnostic relevance not only for a broader field of EU environmental law but also for EU law and policy in general. In the first place, it draws attention to the framework nature of much of EU law and to the important role of networks in interpreting and shaping framework rules. It then shifts the focus to courts and argues that judicial control must be revised in order to factor in the changing nature of norms and the role of networks in changing them. Accordingly, this article is framed in two steps. The first part of the article attempts to make visible the space which framework norms leave for subsequent rule-making. Taking the development of REACH guidance as its specific focus, the article then proceeds to demonstrate how framework norms are made specific and operational through practices of guidance drafting. It does so by focusing on the particular process through which the concept of 'article' was constructed and constituted in a set of negotiations between network participants.[9]

The analysis shows how framework rules are themselves being transformed through network activities, striking a mortal blow at the assumption of their irrelevance. It is precisely this transformation that then mandates a new take on the exercise of judicial accountability. The second part of the article is an attempt at a rigorous reconceptualization of accountability structures in the era of framework norms and 'laws in progress' that are shaped and fashioned by networks in implementation. Recognizing the relevance of networks for determining the content of law, but assuming the infeasibility of conventional judicial scrutiny based upon a thorough and comprehensive appreciation of all that is going on in networks, this article will instead advocate looking at the connections between internal peer control and externally operating judicial control.[10] Analyzing and describing in some detail the processes through which these links are forged and developed, the argument is that, just as post-legislative rule-making accompanies much framework regulation, peer control becomes an element to be taken into account when evaluating the scope and effectiveness of judicial control. The link that the article provides between these two modes of accountability adds to the accountability discussion, which tends to analyze and evaluate modes of accountability in analytical isolation from one another. The article concludes by offering some reflections on the implications of this case study for research into multiple accountabilities.

[9] For an excellent analysis of how a new object of regulation is created, see J. Lezaun, 'Creating a New Object of Government: Making Genetically Modified Organisms Traceable' (2006) 36(4) *Social Studies of Science*, pp. 433–531.

[10] Space precludes a consideration of national courts in the supervision of networks. Observing the asymmetry which exists at the EU level between an integrated administration and a non-integrated judiciary, Hofmann places his hopes on horizontal cooperation between national courts and EU courts. This would prove to be useful in view of 'composite procedures in the areas of implementation of policies and executive rule-making': see Hofmann, n. 7 above, at p. 14.

2. LEGISLATIVE FRAMEWORK AND POST-LEGISLATIVE RULE-MAKING

2.1. *REACH: Law in Progress*

The European Chemicals Agency (ECHA) organized its seventh annual Stakeholders' Day on 23 May 2012 in Helsinki (Finland). At this meeting, representatives of the ECHA, industry associations and non-governmental organizations (NGOs) gave short presentations arranged around each of the four pillars of REACH (**R**egistration, **E**valuation, **A**uthorization, and Restriction of **Ch**emicals), after which members of the audience, mostly businesses and NGOs, could ask questions about specific aspects of EU chemicals legislation.[11] The answers given by the ECHA rarely made reference to the legislative text of REACH.[12] Instead, on several occasions ECHA representatives referred to REACH guidance documents that had been developed to assist in the implementation of chemicals legislation. The intriguingly low profile in discussions of the legislative text itself certainly was not because of a dearth of provisions. REACH is printed on 849 pages of the *Official Journal* and has 140 long and layered articles as well as 17 elaborate annexes.

Despite an impressive thicket of legal rules, as a law REACH leaves open many important questions. This has led some commentators to depict REACH as 'a framework regulation that leaves many political questions to the discretion of the bodies created for implementation'.[13] The preamble to REACH appears to constitute the following bodies for its implementation. According to recital 24, the Commission establishes so-called REACH Implementation Projects (RIPs), which comprise relevant experts and stakeholders. Under Commission leadership, these groups develop guidance documents intended to assist the Commission, the ECHA, Member States, manufacturers, importers and downstream users of substances to comply with obligations arising from chemicals legislation.[14] While the Commission initiated guidance drafting within RIPs, following the establishment of the ECHA, responsibility for guidance changed hands from the Commission to the ECHA, which now coordinates guidance drafting and has updated many documents initially drafted within RIPs.

By describing and explaining good practice on how to meet legal obligations, these guidance documents promote the implementation of REACH and supplement chemicals legislation by filling in the gaps left in the text of REACH. At present

11 Recordings are available at: http://echa.europa.eu/view-article/-/journal_content/40bb6ef5-03b0-496f-8c4c-a8f8d04ab68c.

12 To the best of my recollection, the only direct reference to the text of the Regulation was made by the ECHA representative when the ECHA was asked to comment on participation provisions under REACH.

13 C. Hey, J. Klaus & A. Volkery, 'Better Regulation by New Governance Hybrids? Governance Models and the Reform of European Chemicals Policy' (2007) 15 *Journal of Cleaner Production*, pp. 1859–74, at 1865.

14 Recital 24. The European Chemicals Bureau (ECB) was asked to initiate work on guidance documents before REACH was officially adopted; the ECB started its work at the beginning of 2005: see Hey, Klaus & Volkery, ibid., at p. 1869.

there are altogether 21 guidance documents, taking up approximately 7,000 pages.[15] Faced with this staggering number of pages, some even cry foul play: guidance documents bring in through the backdoor the 'detailed re-regulation' that REACH was designed to substitute.[16] Guidance documents are primarily technical notes on different aspects of REACH, but this says little about how they are applied in normative and practical contexts. The main text of REACH makes no reference to guidance documents;[17] they are classic soft law material. They shirk binding commitments: the cover page of each REACH guidance document reads 'the information in this document does not constitute legal advice'. Nonetheless, they rule in practice. This pragmatism is reflected in recital 35 of the preamble, which provides that 'the Member States, the Agency and all interested parties should take full account of the results of the RIPs'.[18]

Guidance writing is a shared effort, drawing upon the input of Member State authorities, the Commission, the industry, and other stakeholders, including NGOs.[19] To smooth the path of decision-making, the ECHA has published a (once again non-binding) Consultation Procedure on Guidance, which sets out a detailed manual for guidance drafting.[20] The preparation of a new guidance or amendment, or the updating of existing guidance, starts with the ECHA producing a draft, usually in collaboration with external experts. The ECHA will also seek the Commission's opinion, in particular in cases that involve legal interpretation of REACH. The draft is then submitted for consultation to a Partner Expert Group (PEG)[21] and the two scientific committees of the ECHA and/or a Forum,[22] – the scientific committees and the Forum become involved only when their contribution is seen to be necessary. With consultations completed, the ECHA will prepare a final draft, taking the comments on board. The next step is the concluding consultation between the ECHA, the Commission, and national competent authorities. These concluding talks aim to ensure that the new

15 Guidance documents are available at: http://guidance.echa.europa.eu. The ECHA has also compiled a series of shortened versions of REACH guidance documents in order to explain these to the industry in simple terms. In early 2013, the Commission adopted a review report on REACH. It condemns guidance documents as being too complex for businesses, in particular for SMEs, and simplification is called for: see Commission REACH Report, COM(2013)49 final, 14.

16 See Fleurke & Somsen, n. 4 above, at p. 375.

17 Except in Arts. 77(2)(g) and 77(2)(h).

18 Recital 35. Note also Commission Staff Working Document accompanying COM(2013) 49 final, in which it is observed that 'as guidance is heavily relied on for compliance by industry, the Commission services also consider that it should remain stable in the months preceding any registration deadline'. As a result, in anticipation of registration deadlines, the ECHA has set up a six-month moratorium on guidance to provide stability for businesses: see European Commission, 'Commission Staff Working Document – General Report on REACH', SWD(2013) 25, 5 Feb.2013, at p. 27, available at: http://ec.europa.eu/environment/chemicals/reach/pdf/swd_2013_en.pdf.

