Transnational Law and Environmental Governance

New Directions for the Independent European Environment Agency

A Strategic Transnational Concept

Rasmus Dilling

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
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Examining Board

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This Thesis has been submitted for language correction. Few aspects presented in Chapters 2, 4, 6-8 and 12 have been published earlier, see Dilling 2000

Keywords: *European Environment Agency (EEA), independent agencies, regulatory agencies, information agencies, EU environmental law, international environmental law, Community Method, EU multi-level governance (MLG), Open Methods of Coordination (OMC), third level of EU integration, flexible EU integration, private transnational law, public transnational law, transnational governance, transnational networks, transgovernmental networks, disaggregated state, information networking, EU agencification, European administrative law, global administrative law (GAL), cognitive norms, globalisation, global environmental governance, global climate management, soft powers, strategic transnational concept, strategic autonomy, risk management, diversity management, management of uncertainty and complexity, EU democratic deficit, agency legitimacy, agency accountability, structured deliberation, procedural democratisation.*

Summary

This Thesis revitalises the transnational European Environment Agency (EEA) as part of a new concept, the strategic transnational concept.

The strategic transnational concept represents a third level of EU integration, which is neither supranational nor loose cooperation among national agencies. It supplements the traditional Community Method in the development of law by involving the dynamics of the EU agencification process and the global trends of transnational governance and cooperative law. It addresses the complexity of environmental regulation by generating cognitive norms as an outcome of networking and strategic diversity management, deliberation, learning processes and knowledge sharing.

The strategic transnational concept relates to EU experimental governance and the Open Method of Coordination (OMC). However, the concept adds a structured and coordinated transnational process and also ensures linkage to the EU integration process. This implies a new autonomous role of the EEA focusing upon strategic management and structures for deliberation.

Currently, the EEA framework provides limited support for such role. The overall mandates and objectives of the Agency need clarity. The EEA Regulation lacks democratic legitimacy as deliberation beyond the participation by the Commission and the Member States is limited. A fundamental obstacle relates to the mismatch of applying a horizontal transnational structure within the overall vertical and supranational EU framework. Nevertheless, when the dual approach is well employed the hybrid function of the EEA may productively serve as a focal point anchoring "soft" EU transnational management within "stronger" EU regulatory processes.

The strategic transnational concept relates to the expansive global agenda of the EU. As a "global hybrid", the EEA anchors the EU to the emerging global transnational governance. Also, the global dynamics of the concept and the leading role of the EEA facilitate distribution of legal and administrative capacity needed for managing diversity and legal pluralism caused by globalisation.

This Thesis is dedicated to the memory of my father.

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Abbreviations

BAT	Best Available Technologies
BEREC	Body of European Regulators for Electronic Communications
BRIC	Brazil, Russia, India and China
BRIC-SAM	Brazil, Russia, India, China - South Africa and Mexico
CFI	Court of First Instance
CIS	Common Implementation Strategy
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
COP 15	15th Conferences of the Parties to the United Nations Framework Convention on Climate Change in Copenhagen
COP 16	16th Conferences of the Parties to the United Nations Framework Convention on Climate Change in Cancun
COP 17	17th Conferences of the Parties to the United Nations Framework Convention on Climate Change in Durban
CORINE	Programme on Coordinated Information on the Environment
CSR	Cooperate and Social Responsibility
C40	C40 Cities Climate Leadership Group
DG	Directorate General of the Commission
EAP	Environmental Action Programme
EC	European Communities
ECJ	Court of Justice (former European Court of Justice)
EDA	European Defence Agency
EEA	European Environment Agency
EEC	European Economic Community
EIA	Environmental Impact Assessment
EIONET	European Environmental Information and Observation Network
EIT	European Institute of Technology
EMEA	European Medicines Agency
EMU	Economic and Monetary Union
EPA	United States Environmental Protection Agency

