Book Reviews

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EU Chemicals Regulation: New Governance, Hybridity and REACH
by Steven Vaughan
Cheltenham: Edward Elgar Publishing, 2015, 259 pp.
€ 123,06

*Apolline Roger**

The first thing I would like to say about this book might seem frivolous - but it is not. Steven Vaughan has mastered the art of storytelling. Such a skill makes one very popular around a campfire. It is also extremely handy when one ambitions to write a detailed *and* easily readable book on the EU Chemical Regulation 'REACH'. The '*and*' should not be underestimated. Do not get me wrong, REACH (which stands for Registration, Evaluation, Authorisation and Restriction of Chemicals) is a fascinating regulation. Toxic pollution is one of the most important environmental and health issues of our time, and the extent of our 'toxic ignorance' is puzzling. REACH was a courageous regulatory innovation, adopted at the end of entrenched battles involving powerful industry lobbies from the EU and the US, as well as the US government and NGOs. Under REACH, an entity manufacturing or importing more than one tonne/year of a chemical substance has to register it to be allowed to access the European market. The heart of REACH, at least on paper, is therefore the production and diffusion of data on the intrinsic properties of chemical substances. It also sets out the procedures to limit the use of a given substance ('Authorisation') or to ban it ('Restriction') when it poses an unacceptable risk.

However fascinating, REACH is dry, extremely long, complex and technical. REACH has been discussed by academics, but very few venture inside the beast even though, as is often the case, the devil lies in the detail[1]. Furthermore, and this is the whole focus of Steven Vaughan's ambitious book, REACH has a life which extends far beyond the provisions of the regulation. The European Chemical Agency (ECHA) and several other actors are adopting a daunting amount of implementing guidance documents. This post-legislative soft law production has been mainly ignored by academics.

Steven Vaughan had the courage to analyse these numerous and lengthy (as he reiterates many times, citing the number of pages and words involved) documents. He digested them and, without minimising or hiding the true complexity of the matter, explained the normative system they create in an insightful, engaging and simple way.

I. Objectives

The objectives of the book are twofold. The first is to offer an explanation of the REACH regulation enriched by a detailed understanding of the soft law adopted to guide its implementation. Such an understanding is rare, and the book is of unprecedented depth on the topic. The book usefully unveils the practicalities of the implementation of REACH, a reality truly difficult to uncover considering the number and length of guidance documents. It is an example of rigour and clarity. This book will certainly be a stepping stone for other studies of the REACH norms constellations, not least to answer the multiple and fascinating questions sign-posted by the author.

The second objective of the book is to analyse to what extent REACH guidance documents, as a case

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1 Two recent volumes are however all about the details – see Lucas Bergkamp (ed.) *The European Union REACH Regulation for Chemicals: Law and Practice* (Oxford: Oxford University Press, 2013) and Dieter Drohmann and Matthew Townsend (ed.) *Best Practice Guide to Regulation (EC) No 1907/2006* (Oxford: C.H. Beck/Hart/ Nomos, 2013).

study of post-legislative soft law, confirms and/or challenges the existing 'new governance' scholarship. The author sets out, in particular, a classification of REACH post-legislative soft law according to several criteria (authorship, forms, addressees, acceptance, function, genesis, review, impact, coverage). The main contribution to the new governance scholarship is the elaboration of a more nuanced taxonomy of the functions of post-legislative soft law. Four are identified:

– 'Amplification' (guidance goes beyond but respects the text of the regulation);
– 'Standardisation', a subset of amplification (the guidance prescribes a behaviour not specifically set in the regulation);
– 'Translation' (the guidance contradicts a clear provision of the regulation); and
– 'Extrapolation' (the author aims at filling a gap he/she/it identified in the regulation).

These functions are usefully employed throughout the book to classify and clarify the analysed guidance documents. However, the terminology could offer a more immediate comprehension of what each function covers. 'Amplification' is used to describe a situation where optional advice is offered (in contrast with 'standardisation', which concerns the prescription of a precisely described behaviour). A term other than 'Amplification' might have given a more intuitive and immediate comprehension of the reality it designates and of how it differs from 'standardisation'. More importantly, the word 'Translation' can be misleading when used to describe a soft law document which contradicts a clear provision of the hard law it is supposed to help implement. This is especially the case when the author of the guidance document is not the author of the regulation it aims to implement and might not have the power to amend it. Public authorities adopting soft law often tend to be strategically quite vocal on its lack of binding effect, maybe to detract attention from the fact that they adopt influent acts without adequate accountability mechanisms and transparency. A translation is innocuous; it respects the meaning of the main text. Using this term may not be the most efficient way to shine light on a contentious practice.