19 Recital 31, read together with Art. 77(2)(g) and (h).

20 REACH (Revised) Consultation Procedure on Guidance, available at: http://echa.europa.eu/documents/10162/13559/mb_14_2011_consultation_procedure_guidance_en.pdf. The guidance was revised in spring 2011.

21 PEG is an ad hoc expert group involving representatives of various stakeholders, interested parties, the Commission and national authorities. For the mandate, composition and operation of a PEG, see the REACH (Revised) Consultation Procedure on Guidance, ibid., Appendices A, B, C, and D.

22 The Forum for Exchange of Information on Enforcement (Forum) coordinates a network of national authorities with responsibilities in enforcement.

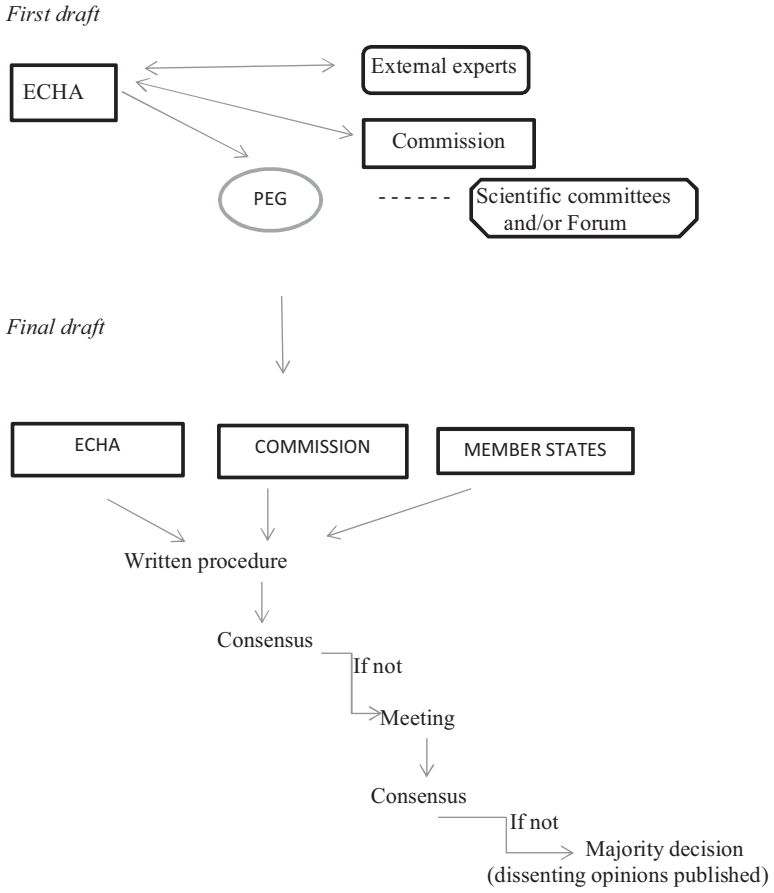

Figure 1: Procedure for REACH guidance drafting

guidance, amendment, or its revision is accepted and implemented in a coordinated manner by all authorities. REACH guidance drafting is a consensual practice, where agreement is attempted in the first place through a written procedure. If consensus is achieved, the guidance is adopted at the stage of concluding talks; if not, a meeting will be arranged. Here the majority prevails if the participants fail to agree on a joint decision on the content of the guidance document.[23] Finally, the ECHA will place the guidance and dissenting opinions on its website. The chart above summarizes the procedure.

2.2. *A Closer Look: Guidance on Requirements for Substances in Articles*

As every REACH guidance document is the outcome of a tailored process, born out of the need to bring clarity to an unclear situation, it is instructive to look more

[23] REACH (Revised) Consultation Procedure on Guidance, n. 20 above, at p. 6. Note, however, that the text is ambiguous. It reads that 'the majority opinion as well as the minority opinions and their justifications will be recorded in the meeting minutes … final version of the guidance document will be prepared by the ECHA Secretariat'.

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closely into the drafting history of one particular guidance document. This is all the more vital since, despite the manifest importance of these networks to legal practice in the EU, empirical knowledge of their activities is still scarce.[24] The following analysis is intended to redress this glaring gap and to describe how REACH rule-making occurs in practice. I have chosen the Guidance on Requirements for Substances in Articles (SiA Guidance) for a case study.[25] It is an interesting, though controversial, choice for a case study as several Member States opposed the definition of an 'article' adopted in the guidance. In view of this opposition and efforts to resolve the stalemate that has arisen, the SiA Guidance is not a typical example of guidance writing. At the same time, it is precisely for this reason that this guidance is worth studying: the tensions and mechanisms for resolution can teach us a lot about the ways in which post-legislative rule-making creatively adapts and evolves in the face of challenges. Because the SiA Guidance relates to a term that has an actual legal definition in the REACH Regulation, it is an informative example of how rules change. Article 3(2) of REACH provides that an article 'means an object which during production is given a special shape, surface or design which determines its function to a greater degree than does its chemical composition'. The case study opens a small window into how rule-making translates and transforms underlying framework norms. In so doing, it makes real the 'dialectic between the enunciation of a new object of government in a legal text, and the administrative and technoscientific instruments that give it material meaning'.[26] By analyzing this dialectic, the case study foregrounds the discussion of accountability.

Behind the seemingly technical controversy regarding the definition of 'article' lies a problem with real consequences. Article 7(2) of the REACH Regulation requires a producer or importer of articles to notify the ECHA if a substance is a 'substance of very high concern' (SVHC) and if an article contains more than 0.1% of this dangerous substance.[27] In addition to complying with this relatively cumbersome notification procedure, a producer or importer of an article must provide information to customers and consumers on safe use of the article. Now much depends on how an article is defined. Taking the example of footwear being imported into the EU, the question arises as to whether a shoe is an article. The intuitive answer is 'yes'. However, another equally plausible interpretation presents itself. A shoe can be perceived as an 'umbrella' article,

[24] Network activities studied in this article have links to comitology on which much has been written. There are also differences that go to the heart of how both of them function. Comitology incorporates national officials into decision-making at EU level to oversee the Commission in the execution of Council decisions whereas implementation networks work the other way around. They incorporate EU-level actors (as well as civil society, absent from comitology processes) into the implementation of EU law, traditionally a matter of national discretion. The role of and opportunities for actors, such as the Commission, in these two institutional contexts vary. For this reason, the choice has been made to exclude comitology from the analysis.

[25] As a methodological note, the case study was conducted in summer and autumn 2012. In addition to documentation publicly available on the ECHA website I have complemented the data through private communications with the ECHA.

[26] Lezaun, n. 9 above, at p. 504.

[27] The other condition is that the substance is present in those articles in quantities totalling over 1 tonne per producer or importer per year.

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giving rise to a regulatory visualization of a shoe that is made up of shoelaces, insoles, heels, eyelets, etc., as articles in their own right. Because the presence of a SVHC in an article is determined by its proportion of weight, the smaller the article, the more easily the notification requirement kicks in. Producers and importers are therefore significantly better off if shoes rather than shoelaces are defined as an article.