ENP	European Neighbourhood Policy
ERG	European Regulators' Group for Electronic Communications Networks and Services
EU	European Union
EUI	European University Institute
GEO	Global Environmental Organisation
G20	Group of 20 - Group of finance ministers and central bank governors from the 20 major global economies
G77	Group of 77 - Coalition at the United Nations of Developing Nations
IGO	Intergovernmental Organisation
IMPEL	European Union Network for the Implementation and Enforcement of Environmental Law
INECE	International Network for Environmental Compliance and Enforcement
INSPIRE	Infrastructure for Spatial Information in the European Community
IPPC	Integrated Pollution Prevention and Control
IRBM	Integrated River Basin Management
ITER	The International Thermonuclear Experimental Reactor
IWRM	Integrated Water Resources Management
MLG	Multi-Level Governance
NATO	North Atlantic Treaty Organisation
NFP	National Focal Points
NGO	Non-Governmental Organisation
NRA	National Telecommunication Regulator or Administrator
OECD	Organisation for Economic Cooperation and Development
OMC	Open Method of Coordination
PHARE	EU pre-accession financial instrument for Central and Eastern European countries to support transition and accession to EU
TEC	Treaty of the European Communities
R20	R20 Regions of Climate Action
SCO	Shanghai Cooperation Organisation
SEA	Single European Act
SEIS	Shared Environmental Information System

TACIS	Technical Assistance to the Commonwealth of Independent States
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
TOL	2007 Treaty of Lisbon
UK	United Kingdom
UNCED	1992 United Nations Conference on Environment and Development in Rio de Janeiro
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UN	United Nations
US	United States of America
USAID	United States Agency for International Development
US APA	United States Administrative Procedure Act
WFD	The EU Water Framework Directive
WSSD	2001 World Summit on Sustainable Development in Johannesburg
WTO	World Trade Organisation

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These experiences have allowed me a greater insight in, and hopefully also a better understanding of, the needs, hopes, expectations, enthusiasms and views expressed throughout the world. These expressions reveal a great amount of diversity among people and cultures, which constantly may surprise and give thoughts for reflection. Often, differences occur even in our understanding of basic concepts. It also underlines that the world remains a place of immense diversity despite the process of globalisation. These experiences are reflected in many of the discussions and points made in this Thesis.

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Rasmus Dilling

1 Introduction

"To become recognised as the world's leading body for the provision of timely, relevant and accessible European environmental data, information, knowledge and assessments", (EEA 2009a, 3).

The objective of this Thesis is to provide new directions for the European Environment Agency (EEA)[1] and the integration process of the European Union (EU) based upon the recent trends in both EU and global level transnational governance and law[2].

This Thesis defines a revitalisation of the transnational EEA based on technical strategic autonomy. This autonomy bypasses the deadlocked EU constitutional discussions caused by the Meroni Doctrine on the legal autonomy of the EU Agencies. Instead, the autonomous position of the EEA is based on the specialised technical and scientific characteristics of the Agency[3].

The Thesis also defines the legal and institutional structures of the autonomous EEA as part of a new concept: the strategic transnational concept, which is an innovative approach to the EU integration process.

As the recent 2007 EU Treaty of Lisbon (TOL) maintained the established EU constitutional institutional balance, with no clear definition of the legal autonomy of the

[1] Hereafter referred to as the EEA or "the Agency".

[2] In brief, transnational governance has been described as "sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the politics of the cabinets or chief executives of those governments" (Keohane & Nye 1974, 43).
It follows, that transnational governance at EU level is a third level of governance supplementing, according to Craig, "the continuum between intergovernmental and supranational governance at EU level". The transnational concept allows the Member States, and the individual sub-national actors "wider room of manoeuvring, escaping the central role of the state, allocated by the intergovernmental approach, and likewise escaping the autonomous position of the supranational institutions able to constrain the behaviours of all actors" (Craig 2011, 24ss).
See further definition of transnational law and governance in Chapter 4.1.

[3] The European Environment Agency (EEA) has a legal personality of its own, EEA Regulation Article 7. This Thesis attempts to provide for the definition, scope and meaning of such legal personality – and to apply it in a meaningful way within the legal and institutional framework of the EU Treaties.