However, finding an adequate label is a deeply difficult exercise. And in the same way that 'a rose by any other name...', my disagreement is only with the labelling. The differentiation itself, between these four functions, is a precious tool for future new governance studies. It helps better understand the potential impact of soft law in practice and the intention of its authors. Last but not least, it reveals the variety of relationships between hard law and soft law when they are 'yoked', i.e. so deeply bound that a 'hybrid' is created.

The main strength of the book, and what I am sure must have made it a seriously difficult project to complete, is that each contribution to the new governance theory is deeply grounded in a rigorous, detailed, skilful and informed analysis of the practice. The structure of the volume reflects this methodology.

II. Structure and Content

As advised by Steven Vaughan, Chapters 2 and 3 can be skipped by readers already accustomed to REACH and more generally to the chemical policy debate. However, they will be indispensable for others. Chapter 2 presents the scientific and political background of REACH. By doing so it emphasizes why reducing our 'toxic ignorance' - REACH's aim - is a truly ambitious and complex enterprise. Our knowledge of the characteristics and impacts of chemicals is still limited, as is our capacity to gather adequate data. Furthermore, even when data is actually available, REACH has yet to find a way to standardise the format of the data and diffuse it in a way which would make the information useful for public authorities, consumers, downstream users, etc. Building on this background, Chapter 3 draws REACH's landscape. It gives an overview of the institutions and of the main obligations REACH creates, which are studied in-depth in the following chapters.

Chapter 4 is the first of five chapters eviscerating the complexities of REACH's institutional and normative architecture. After detailing the functioning of the European Chemical Agency, it explains who is involved in the adoption of REACH post-legislative soft law as well as the scope and variety of this production. A useful typology of the different acts of post-legislative soft law is provided on p. 78-79. Having observed that the procedures for guidance production and amendment lack public participation and transparency, the chapter logically ends with a reflection on accountability. The author confirms

what can be observed in other areas where EU soft law flourishes: the disconnection between the perception of guidance documents by EU Courts and the importance and variety of their practical effects. The data collected will, without doubt, be useful to people interested in the impact of the growing use of soft law on access to justice, public participation and accountability in environmental law.

REACH mandates the sharing of certain data between those manufacturers and importers intending to register the same substance. When they need to do so, they come together in groupings called 'Substance Information Exchange Fora' (SIEFs). Informed by practice and academic reflection, Chapter 5 is a brilliant piece to obtain a concrete understanding of SIEFs and the theoretical significance of this peculiar structure of cooperation between enterprises. It identifies the gaps in the main regulation that the guidance either tries to fill, effectively fills or ignores – even when guidance would have supported a better functioning of the system. Steven Vaughan therefore identifies the contours of the enterprises' margin of appreciation and reveals the nature and impact of ECHA normative strategy.

Chapter 6 is an extremely rich analysis of the very heart of REACH: the obligations related to the creation, registration and dissemination of information. It addresses a fundamental question: is REACH able to effectively reduce toxic ignorance or will it become a box ticking exercise with little impact on both the capacity of public authorities to identify dangerous substances and of the public to better control their exposure? More than ever, the deep analysis of the guidance opens a window on what is really required from companies. What the analysis reveals is that ECHA focuses on data creation rather than dissemination, on information flows between companies rather than between companies and employees/consumers/the public. REACH's heart, the creation of information, is not beating as it should to drastically reduce toxic ignorance. As brilliantly evidenced by Steven Vaughan, the information is presented in a format that is difficult to exploit and is often of very poor quality. The guidance document and enforcement procedures set by REACH do not seem to be able to address this issue.

Chapter 7 highlights what might be the main weakness of REACH: the disconnection between information generation and regulatory action. Only 5% of the registration dossiers are checked; the registrants have no obligation to notify the authority when they identify an unreasonable risk; and the quality and format of the information are a barrier to an easy review for regulatory action. The registration could be, but is not, used as a tool to gather toxic knowledge to ground decisions to restrict harmful chemicals. Steven Vaughan rightly qualifies the situation as 'worrying, and a waste of regulatory effort' (p. 163). Chapter 7 exposes the practical issues in the Authorisation and Restriction processes. It also points out evidence of the significant influence of ECHA guidance, which shapes, usefully but not always for the best, the Authorisation and Restriction processes.

Chapter 8 demonstrates that surprisingly little guidance has been developed at EU level on the enforcement of REACH by the Member States. Despite some effort of harmonisation and the existence of an enforcement cooperation forum, it is not clear whether the mechanisms developed under REACH will effectively support the creation of a level playing field for chemical manufactures and importers. A study of the UK enforcement system further illustrates the complexity of ensuring an effective, multi-level implementation.