In essence, REACH rule-making was confronted with a task of statutory interpretation: a need to define what constitutes an 'article'. Confronted with such a herculean task, the adoption of the SiA Guidance was set in motion. The work was initiated within REACH Implementation Project RIP 3.8, led by the Commission services as preparation of the guidance had started before the ECHA was up and running (before 1 June 2007). In addition to the Commission, a total of 19 participants were involved in the work: seven Member States, 11 industry representatives, and a Japanese representative.[28] A difference of opinion emerged between a group of Member States and the Commission. Of the participating Member States, Denmark, France and Germany supported the view that the 0.1% threshold should be made applicable to shoelaces, challenging the Commission's preference to apply the threshold for shoes. Member States were not opposed just on principle. They were particularly worried about the loss of information caused by the interpretation championed by the Commission. Namely, the stance adopted by the Commission means in practice that producers or importers of articles with SVHC content above 0.1%, which usually triggers notification and information requirements, escape the requirements if these articles are put together as one large article in which a SVHC remains below the critical threshold of 0.1%.

In its opinion of 2007, the Commission, with reference to internal consultations with its Legal Service, rejected the interpretation by the three Member States in favour of the interpretation that the threshold applies to the whole article, not to its individual parts. The first version of the SiA Guidance was adopted in May 2008 along the lines of the Commission's view, carrying a disclaimer for the position of the opposing Member States.

In the summer of 2009, the ECHA initiated the process of updating the SiA Guidance with a view to ironing out the disagreement that had flared up. With the first deadline for notification and communication obligations approaching (1 June 2011), the ECHA wanted to further clarify the matter and, remarkably, to publish the guidance without reference to the dissenting Member States. In line with the Consultation Procedure on Guidance, the ECHA prepared the draft, which it then modified after receiving comments from outside experts. The PEG consultation took place in two stages, application of the 0.1% threshold forming part of the second round. This consisted of 20 stakeholders: nine Member States, eight business representatives, one NGO and the Commission Directorates–General (DGs) Enterprise and Environment.[29] Altogether 83 comments were submitted, of which 12 touched upon the 0.1% issue.[30]

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28 Personal communication, ECHA representative, 6 Sept. 2012 (on file with author).

29 Personal communication, ECHA representative, 21 Sept. 2012 (on file with author). The Commission is divided into departments, known as Directorates-General (DGs).

30 Summary of Comments Received during the Second Round of the PEG Consultation on the Draft Revised Guidance (Summary of PEG comments), available at: http://echa.europa.eu/web/guest/support/guidance-on-reach-and-clp-implementation/consultation-procedure/closed-consultations-reach.

The summary of comments reveals that the initial coalition of Member States was reinforced by new members. In addition to Denmark, Germany and France – which renewed their objection – Sweden, Austria and Norway, as well as one NGO (the World Wildlife Fund) appeared. Pleading new reports, they suggested a number of amendments to the part of the guidance concerning application of the 0.1% threshold.[31] By contrast, five industry representatives expressed their satisfaction with the interpretation of the draft guidance and observed that the contrary interpretation would contradict the legal text of REACH. Providing a brief reply to each comment, the ECHA noted that the Commission's view had been imparted to Member States at the PEG meeting. There, the Commission had invoked the convenience of a hypothetical legislator and argued that '[i]f the legislator had wanted [the 0.1% threshold to apply to homogenous materials only] … the legislator would have explicitly mentioned this'.[32]

The matter came up again in the consultation of the Forum and Member State Committee in spring 2010. In addition to the Member States that had opposed the Commission interpretation in the PEG round, Belgium joined the ranks. These Member States questioned the Commission's point of view, illustrating inconsistencies in its interpretation. In their opinion, the Commission was virtually arguing that an article ceased to be an article when it was assembled into another article, the two items forming something that the Commission would describe as a 'complex article'.[33] The Member States were particularly interested (almost to the point of absurdity) in knowing whether the article would become an article again when it was disassembled. The business was further discussed in the meeting of the Competent Authorities (CARACAL). The Commission ended up sticking to its guns and the Member State argumentation fell on deaf ears. The Commission argued that, in view of the approaching deadline for notification, 'the principle of legitimate expectations might be questioned if the previous guidance on the 0.1% threshold were overturned just a few months before the deadline for notification without any change in legislation'.[34] This again led some Member States to complain that the Commission had delayed the announcement of its final view, leaving Member States with insufficient time to reflect on it.

In April 2011, the ECHA published the updated SiA Guidance, accompanied by a fact sheet informing readers that not all Member States endorse the interpretation of the guidance. Austria, Belgium, Denmark, Germany and Sweden left dissenting opinions which were added to the ECHA website.[35] References to the controversy or dissenting views have been deleted from the final text of the SiA Guidance.

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31 For reports see, e.g., the report published by the Nordic Council, available at: http://www.norden.org/en/publications/publikationer/2010-514.

32 Summary of PEG comments, n. 30 above.

33 For the Commission reasoning, see also its recent Staff Working Document, SWD2013 (25) final, n. 18 above, at pp. 28 and 18.

34 Seventh Meeting of Competent Authorities for REACH and CLP (CARACAL), 7–9 Feb. 2011, Brussels (Belgium), 4 Feb. 2011, Doc. CA/26/2011, available at: http://echa.europa.eu/documents/10162/13636/update_com_opinion_sia_en.pdf.

35 See http://echa.europa.eu/documents/10162/13636/draft_guidance_req_sia_en.pdf.

2.3. *REACH Rule-making: Some Critical Comments*

From what can be inferred from the guidance drafting process, the ECHA is a major player. Firstly, it coordinates guidance writing and maintains an online repository for guidance documents as well as for other information on chemicals legislation. In the electronic corridors of the vast database that the ECHA manages, information surrounding the guidance writing process is relatively easy to retrieve. Yet the ECHA's success should not be measured by its capacity to store information but by how readily it discloses that information. Two points for improvement should be addressed: (i) in the case of enquiries for further information about a particular guidance document, the enquirer is at a loss; guidance documents do not designate anyone as a contact person who can answer questions or provide additional information regarding the process of guidance writing or document content, and (ii) although step-by-step information on the consultation procedure can be found on the ECHA website, final guidance documents do not include summary information on the process (who was consulted, how many comments were received, and so on). This stands in regrettable contrast to guidance documents adopted in the framework of implementation of the Water Framework Directive (WFD):[36] each of these WFD guidance documents, which currently number 28, includes a list of participants and their organizations.[37]

In spite of these shortcomings, by and large information on REACH guidance has been made available and is documented so as to allow for later scrutiny. For instance, documents from the consultation rounds are saved on the ECHA website as Excel spreadsheets in which positions are listed and controversial issues are flagged, with notes in the spreadsheet on reasons why comments are accepted or rejected.

Secondly, the ECHA has an exclusive right both to start the process of drafting a new guidance and to update existing guidances. In this respect, it holds an agenda-setting position. The influential role of the ECHA in the guidance writing process has not gone unnoticed and has spurred suspicions that may potentially undermine implementation projects. Scholars comment that 'it might be an unfortunate construction that the specific operationalization and application of the generic legal standards (such as adequate control) has to be dealt with by the same bodies that prepare and hence essentially shape the risk related decisions'.[38] Its influence is, however, constrained by the Commission's role in REACH implementation.

Anecdotal evidence available from the drafting history of the SiA Guidance seems to support the view that guidance-making opens the door for the Commission to wield its power. Notably, it is the Commission that benefits from disagreement. The Consultation Procedure on Guidance that was applicable at the time provided that, should Member States remain in disagreement, the ECHA Executive Director decides on the final text of

[36] N. 1 above.

[37] For WFD documents, see: http://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm.