EU agencies, it has become increasingly clear that the EU Commission[4] remains responsible for the activities of the EU agencies and thus, that continuing discussions on the legal independence of the EU agencies in any regulatory terms may prove futile[5]. In fact, the legal uncertainty tends to have an opposite effect, as we may observe an increasingly instrumental use of the transnational EEA by the supranational EU Commission, and therefore a gradual decline of the original transnational character of the EEA[6].

This development could have the repercussion of setting the EU agency model at risk of being viewed as a less favourable governance tool by the Member States; adding to an increasing perception of the EU agency model as yet another supranational instrument of the Commission, chaired by and/or influenced by the Commission, and where the Commission enhances the EU agenda on behalf of the transnational approach and the real influence of the Member States. As the EU agency model originally was seen as a transnational vehicle, and as an alternative forum for the Member States to become involved in the development of the EU regulatory process, such development could turn out detrimental to the general acceptance and legitimacy of the EU agency model, as the model risks losing appeal and thus, becoming obsolete.

[4] Hereafter also referred to as "the Commission".

[5] Related, the term "regulatory agency" applied in this Thesis refers in relative broad terms to an independent regulatory body with a full range of regulatory powers including norm setting and enforcement mechanisms. Such definition is broader than the absolute definition proposed by the EU Commission; where a "regulatory" agency only can issue individual legal binding decisions (and thus, not legally binding rules), and is subject to the responsibility of the EU Commission. The distinction will be further discussed in Part II.
Unless otherwise stated, this Thesis applies the broader definition of "regulatory agency.

[6] Supranational organisation or governance is typically used descriptively, and has not acquired a distinct legal meaning (Schermers & Blokker 2003, 46s). The EU is an organisation characteristic of supranational features originating from the 1951 European Coal and Steel Community. Schermers & Blokker argue that no completely supranational organisation currently exists, as even the EU depends to a considerable extent on intergovernmental cooperation (a point which still is valid despite the later changes to the EU Treaties). And taking this point into consideration, the term "supranational" applied in this Thesis is used in relative, not absolute sense.
The fundamental characteristics of supranational organisations are according to Schermers & Blokker: 1) the organisation should have the power to take decisions binding the Member States, 2) the organs taking the decisions should not be entirely dependent on the cooperation of all Member States, 3) the organisation should be empowered to make rules, which directly bind the inhabitants of the Member States, 4) the organisation should have the power to enforce its decisions, 5) the organisation should have some financial autonomy, and 6) unilateral withdrawal should not be possible.

Perhaps as a consequence of such instrumental use, we are witnessing a new European institutional transnational approach based upon loose cooperation between Member States and the horizontal influence of the Commission. This allows the Member States to retain their individual strategic approach, as binding output commitments are low. An example of such loose cooperation is the involvement of the national regulating bodies in the recent 2010 European Telecoms Body, Body of European Regulators of Electronic Communications (BEREC). Another example is the loose cooperation among Member States established in the water management sector; from the outset of the Water Framework Directive (WFD), the implementation of the directive has been supported by the Common Implementation Strategy (CIS) based upon a network of the heads of national regulators, which gives non-legally binding guidance on implementation to national and other lower-level authorities.

The challenges for the Community[7] is not to let these new transnational processes initiated by the Member States bypass and diminish the important involvement of the Community itself. As this Thesis argues, the potential of the transnational process for the EU integration would lose out if its core were not centred within the Community. In order to sustain both the EU and the European integration process, it is important to allow the Community a coordinating role in the European regulatory process[8]. This does not, however, necessarily indicate a Community coordination based upon the traditional supranational top-down Community Method[9]; it also includes Community driven transnational regimes such as originally established by the EU agency model. The point is that the Community based transnational approach should not be replaced by the Member State based transnational approach. Rather, the Member States should have a strong incentive for joining the Community based transnational regimes in addition to other transnational models.