Chapters 9 and 10 build on the data collected in the previous chapters to draw together the lessons learned from the analysis of REACH as a 'hybrid' for the new governance scholarship. REACH soft law assumes multiple forms. It deals more comfortably with obligations of enterprises (or of the Member States) than with the rights of the general public, which it tends to ignore. Most of the soft law aims at extrapolating the hard law obligations or standardising the ways in which they are implemented. However, ECHA has adopted guidance which contradicts the main regulation to shape essential aspects of implementation.

In addition, the author highlights the ways in which REACH post-legislative soft law challenges some aspects of the new governance scholarship. Is REACH peculiar? Or is the extent of the soft law adopted to support its implementation the reason why more variety can be identified? Whatever the reason, REACH shows that if private persons are involved, soft law production remains mostly in the hands of public authorities which defies the common 'privatisation' observed in new governance case studies. Even more interestingly, REACH hybridity challenges several of the 'positive' assumptions frequent-

ly underlying the analysis of the new governance phenomenon. First, an increase in transparency is not a by-product of new governance. It is a basic requirement of good governance, but is far from being systematically respected. Second, instruments of new governance are not necessarily more consensual and non-hierarchical. REACH shows the exact opposite. Some documents contain an explicit waiver informing of the absence of consensus and a hierarchy exists between the different forms of soft law. Last but not least, seeing new governance as a solution to the limits of traditional EU law might be misleading. REACH post-legislative guidance often mirrors hard law provisions in everything but their binding effect. It does not embed an innovative method of action; it simply ensures that what was not specified by the legislator can be detailed downstream. Steven Vaughan rightly qualifies this as a necessity, but is soft law the best media for this endeavour? This important question becomes essential when looking at the lack of justiciability, of transparency, of public participation and the on-going debate on the legitimacy of soft law. Another question is the legality of the guidance. The author notes that 'one might question whether there is an element of competence creep in ECHA's approach' and 'whether the Agency has overstepped its generic mandate' (p. 232). Unfortunately this question is raised but left unanswered, which seems problematic given that the book evidenced the adoption of guidance contradicting the main regulation. The Treaties have been interpreted by the Court as opposing a fundamental limit to the power of EU Agencies[2]. This question is essential as it comes down to whether EU authorities can escape the procedural and substantive limitations framing the adoption of hard law by simply giving to a very prescriptive document the label of 'guidance'. For the same reasons, the discussion of the legitimacy of REACH post-legislative guidance (p. 243-246) could have been usefully developed further. However, not everything can be done in a reasonably sized volume and these remarks are a compliment: it is only because the analysis is so good that the reader wants more.

Finally, the author suggests avenues for further research (p. 233-234) – which I have no doubt will gain a lot from using this volume as an example of excellent methodology, as a collection of insightful findings and as an ambitious contribution to the new governance scholarship.

Deference in International Courts and Tribunals - Standard of Review and Margin of Appreciation
Edited by Lukasz Gruszczynski and Wouter Werner
Oxford: OUP, 2014, 464 pp.
£70 GBP

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States must comply with international obligations. When an international court or tribunal has competence to do so, it reviews State acts to determine their legality under international norms. Reviewing State acts is a delicate affair: international adjudication's effectiveness depends on its legitimacy. Legitimacy, in turn, depends on the perception that international bodies ensure compliance with international norms, rather than interfering with State policies and annulling them at will.

In brief, international tribunals must be concerned to display a respectful stance towards States, lest the latter be tempted to consider withdrawing from their jurisdiction. Since jurisdiction by consent is the rule, the prospect is not merely hypothetical. Venezuela's withdrawal from the ICSID Convention and the ongoing debate about the UK abandoning the European Convention of Human Rights show this much clearly. When States dislike how international justice is administered, exit is a realistic option, alongside voice, loyalty and the unlikely tool of neglect.[1]

The spectacle of international judges tiptoeing deferentially around State sovereignty is understandable. One aphorism illustrates it exhaustively:

> Leopards break into the temple and drink the sacrificial pitchers dry; this repeats over and over again; finally it can be calculated in advance and becomes part of the ceremony.[2]

The priests run the temple, but cannot dare to bother the leopards. The result is a ceremony hardwired with deferential rituals. ***Gruszczynski*** and

2 Case 9/56 Meroni v. High Authority [1957/1958] ECR 133; Case 98/80 Romano v. Inami, [1981] ECR 1241, Case C-270/12 UK v. Parliament and Council EU:C:2014:18.

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1 Albert O. Hirschman, *Exit, voice, and loyalty: Responses to decline in firms, organizations, and states* (Harvard university press, 1970).

2 Franz Kafka, *The Zürau aphorisms* [1946] (2006), 20 (our translation).