[38] See Hey, Klaus & Volkery, n. 13 above, at p. 1866; see also Fleurke & Somsen, n. 4 above, at p. 365.

the guidance document, after consultation with the ECHA Management Board.[39] However, the Commission's view proved to be decisive for finalizing the text of the document. In the summary of PEG comments, the ECHA endorsed the authoritative status of the Commission opinion and noted that 'the legal opinion of the European Commission is determining for ECHA unless overruled by a decision of the Court of Justice'.[40] One of the opposing Member States, Sweden, pointed out that during the SiA Guidance drafting the Commission virtually created new terms, such as 'component', 'autonomous article', and 'complex article'.[41] The special status of the Commission is also clear from an analysis of comments supplied during consultations. For instance, in the case of the PEG consultation, the Commission participated but did not submit comments, which implies that it can get its point across in other ways and can, as a result, forgo commenting altogether. The lack of traceable imprints of influence is worrying, as the Commission may not always speak with one voice and guidance drafting can end up being plagued with latent controversies. For instance, in the case of the 0.1% disagreement, the PEG consultation included two DGs: Environment and Industry. As a coalition of Member States opposed to the 0.1% interpretation on environmental grounds, it is difficult to believe that the views of both DGs were unanimous.

The strong, if not dominant, role the Commission plays in guidance drafting is also problematic from the perspective that it destroys the level playing field (or at least in principle 'egalitarian' peer culture) among network participants.[42] The development of the SiA Guidance shows how those Member States that adopted views in opposition to those of the Commission were identified early in the process as 'troublemakers' that needed to be proselytized. The strategy which was deployed here, as well as in network decision-making more broadly, is the power, and politics, of repetition.[43] We recall that the update of the SiA Guidance was not triggered by the need to take into account recent scientific or technical developments. Instead, it was launched in order to reach a common understanding of the application of the 0.1% threshold and to publish the guidance without dissenting footnotes. The involvement of the Commission Legal Service, in delivering an opinion on the 0.1% limit, raises a question of procedural fair play. As is clear from the above, the Member States felt that more than a half year during

[39] According to the currently applicable REACH (Revised) Consultation Procedure on Guidance, the majority rules where consensus cannot be reached. This new rule would not have changed the outcome of the SiA Guidance drafting process as recalcitrant Member States were in a minority: see REACH (Revised) Consultation Procedure on Guidance, n. 20 above.

[40] Summary of PEG comments, n. 30 above.

[41] See http://echa.europa.eu/documents/10162/13636/draft_guidance_req_sia_en.pdf. For the role of the Commission in delivering de facto authoritative opinions on the interpretation of the law and the normative bewilderment of national officials it may cause, see S. Levefre, 'Interpretative Communications and the Implementation of Community at National Level' (2004) 29(6) *European Law Review*, pp. 808–22.

[42] On the issue of equal access to networks see, for instance, D.C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) *Yale Law School Faculty Scholarship Series*, Paper 428, available at: http://digitalcommons.law.yale.edu/fss_papers/428.

[43] On the concept of iterated deliberation, see E. Korkea-aho, *New Governance and the EU Courts: The Experimentalist Architecture of Judicial Decision-Making*, Doctoral thesis, University of Helsinki (Finland), Dec. 2011.

which the Commission spent elaborating the issue was too long, especially given that its opinion was made available to them just before the CARACAL meeting.

Finally, the role played by non-business stakeholders and NGOs remains shrouded in uncertainty. Despite the occasional glimpses of societal legitimacy in the Consultation Procedure on Guidance,[44] non-institutional interested parties, with the exception of industry partners, do not play a noticeable role in the guidance writing process. For instance, the SiA Guidance was drafted, negotiated and adopted with the participation of one NGO only. Non-institutionalized stakeholders may be involved in guidance drafting only through PEGs.[45] According to the revised Consultation Procedure on Guidance, the PEG is set up on an ad hoc basis for each guidance document, although the creation of a permanent PEG is also anticipated.[46] Getting into a PEG is premised on prior institutional friendship with the ECHA, as PEG members are chosen from those partners accredited by the ECHA.[47] When preparing a new guidance, the ECHA invites accredited stakeholders to nominate experts, one for each organization. Those thus nominated and notified to the ECHA may participate in the PEG without further involvement with or assessment by the ECHA. On the face of it, there are no institutional hurdles that would put non-institutionalized stakeholders in a disadvantaged position to compete for influence and visibility.

More worryingly, however, the perception of what the mandate of the PEG is and how it is supposed to function in the context of REACH rule-making appears to have become lost somewhere along the way. Generally speaking, the Consultation Procedure on Guidance justifies consultation on two grounds. In the first place it explicitly acknowledges that guidance documents are 'of a highly technical nature'. However, in a moment of rare frankness about the nature of these guidance documents, it continues that the adoption of guidance documents is not just dispassionate technical wrangling but 'require[s] interpretation of the underlying regulation(s)', thus acknowledging the policy choices inevitably involved in guidance drafting practices.[48] This again affirms that, at least in theory, the ECHA recognizes the need to gain both expert knowledge and societal legitimacy. However, recognition does not translate into a guarantee that societal legitimacy de facto enters into guidance drafting. As noted, non-institutionalized actors – meaning those with potentially other than technical rationality and training – may access guidance drafting only through the PEG group, whose mandate is construed quite narrowly on 'technical content issues'. This renders mostly symbolic the role of the

44 The ECHA emphasizes the involvement of interested parties on both non-instrumental and instrumental grounds: it seeks to involve them in order to enhance legitimacy and to obtain relevant, useful and up-to-date information: see REACH (Revised) Consultation Procedure on Guidance, n. 20 above, at p. 2.

45 In some cases, the ECHA can decide to launch a general online consultation but it is left up to the PEG or the ECHA Secretariat to decide on how to take the comments into account: see REACH (Revised) Consultation Procedure on Guidance, ibid., at p. 4.

46 Ibid., at p. 5.

47 For members and the procedure for becoming an accredited stakeholder, see information available at: http://echa.europa.eu/about-us/partners-and-networks/stakeholders/how-to-become-an-accredited-stakeholder-organisation.

48 Both quotations are from REACH (Revised) Consultation Procedure on Guidance, n. 20 above, at p. 2 fn 1.

PEG as a platform to present, for instance, NGO views.[49] Accredited NGOs may feel hindered in nominating an expert because of a lack of technical content expertise where, in reality, scientific issues disguise problems of a different kind. Answering questions such as whether something is workable for industry, environmentally friendly, or accessible and safe for consumers is more often than not an exercise in balancing between conflicting objectives.

Two years after the adoption of the second version of the SiA Guidance, the situation is very much open. Enforcement of the REACH Regulation falls on national authorities, which, in the case of the six disagreeing Member States plus Norway, is a concern for non-EU importers who raised the issue of trade distortions at the meeting of the Asia-Pacific Economic Cooperation (APEC) in Moscow on 4 February 2012. The Executive Director admitted that importers may end up having to adopt varying practices in different Member States, making it a compliance nightmare for foreign companies. He continued, however, that 'in many cases' where the importer is providing spare parts, it would in any event have to provide information on the components of the product to comply with the notification requirements.[50] In September 2012, the ECHA representative confirmed that no further development had been made.[51]

3. CHANGING RULES AND ACCOUNTABILITY STRATEGIES

The discussion above was framed in terms of a distinctive conception of law that lays down a framework, which is then made operational and suitable for implementation through guidance drafting practices. One of the noteworthy features of guidance documents is that they not only create soft norms intended to fill in gaps in cases of genuine technical uncertainty but they also produce normative content with a view to transforming and giving a new meaning to underlying (hard law) framework norms.[52] The next sections extend the analysis and discuss how such developments affect strategies of accountability, in particular judicial accountability. I will show how seemingly different modes of accountability – modes that are also often perceived as (antagonistic) alternatives to each other – can, in fact, be happily synergetic. This focus on the links and synergies between different types of accountability then gives rise to the idea of multiple accountabilities. Implicit here is the assumption that a variety of accountabilities may already cover a considerable number of activities, but what is missing from most analyses is the role of

49 Ibid., at p. 5.

50 Chemical Watch News, 'Apec Seeks Answers on SVHC Notification', 10 Feb. 2012. The Commission is equally worried about the compromising effects of this disagreement on the internal market and remarks, without specifying details, that it has 'taken appropriate steps': see SWD(2013) 25, n. 18 above, at p. 47.