[7] When referring to "*the Community*", it has the same meaning as the EU.
[8] When referring to the *European integration or harmonisation process*, it is understood as European-wide processes, not specifically related to the EU (although the EU may take part in such), and therefore exceeding the specific EU integration and harmonisation processes. When referring to the *EU integration or harmonisation process*, it is understood as the specific processes within the EU, and for the development of the Community itself.
[9] Understood as the traditional EU decision-making within the institutional form of governance, which includes the process of transfer of powers from the Member States, the institutional set-up and decision-making in the EU (Foster 2009, 136).

1.1 The Vision: A Strategic Transnational EEA

The challenge of this Thesis is to re-establish the Community based transnational approach according to the original intentions and legitimacy of the EEA. As decades of legal and political development have shown, true legal autonomy is not allocated to the EU agencies. It is also not foreseeable for the EEA in the near future to receive regulatory powers; to become a regulatory agency. Accordingly, the Thesis restates the transnational potential of the EEA focusing on the autonomous position of the EEA utilising its specialised technical and scientific characteristics.

Therefore, instead of focusing upon legal autonomy in terms of regulatory responsibilities, this Thesis focuses upon a consolidated independent status of the EEA based upon strategic technical autonomy, or in other words; a transnational EEA based upon strategic application of technical autonomy. Such a focus refers to the synergy of deliberative transnational processes among national administrations, epistemic communities[10], and private and public actors. It is a synergy that enhances the processes of targeted generation and distribution of information, research and knowledge, and the development of factual norms rather than strict legal norms[11]. It is a synergy applied strategically within transnational networking which aims at the needs and demands among actors for complex environmental management and implementation of regulatory policies and legislation[12].

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[10] Epistemic communities are defined as networks "of professionals with recognized expertise and competences in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" (Haas 1992, 3).

[11] The Thesis employs a broad definition of law based upon a normative approach. Based upon the definition suggested by Chayes & Chayes, "norms" are used in the Thesis in a generic sense to include a broad class of "generalised prescriptive statements – principles, standards, rules, and so on – both procedural and substantive. The term includes statements that are reduced to writing, or some other authoritative formulation, as well as informal, tacit, or background norms. And there is no distinguishing into any systematic or hierarchical order of these categories, and in practice they all interact in complex ways" (Chayes & Chayes 1995, 113).
Also, following the normative nature of Luhmannn's theory of law, the Thesis applies a broader definition of law based upon legal pluralism and a sociological "positivism", or approach where law, or norm is a functional social structure for reducing complexity and risk, and stabilising normative expectations for society over time (King & Thornhill 2003, 37ss, 40, 42s, and 52ss and Luhmann 1983, 100 and 115). Luhmann sees law's time-binding function, its stabilisation of norms over time, as providing forms, which are able to transform risks into norms. This happens in ever-changing situations so as to enable facts to be established, repetitions to be recognised, and for learning to occur (Luhmann 1993, 51ss and King & Thornhill 2003, 186ss).

[12] As the Thesis argues in the following chapters, the approach is ***strategic*** as it concerns planned activities, which serve constructively to the development of norms, policy, etc. Strategy refers to diversity

Such transnational processes also provides a deliberate learning process for the Community, the Member States and the other participating actors in obtaining and distributing useful knowledge and information; a process which in itself may consolidate learning into factual norms. Eventually such knowledge and information should be canalised back into the regulatory process, which then could evolve into new legal norms set out in legislation.

The transnational vision employed by this Thesis is two-fold. First, the strategic transnational concept refers to the generation of knowledge and factual norms. Second, the strategic transnational concept presents an EU regulatory instrument that deliberately shall be applied by the Community in the EU integration process.

The Thesis will argue that the vision conforms to EU law and that the strategic transnational concept is a further development of the recent EU experimental governance approach integrating the Member States further into the definition and implementation of EU environmental law. This horizontal regulatory approach indicates a more open process of standard setting with more emphasis on methodological criteria and institutional and procedural norms, rather than substantive norms (Ladeur 2000)[13].