51 Personal communication, ECHA representative, 6 Sept. 2012 (on file with author). The situation has remained unchanged since then: see SWD(2013) 25, n. 18 above, at pp. 28 and 47.

52 See also Scott, n. 5 above. In the realm of implementing international agreements, Heyvaert notes that 'the norms supported by the network defy a classification as either hard or soft law, but combine elements of both': see Heyvaert, n. 8 above, at p. 648. This – what she calls 'hybridization' – also takes place in the complex relationship between framework norms and post-legislative rule-making.

institutional design in thinking up effective accountability strategies that minimize overlaps and maximize and exploit synergies.[53]

3.1. *Demarcating Network Accountability*

In the academic literature, implementation networks, such as those found in the realm of REACH rule-making, are called 'forums'.[54] They are characterized by having an informal institutional skeleton, emerging and operating in an area that has traditionally been reserved for domestic implementation actors but is now transnational, incorporating European and global actors. The participant pool is diverse and network working methods are usually associated with forms of learning and benchmark setting, reflecting a 'reciprocal and heterarchical relationship between participants'.[55] For lawyers, networks pose two general yet fundamental questions: (i) what is the significance of these networks for law and legal practices, and (ii) how can they be subjected to (judicial) oversight?

The relevance of networks for law eludes definitive understanding and categorization. Crucially, this is down to the wide variety of contexts in which networks operate, thus prescribing rigorous empirical evaluation. The importance of empirical analysis cannot be overstated: the more essential network activities become in establishing themselves as reference points for all those working in the relevant field, the more important it becomes to know how their authority is constructed and maintained and whether it can effectively be challenged from outside. Indeed, the second crucial question arises with regard to accountability: what is the extent of autonomy that these networks and other such loose organizations enjoy and how can their external control adequately be arranged? It is observed that 'networks often exhibit autonomy in their promulgation of norms of best practice and benchmarking in ways that are not clearly susceptible to control'.[56] There are no readily identifiable principals to whom actors report, and the most common accountability mechanism is peer review, in which network actors explain their actions and have their reasoning scrutinized by network peers. In the discussion and analysis of networks, a 'peer' is understood widely. A peer is a member for 'mutual monitoring of one another's performance within a network of groups, public and private, sharing common concerns'.[57] Peer control is considered as affording a rather weak form of (democratic) accountability, to the extent that it is democratic at all. It is often dismissed as a form of free-floating accountability, not really contributing to the common pool of public accountability.

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53 A notable exception is J.L. Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance', Yale Law School, Research Paper No. 116, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924879. His example concerns contracting out which, as in the case of framework lawmaking, requires fresh insights into accountability mixes.

54 See M. Thatcher & D. Coen, 'Reshaping European Regulatory Space: An Evolutionary Analysis' (2008) 31(4) *West European Politics*, pp. 806–36, at 813.

55 Lange, n. 8 above, at p. 45.

56 K.A. Armstrong, 'The Character of EU Law and Governance: From "Community Method" to New Modes of Governance' (2011) 64(1) *Current Legal Problems*, pp. 179–214, at 196, referring to Thatcher & Coen, n. 54 above.

57 R.E. Goodin, 'Democratic Accountability: The Distinctiveness of the Third Sector' (2003) 44(3) *European Journal of Sociology*, pp. 359–93, at 378.

Underlying this view is a suspicion of an impenetrable community, which begs the question of how to ensure that those outside have a sufficiently informed understanding of what is going on inside.[58] In so far as networks are marginal actors, this does not have to be a particular concern, yet the situation is radically different when networks put down roots and gain authority. As an instance of such regulatory entrenchment, this article has analyzed network activities transforming REACH framework rules. It is precisely this transformation that fuels the need for external, perhaps most importantly judicial, control.

Judicial review of new regulatory forms has been subject to heightened interest in recent years. Observers seem to be united in the inability of judicial review to control and curb autonomous network actors.[59] A wide variety of reasons have been given for this, ranging from the transnational character of network activities that result in decay of the traditional delegation doctrine to the soft law character of many network 'outputs' and lack of substantive expertise on the part of the courts to make any meaningful intervention. The shared conclusion is that the traditional command-and-control approach needs to be updated to better reflect the reality of network activities.[60]

One such modernized approach is democratic experimentalism, as elaborated primarily by Charles Sabel and Jonathan Zeitlin. It is sceptical of any version of constructions that rely on either delegation or the principal–agent relationship to hold actors to account. It is also fundamentally distrustful of courts in a world of 'what-ifs': increasing complexity, turbulent scientific progress, and transnational connections.[61] In a recent contribution, Sabel and Zeitlin make an interesting link between type of norm and judicial accountability. In their view, courts are increasingly in deep water and cannot establish or police lines of accountability, because when actors seek solutions to problems of different kinds, rules will inevitably change. Not only does this apply to framework norms that provide very little clarity but equally to norms that are given a very specific definition in legislation. The concept of 'article' is verbosely enshrined in REACH, yet it cannot guide actors to a sufficient degree and is thrown into a normative limbo. Consequently, the courts are deprived of, or confused about, rules against which to measure the behaviour of actors.[62]

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58 Y. Papadopoulos, 'Accountability and Multi-Level Governance: More Accountability, Less Democracy?' (2010) 33 *West European Politics*, pp. 1030–49, at 1040. See also Heyvaert, n. 8 above, at pp. 670–1, describing the same phenomenon as 'an *intra-institutional* form of accountability' (emphasis in the original). Lange discusses the role of peers or 'fellow professionals' in transnational governance networks and notes that peer relations confer a form of legitimacy, best described as 'credibility'. Interestingly, in her view, credibility is accompanied by accountability exercised by actors, not at the same level but higher on the institutional structure: see Lange, n. 8 above, at pp. 59–60.

59 See, e.g., R. Rawlings, 'Changed Conditions, Old Truths: Judicial Review in a Regulatory Laboratory', in D. Oliver, T. Prosser & R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press, 2010), pp. 283–305.

60 See, e.g., D. Curtin & L. Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38(1) *Journal of Law and Society*, pp. 163–188, at 166.

61 C. Sabel & W.H. Simon, 'Epilogue: Accountability Without Sovereignty', in G. de Búrca & J. Scott (eds), *Law and New Governance in the EU and the US* (Hart, 2006), pp. 395–411.

62 C. Sabel & J. Zeitlin, 'Experimentalist Governance', in D. Levi-Faur (eds), *The Oxford Handbook of Governance* (Oxford University Press, 2012), pp. 169–83, at 174–5.

The suggested solution by Sabel and Zeitlin suits the context of framework regulation and networks. They highlight internal mechanisms prevalent in networks, inducing peer review which 'becomes in turn dynamic accountability'.[63] As an alternative to principal–agent accountability, dynamic accountability accepts the transformation of rules 'in use' and exploits as a form of review those particular processes that occur when norms are 'used'. REACH rule-making serves as one of many examples of such processes. Although theoretically and empirically convincing,[64] this kind of dynamic accountability is, however, somewhat unsatisfactorily connected to other established forms of (external) accountability, leaving peer control as a legitimate and effective mode of accountability undetermined and vulnerable to doubt. Therefore, the question about the relationship between external and internal accountability mechanisms in relation to networks involves an unexplored point of synergy. Developing the idea further and taking into account the context in which framework norms coexist with a maze of lower level rule-making, I suggest that peer control can be connected with judicial review. Just as post-legislative rule-making accompanies much framework regulation, peer control can be incorporated as part of judicial control.

Immediately below I present some concrete examples of how peer control and judicial supervision can pool resources and expertise to make sure that gaps in framework laws do not translate into gaps in accountability.

3.2. *Peer Control and Judicial Control*

The incorporation of peer control into the review function of courts can take many forms, ranging from: (i) the use of guidance documents to fill in gaps left by framework norms, through (ii) assisting courts to select the optimal level of intensity of review, to (iii) keeping conflicts out of the purview of the courts. I address each of these separately.

Use of guidance documents as a response to the absence of clarity and precision of underlying framework norms

The first example comes closest to the account by Sabel and Zeitlin of the changing relationship between norms and accountability. Framework norms are open-ended, broad, and technical all at the same time, presenting courts with a dilemma of statutory interpretation. The following infringement case introduces the issue. Advocate General (AG) Mengozzi notes the open-ended nature of Directive 91/271/EEC concerning urban waste water treatment[65] and continues that:

> not only does Directive 91/271 contain a number of general and imprecise terms – in contexts, what is more, which are highly technical – but the Commission itself has not

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63 C. Sabel & J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance', in C. Sabel & J. Zeitlin (eds), *Experimentalist Governance in the European Union* (Oxford University Press, 2010), pp. 1–28, at 12.

64 Several contributors have found evidence to support the thesis: see, for instance, articles in Sabel & Zeitlin, ibid.

65 Council Directive 91/271/EEC of 21 May 1991 concerning Urban Waste Water Treatment [1991] OJ L 135/40.

> drawn up any related guidelines, even unilateral guidelines, to allow a clear understanding of the way in which the rules will be construed … it would be highly desirable for at least the Commission, if not the legislature, to provide such clarification by drawing up and publishing appropriate guidance on interpretation.[66]

Two points arise from this observation. Firstly, although acknowledging that the technical context creates its own special regulatory twists and turns, the AG does not restrict the role of guidance to filling lacunae. On the contrary, guidelines come into play when the need arises to interpret underlying framework norms. Secondly, the 'even' in front of 'unilateral' suggests that the unilateral nature of guidelines is perceived as sub-optimal, which raises the possibility that guidelines developed with the involvement of a broader range of actors might be better received. Somewhat unexpectedly, the Court of Justice (ECJ) picked up on the AG's observation. Observing that it simply has no jurisdiction to determine the numerical obligations necessary to attain the objectives of the Directive, the ECJ entitled the Commission to adopt guidelines, describing this practice as nothing less than 'legitimate'.[67] This case is notable when it is remembered how hesitantly the courts have used guidelines in judicial interpretation.[68] Guidance documents are atypical instruments and are usually classified in the category of soft law instruments. Case law exists on the conditions under which the CJEU[69] reviews soft law instruments, the central question being whether soft law instruments have legal effect. This case law might be extended to analyze the conditions under which the CJEU uses guidelines to guide its own interpretation. However, since the case law has been shown to apply poorly to situations in which the EU courts are confronted with the review of post-legislative guidance,[70] it cannot be anticipated to fare much better in the analysis and systematization of those situations in which interpretive guidelines, intended to fill in the gaps left by framework norms, could be useful for the courts themselves. In that respect, the newly found openness to interpretative guidelines in the urban waste water system case is worth acknowledging.[71]

The more general point here is that one way to increase the information base necessary to make judicial scrutiny relevant and meaningful is to consult interpretive guidelines, such as REACH guidance documents, which involve interpretation by the ECHA and other stakeholders in the REACH Regulation. They could be relied upon by the courts in matters of substance as well as in matters

66 Case C-301/10, *Commission* v. *UK*, Opinion of AG Mengozzi delivered on 26 Jan. 2012 (not yet reported), para. 29.

67 Case C-301/10, *Commission* v. *UK*, judgment given on 18 Oct. 2012 (not yet reported), para. 61.

68 An exception here is Case C-310/99, *Italy* v. *Commission* [2002] ECR I-2289, para. 52, in which the ECJ explained that the guidelines are useful in ensuring that the Commission keeps on its best behaviour but 'they cannot bind the Court. However, they may form a useful point of reference'. See also Case C-387/97, *Commission* v. *Greece* [2000] ECR I-5047, paras. 87 and 89, and Case T-184/97 P, *BP Chemicals Ltd* v. *Commission* [2000] ECR II-3145, para. 64.

69 In this article, the terms 'CJEU' and 'the EU Courts' refer to the Court of Justice (ECJ) and the General Court (EGC) collectively.

70 See a recent overview in Scott, n. 5 above, at pp. 337–43.

71 See also Case C-342/05, *Commission* v. *Finland* [2007] ECR I-4713, para. 29.

concerning the manner in which procedural aspects are weighed.[72] Do REACH guidance documents fulfil this function? Since REACH has been in force for just over five years, rulings are few and far between. Yet the two preliminary rulings given so far make for informative reading. The first involved the answer given by the ECJ to the question of whether the exemption from registration concerning polymers (Article 2(9) REACH) is also applicable to reacted monomers contained within polymers.[73] The Court's reasoning was perhaps too succinct to inform the technical issues but for present purposes AG Kokott's opinion is important. She relied upon REACH guidance to defend her conclusion that the registration obligation would not be too burdensome on businesses,[74] confirming what has been said above about the broad public policy nature of guidance involving a balancing of interests. Another preliminary reference queried whether REACH applies to materials that were once waste. In that case a contractor had purchased from a telephone company discarded telephone poles treated with chromated copper arsenate (CCA) and wanted to use them as underlay and duckboard to build a hiking trail in Lapland.[75] Although it excludes waste from its scope, the REACH Regulation is ambiguous about recovered material. In its written observations to the ECJ, the Commission itself referred to the guidance document 'Waste and Recovered Substances' and followed its argumentation, holding that once waste has ceased to be waste, it returns to the scope of REACH.[76] Here again, the role of guidance is not limited to providing technical gap-filling, for determining the material scope of a law falls in the realm of traditional judicial (formal) argumentation.

The use of guidance as a response to the absence of clarity and precision in framework norms is premised on the increasing need for information as part of effective judicial control. However, this information is not to be treated or classified narrowly as scientific expertise.[77] As is clear from the cases analyzed above, guidelines are not primarily perceived as a source of technical specifications but increasingly as a source of

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72 The scientific panels of the European Food Safety Authority (EFSA) have adopted guidance documents identifying their own benchmarks for undertaking risk assessment. Alemanno suggests that the EU courts 'might rely on the growing number of guidance documents which are prepared by the EFSA's scientific panels in order to define their own way of conducting risk assessment. In fact, only these documents may potentially provide a useful legality benchmark in reviewing the proper conduct of the panel when carrying out the risk assessment': see A. Alemanno, 'Science and EU Risk Regulation: The Role of Experts in Decision-Making and Judicial Review', paper presented at the Young Researchers Workshop on Science and Law: Scientific Evidence in International and European Law, 31 May–1 June 2007, ISUFI, Lecce (Italy), at p. 17, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1007401.