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management based on a framework of reference, as priorities, organisation, goals and objectives increasingly are "moving targets" reflecting the complexity, risk and uncertainty involved in environmental governance. In addressing such "moving targets", the framework must provide the structures needed for "orchestrating" such diversity management.
The approach is ***autonomous***, as it refers to the integrity and strategic choices of the EEA, and the technical specialisation, allowing room for manoeuvring, withstanding influences and interests, free from political and external scientific agendas, and free from decisive influences.
And the approach is ***transnational*** referring to the horizontal interrelationship between Member States and the EEA, as an addition to the traditional supranational and international relations, indicating a new approached for law, regulation and governance as a third level of EU integration. These aspects will be address in later in the Introduction, and in the Thesis.

[13] **Procedural norms, or law** - are also referred to as administrative law. It is defined as the "processes and management of the institution and the processes of interaction among the institutions themselves, the processes and interaction between the Union and the Member States and its external relations with other countries and international organisations" (Foster 2010, 99s). Procedural norms are not "harmless". Weiss et al note that "often the cause more controversy than substantive norms, in the sense that they possess a higher degree of determinacy, as they are perceived as placing greater restrictions on state's sovereignty than substantive norms" (Weiss et al 2007, 333).
Institutional norms, or law – are also called the constitutional law of the EU. It concerns the "structure of the Union, the regulation of the main institutions and other bodies of the Union. Institutional law also concerns the relationship of the institutions among themselves, the relationship of the Union with the Member States and its external relations with other countries and international organisations" (Foster 2010, 99s).

The strategic transnational concept concerns both negative and positive EU integration. When the strategic transnational concept generates lessons and norms for implementation of Community law it resembles negative integration. When the strategic transnational concept is applied directly by secondary EU legislation as a regulatory instrument, it is part of positive integration. Thus, the vision should be considered an innovative and supplementary approach to the traditional Community Method.

Therefore, when applying the strategic transnational concept as a regulatory instrument, it is not in opposition to, but rather a supplement to the harmonisation process. It is a deliberative process, which should be applied by the EU, where appropriate. It is an alternative regulatory approach to the traditional Community Method. The strategic transnational concept stimulates and generates new knowledge on procedural and factual norms based upon the benefits of transnational networking.

Hence, the transnational vision represents a new third level of EU harmonisation of law based upon transnational or transgovernmental cognitive processes of deliberation and cooperation between European agencies and the involvement of private and public stakeholders. As a third level of EU harmonisation, the transnational vision addresses EU harmonisation based upon cognitive cooperative law in addition to the traditional EU harmonisation based upon national law and supranational community law. The transnational harmonisation process positions itself somewhere "between" the supranational and national legal and institutional structures of the EU and of the Member States. In focusing upon the transnational EEA, the vision also defines the interaction between the transnational EEA on the one hand, and the supranational EU institutions and the national institutions on the other hand.

Substantive norms, or law – is defined as the "legal rules established to carry out the broad policy areas of law agreed under the Treaties and can be distinguished from the law relating to the institutions and the procedural law of the Union. The substantive law is largely secondary law and takes effect predominately in the Member States and not at the Union level. The substantive law has also been described as economic law or the law of the economy of the Community" (Foster 2010, 99s). In the context of international environmental law, "substantive law, or norms establish rights and obligations concerning the environment, as opposed to Procedural norms that prescribe the method or process for implementing substantive norms or for their enforcement, or that deal principally with procedures states must follow" (Weiss et al 2007, 259).