73 Case C-558/07, *SPCM SA and Others* v. *Secretary of State for the Environment, Food and Rural Affairs* [2009] ECR I-5783.

74 Ibid., Opinion of AG Kokott delivered on 10 Mar. 2009, para. 127. The Court did not refer to the guidance in its judgment, yet it endorsed the AG's reasoning as far as the substance was concerned.

75 Case C-358/11, *Lapin elinkeino-, liikenne- ja ympäristö- keskuksen liikenne ja infrastruktuuri vastuualue*, judgment delivered on 7 Mar. 2013 (not yet reported).

76 Ibid., Commission's written observations on proceedings, 3 Nov. 2011.

77 For how the EU courts treat scientific expertise analysis, see J. Corkin, 'Science, Legitimacy and the Law: Regulating Risk Regulation Judiciously in the European Community' (2008) 33(3) *European Law Review*, pp. 359–84; V. Heyvaert, 'Reconceptualizing Risk Assessment' (1999) 8(2) *Review of European Community & International Environmental Law*, pp. 135–44.

interpretation of framework regulation. This shift in what might be considered the function of guidance does not deny the importance of technical and bureaucratic expertise woven in, but it makes the point that societal acceptability of guidance cannot be ignored if post-legislative guidance is frequently invoked as a source of what is deemed to be reasonable, proportional or necessary; the balance between societal and technocratic legitimacy must be the aim of guidance writing.[78]

Use of peer review to assist the courts in selecting an optimal level of intensity of review

Whilst guidance documents may be consulted in the judicial review procedure, the very processes that produce these documents may also be useful for courts. This observation bears a close resemblance to a discussion of the use of scientific peer review by courts. Alemanno has argued that the courts can utilize the mechanisms and results of scientific peer review in two ways: judges can either call in experts to analyze scientific evidence offered by the parties to a dispute or, if the evidence has already been peer reviewed, they can adopt a presumption of correctness of findings and conduct a less intense review.[79] REACH actually introduces this kind of scientific peer review. When a company applies for registration, the ECHA undertakes a completeness and, in some cases, a compliance check. For the latter, which is a more substantial and intrusive form of review, the ECHA is obliged to confirm that registration is consistent with a number of information requirements enshrined in REACH. Each technical dossier submitted with the registration must specify, in relation to certain categories of information, whether the information it contains has been reviewed before submission. REACH does not explicitly require a reviewer to be independent, only to have appropriate experience. However, it serves both individual applicants and the chemicals industry to emphasize the scientific merits of the reviewer in a bid to convince the ECHA to 'go easy' on the application.[80]

Adopting a broader understanding of peer activities not limited to strictly scientific pursuits, REACH rule-making offers a new perspective from which to assess the courts' deference and the intensity of review. On the one hand, post-legislative rule-making creates more and better reference points for the courts to address and consider what takes place in systems such as REACH. There is in this sense no relaxation of scrutiny. On the other

[78] The interesting question and point of clarification concerns the judicial treatment of guidance documents and whether they are treated differently from the more traditional scientific expertise (e.g., the ECHA opinions prepared in the context of the Commission's decision-making on authorization of chemicals). Do the EU courts distinguish between guidance documents involving 'policy' advice and scientific opinions involving 'scientific' advice? Or does the attitude towards guidance speak of a general inclination on the part of the EU courts to acknowledge that the strict division between 'scientific' and 'policy' advice cannot be sustained? As yet the case law is not expansive enough to answer the questions posed. Thanks are due to Veerle Heyvaert for raising the issue.

[79] Alemanno, n. 72 above, at p. 25. See also A. Alemanno, 'The Dialogue between Judges and Experts in the EU and WTO', in F. Fontanelli, G. Martinico & P. Carrozza (eds), *Shaping Rule of Law Through Dialogue: International and Supranational Experiences* (Europa Law, 2010), pp. 347–76, at 362–7.

[80] J. Scott, 'REACH: Combining Harmonization and Dynamism in the Regulation of Chemicals', in J. Scott (ed), *Environmental Protection: European Law and Governance* (Oxford University Press, 2009), pp. 56–91, at 64.

hand, the repeated process of testing arguments and opinions among peers increases the information available to reviewing courts, which disincentivizes the courts from developing their own view on the matter. For instance, the ECHA website contains a great deal of relevant information that is potentially useful for the courts. Should the CJEU be asked a question on the 0.1% limit for SVHCs in articles, the controversy surrounding the issue would be likely to nudge the EU courts to look at the issue more closely. In other, less contested matters, the information available might encourage the courts to take a step back. Not only is the information assessed among peers – those who can reasonably be expected to understand the argument and assess its technical and technocratic merits – but also among peers who might be better equipped than courts to judge the societal-political stakes at play.[81]

The next example of REACH administrative decision-making goes beyond REACH guidance drafting but should briefly be discussed as it helpfully illustrates the role of information in optimizing the intensity of review. REACH involves procedures for authorizing as well as restricting the use of certain chemicals.[82] While both procedures share similarities, they differ in terms of which aspects of decision-making are open to participatory decision-making. Remarkably, in contrast with the restrictions process, the authorization process restrains the extent to which parliaments and the general public may participate.[83] Now, drawing on the connections between peer review and judicial review, the EU courts could move crabwise between strategies of varying degrees of intensity. When reviewing decision-making (including scientific evidence) in the context of a more inclusive restrictions procedure, the EU courts might adopt a light touch as scientific evidence has been more thoroughly discussed and can thus more legitimately be deferred to. In this particular instance, internally operating peer control influences the contours of external control, in the form of a deference decision. In the same way in which the deference decision is affected by the functioning of peer review, internal mechanisms can prompt judicial review not to defer to the decision under scrutiny and can, in addition, provide a pool of arguments relevant to evaluation of the decision-making. When commenting on the system of legal remedies in REACH, Bronckers and Van Gerven make this connection by holding that the ECHA and its committees 'must address these comments [comments from interested parties] in the statement of reasons of their decisions and opinions, making ex post judicial control more effective'.[84]

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81 This observation somewhat unhelpfully recurs in the familiar dilemma of science versus politics, experts versus locals etc. in (environmental) decision-making. Without wishing to stoke the fire of a long-standing debate, I limit myself to noting that when people, commodities and ideas travel across the world it seems to matter less to ascertain whether information comes from locals, experts or courts (not denying its importance altogether) than whether that information can withstand scrutiny by locals, experts or courts.

82 REACH Regulation, n. 3 above, Title VII (Authorisation) and Title VIII (Restrictions on the manufacturing, placing on the market and use of certain dangerous substances, preparations and articles).

83 See Scott, n. 80 above, at pp. 77–8. See also V. Heyvaert, 'The EU Chemicals Policy: Towards Inclusive Governance?', LSE Law, Society and Economy Working Paper 7/2008, available at: http://www.lse.ac.uk/collections/law/wps/WPS2008-07_Heyvaert.pdf.

84 M. Bronckers & Y. van Gerven, 'Legal Remedies under the EC's New Chemicals Legislation REACH: Testing a New Model of European Governance' (2009) 46(6) *Common Market Law Review*, pp. 1823–71, at 1852–3 (emphasis in the original).