The third level of EU harmonisation, based upon transnational cooperative law, provides an escape from supranational command, and the possible national fragmentation resulting from the Subsidiarity principle. In providing for cooperative law, which productively addresses complex environmental regulation, the strategic transnational concept consolidates the autonomous position of the EEA among other Community and national institutions. Also, as it will be described later, the transnational dimension of the third level of EU harmonisation adds to the notion of the related third level harmonisation applied by EU experimental governance and the Open Method of Coordination (OMC). In essence, the Thesis attempts to strengthen the experimental path of the EU integration; correcting the paradox observed that in recent years the experimental open character of governance and the European institutions has increasingly vanished and "been supplanted by a state-centred perspective of a kind of "super state", in spite of the fact that this runs counter to the new relational logic of transnational heterarchical and societal self-organisation and its open dynamics of self-transformation based upon networking and focusing upon the value and productivity of divergence" (Ladeur 2011b, 398s).

The processes involved in transnational cooperative law are part of the same dynamics seen in the EU agencification processes, and the similar processes involved in developing a European administrative law, or Global Administrative Law (GAL)[14]. It is a dynamic based upon an increasingly distinct and disaggregated role of national agencies involved in transnational networking, which surpasses the traditional role of state in international matters (Slaughter 2004a), and even provides for a unique autonomous position of the individual national agency at the domestic level.

As it will be discussed in Chapter 11, this Thesis argues for a significant position of the state in a globalised world; as the state agency represents a vital focal point in combining and connecting transgovernmental networking with the regulatory and institutional processes at national level. Therefore, the relevant issue is not whether state matters in an increasingly globalised world, but rather how to define the "disaggregated" repositioning of the national agencies in terms of the strategic transnational concept.

[14] Not to be confused with the traditional terms of *International Administrative Law*, which is the law that governs intergovernmental organisations (IGOs), (See, Weiss et al 2007, 151).

Legitimacy Crisis – Innovation Needed

Related to the third level harmonisation, the strategic transnational concept also provides a productive approach to addressing the legitimacy crisis (i.e. the increasing lack of public confidence in the European integration process). "The EU is no longer enjoying the prestige it used to have under former Commission President Jacques Delors, and the EU has been slow in responding to the legitimacy crisis, which emerged in the 1990s and has become increasingly present" (Dehousse 2011a, ix). As seen in the context of economic policy, the Member States rather than the EU responded to the recent economic and financial crisis in intergovernmental manners[15]. It is correct to ask whether the "Community Method" has become "obstinate or obsolete" (Dehousse 2011a). Based upon the recent legitimacy crisis, "we observe a shift in the balance of power between the national governments and the European institutions. Some will see in this the need to delegate further authority to supranational bodies. Others will, on the contrary, read these developments as confirming that the diversity in Europe among a large number of states does not allow for more centralised governance" (Dehousse 2011b, 12s).

But even when states attempt to take over, the traditional intergovernmental decision-making processes seem to be in trouble. This became evident upon the failure of the highly anticipated 2009 COP 15 meeting in Copenhagen on climate changes[16]. In consequence of such failure, it appears that the process of reaching intergovernmental agreements have now shifted towards a more transnational governance approach, as will be described in the Thesis. This is further substantiated by the recent changes in the environmental policy

[15] Intergovernmental governance or organisation may be understood based upon two fundamental characteristics (Schermers & Blokker 2003, p. 45); 1) the decision-making powers are in fact exercised by representatives of governments. Organs composed of persons independent of the Member States, committees of experts or parliamentary assemblies may play an advisory role, but they will generally not have the power to take final decisions, and 2) In important matters, governments cannot be bound against their will. Intergovernmental organizations seek collaboration among governments, and are in no way superior to them. Although intergovernmental organizations can sometimes take binding decisions, this is only possible where the decision in question enjoys the unanimous approval of all members. By voting against a draft decision a government can thus prevent its adaption (Schermers & Blokker 2003, p. 45).

[16] The 2009 United Nations Climate Change Conference, commonly known as the Copenhagen Summit, was held at the Bella Center in Copenhagen, Denmark, between 7 December and 18 December. The conference included the 15th Conference of the Parties (COP 15) to the United Nations Framework Convention on Climate Change and the 5th Meeting of the Parties (MOP 5) to the Kyoto Protocol. According to the Bali Road Map, a framework for climate change mitigation beyond 2012 was to be agreed there, see http://www.iisd.ca/recent/recentmeetings.aspx?id=5&year=2009.

agenda, as we now in general witness both a diminished environmental policy agenda and declining public interest, with the significant exception of the climate agenda.