In recent years, the EU courts have shown more interest in reviewing science-based decision-making, not just for its formal correctness but also for its substantive acceptability.[85] It is not difficult to divine a rationale for this being so. The EU courts can afford this because of the vast repositories of information now available to them. As a result of the accumulation of information and knowledge the EU courts have a choice: they can either intensify their review if documentation seems to summon more questions than answers, or they can defer to scrutiny taken by multiple processes of making framework norms operational. There is still a fine line between deference and intensity but the difference is that the decision as to the optimal level of scrutiny is now informed by background information supplied by network participants, not by dogmatic assumptions held about the role and reach of judicial review.

Peer control keeping conflicts out of courts

Finally, a brief discussion is in order about whether post-legislative rule-making transfers potential conflicts to, or away from, courts. The institution of post-legislative rule-making is a place where disagreements are, in the first instance, expressed and mediated. As a participant in guidance drafting, the ECHA's Member State Committee serves as an illustration of the link between post-legislative rule-making and its tendency to defuse a conflict. The Committee has a duty-bound obligation to resolve (not just attempt to do so) disagreements over certain matters specified in REACH.[86] In addition, disagreements are teased out and addressed through channels carved into the REACH Regulation: they allow Member States, the Commission and often other interested parties also to voice their concerns and negotiate conflicting points of view when a decision is still on the table.[87] By channelling and taming conflicts, these procedures potentially discourage actors from involving the CJEU.

Is there any evidence that post-legislative rule-making has reduced the need to go to court? By way of a preliminary remark, it should be noted that the ECHA has been operational for only a few years (since 2007) and is still in many respects in a testing phase. Therefore, it is difficult to interpret any number of REACH-related court cases as bearing a direct connection with peer control in REACH. Perhaps some connection can be established between the suggestion that post-legislative rule-making might lessen the willingness to litigate and the fact that the ECHA Board of Appeal (where disagreements and disputes arising from simplified procedures will accumulate more swiftly) readied itself for an onslaught of appeals during 2010.[88] With this not

85 For an early judgment, see Case T-13/99, *Pfizer Animal Health* v. *Council* [2002] ECR II-3305.

86 REACH Regulation, n. 3 above, Art. 76(1)e.

87 Scott, n. 80, above.

88 Bronckers & Van Gerven, n. 84 above, at p. 1846. Note that the intention is not to equate the internal administrative appeal with judicial review. The Board of Appeal is only brought into the analysis as a general indication of litigation interest. However, there may be a stronger link between the two. In cases enshrined in Art. 91(1) REACH, the appeal to the Board of Appeal is a precondition for judicial review (Art. 94(1) REACH), and here the low number of administrative appeals also indicates low numbers of applications for judicial review.

happening, the Board of Appeal has since dealt annually with modest numbers of cases.[89]

Much depends on the Commission. In analyzing networks in the telecommunications sector, Thatcher and Coen note that, as a result of the Commission's veto powers over independent regulatory authorities, the CJEU is needed less often to adjudicate.[90] In the case of REACH rule-making, the Commission does not have formal veto powers over Member States and the latter may rebel on salient issues. The alliance of many Member States in the controversy over the application of the 0.1% threshold possibly explains why the Commission could not bring the rebels into line. However, if the issue has minor significance or limited appeal to other Member States, the Commission yields at least de facto veto powers over individual insurgents.

A more definitive analysis must await future research. Suffice it to conclude with two observations. Framework regulation in itself may have the potential to transfer conflicts most naturally dealt with by legislation to courts whereas post-legislative rule-making may offer a platform to negotiate and respond to conflict. It can be accepted that this is not always the case and there are instances where post-legislative rule-making will create entirely new conflicts or entrench divides that led to the conflict. But even the last instance does not disable the argument put forward here; rather it can be said to qualify it: although post-legislative rule-making might run the risk of occasionally falling victim to factions and interpretative struggles, battles fought prior to the case entering the judicial procedure entail potentially valuable information for judges whose thankless task it is ultimately to decide whether it is shoes or shoelaces.

4. CONCLUSION: MULTIPLE ACCOUNTABILITIES FOR LAWS IN PROGRESS?

Challenging the much more traditional account of guidance adding merely technical content to the legislative framework, this article has shown how framework norms are made operational and given interpretation through practices of guidance drafting in networks. The increasing relevance of networks for determining and setting out what the law says nevertheless raises a concern. The system of REACH rule-making has made for sobering reading, and the in-depth study of the development of the SiA Guidance fittingly illustrates the pitfalls of post-legislative rule-making. Unclaimed

[89] In the 2010 annual report the ECHA observed that contingency measures planned for 2010 were unnecessary. While noting that some cases are still to be expected, the ECHA commented that its work with companies during the registration process paid off in the low number of registration rejections and then, of course, ultimately in the low number of cases submitted to the Board of Appeal: see the 2010 ECHA General Report, at p. 32, available at: http://echa.europa.eu/documents/10162/13560/mb_03_2011_general_report_2010_final_en.pdf. In 2011, it was again noted that the number of appeals was lower than anticipated. The Board of Appeal gave a final decision on two cases, two cases were withdrawn and two others were withdrawn after rectification by the Executive Director: see the 2011 ECHA General Report, at p. 47, available at: http://echa.europa.eu/documents/10162/13560/mb_06_2012_general_report_2011_final_en.pdf. The year 2012 was also quite modest in quantitative terms – eight appeals were made to the Board of Appeal: see the 2012 ECHA General Report, at p.46, available at: http://echa.europa.eu/documents/10162/13560/final_mb_09_2013_general_report_2012_en.pdf.

[90] See Thatcher & Coen, n. 54 above, at p. 824.

potential for greater opportunities for informed participation and the uncontrollable role of the Commission feature among the chief concerns.

Assuming the unfeasibility of an ever-expanding judicial gaze, this article has suggested that control exercised in and by networks should be perceived as part of subsequent judicial control. Peer control increases the amount and quality of information available to the courts. At best, strategically chosen and used information can develop into a method of indirectly controlling networks. By deferring and referring only to information which has been produced in a way that satisfies the basic procedural requirements, judges can indirectly act as catalysts to urge actors themselves to make an effort.[91] This would be a desirable development. A truly accountable chemicals policy is possible only when actors can justify their actions to peers who are equipped with the expertise that brings something to bear on the resolution of the matter. The reader may now legitimately wonder if this emphasis on information dispenses with the notion of courts as generalists.[92] Quite the contrary: what cuts across all the examples is the realization that peer control gives the courts more leeway. Rather than becoming experts themselves, the courts can use information in order to regulate the scope and effectiveness of their review – comfortably within their generalist expertise.

Finally, in acknowledging and better incorporating peer review as part of judicial review, we might move closer to addressing one of the recurring problems of the current regulatory system: 'too many accountabilities' do not always create one coherent system.[93] The notion of multiple accountabilities has been coined to take into account the development of a diversity of regulatory and institutional strategies. For all those interested in accountability in an era of post-legislative rule-making, the urgent task is to locate and establish connections between different modes of accountability in an effort to keep up with the progress of 'laws in progress'.

[91] These basic procedural requirements are satisfactorily enshrined in the REACH (Revised) Consultation Procedure on Guidance, n. 20 above. See also J. Scott & S. Sturm, 'Courts as Catalysts. Rethinking the Judicial Role in New Governance' (2007) 13(3) *Columbia Journal of European Law*, pp. 565–94.

[92] Thanks are due to Deirdre Curtin for posing the question.

[93] T. Prosser, 'Conclusion: Ten Lessons', in Oliver, Prosser & Rawlings, n. 59 above, pp. 306–18, at 317.