Majone describes the situation well; "the legitimacy crisis in any variant has perhaps come to a point where the legitimacy of the EU rests upon whether the EU can demonstrate (by deeds, not by words) that it adds value to what individual states, or subset groups of states, can achieve on their own. Without such convincing demonstration, it seems at risk in the future EU to resolve the legitimacy crisis that currently and increasingly is undermining the stability of the Union" (Majone 2011, 23).

The need for innovative harmonisation approaches is further apparent in the significant ongoing enlargement process of the EU, also as argued by Majone. The traditional Community Method has faced "a radical new context in an EU 27+ members qualitative different from the former EU (and EEC) of 6, 12, and 15 Member States, and the relative high level of heterogeneity in socio-economic conditions and political preferences leading to socioeconomic and geopolitical diversity undermining the traditional "one-way" integration" (Majone 2011, 28ss).

Therefore, innovative ways are needed in EU cooperation in order to regain public legitimacy, and in order to apply inter-state, or re-apply classic intergovernmental mechanisms in new concepts. Such public legitimacy is based upon deliberative processes that may be considered as a functional equivalent to democracy; making up for the democratic deficit of the EEA as a non-majoritarian organisation (see also Kjaer 2010, 35s and 164s).

An innovative approach to EU harmonisation is the core focus of the strategic transnational concept presented by this Thesis. It is an escape from the paralysing integration approach of traditional intergovernmentalism and supranationalism, and the threat to European integration caused by the increasing nationalistic protectionism. The strategic transnational concept presented here is a legal and institutional concept of EU governing, and also of EU governance. Applying the words of Poul Kjaer, it is a concept, "which forms a hybrid consisting of a governing dimension, characterized by

legal and organizational hierarchy, and a governance dimension, which operates within a network form characterized by legal and al heterarchy“ (Kjaer 2010).

The EEA – An EU Lead Transnational Institution

It is proposed here that the EEA should be the lead EU transnational environmental institution. Transnational facilitation requires the support of a transnational lead institution, which in structure, organisation and operation must itself be transnational and horizontal. The Community is already to a minor extent encouraging transnational processes as seen in the Water Framework Directive (WFD). However, it lacks the necessary overall transnational visions and institutional coordination. The Commission is, due to its vertical supranational position, ill-fitted to enter constructively into horizontal transnational management. Such role should be allocated the EEA; a transnational regime calls for a transnational institution. The current EEA already has the fundamental transnational organisational structure, which would make the EEA a suitable candidate for becoming the lead EU transnational environmental institution. The transnational role and function of the EEA should be mandated in general terms in the EEA Regulation[17], and specifically by the individual EU directive applying the strategic transnational approach.

It follows that the strategic transnational concept is a targeted approach to be applied not only by the EEA, but also by the Commission and the Member States; thereby constituting a delicate balance of interests centring the technical integrity of a specialised EEA. Naturally, this raises questions of accountability both in terms of institutional management within the Community order, and within the networks themselves. These aspects will be addressed later in Part III.

[17] Ibid. note 22.

Global Dimensions

The strategic transnational concept also contains a global dimension beyond the borders of the EU. The concept may apply globally, and not only within the EU context. Four considerations will be further articulated in Chapter 11:

First, it will be argued that the EU represents a promising breeding ground for the strategic transnational concept, which has the worldwide potential to mitigate the negative impact of globalisation and the inequality in terms of inadequate national legal and institutional capacity. Accordingly, the strategic transnational concept may in general represent a potential approach to managing the impact of the globalisation processes by allocating legal and institutional capacity at domestic level.

Second, like the third level of EU harmonisation, the strategic transnational concept also presents a third level of integration in the federal context. Subfederal levels of government may have strong conflicting positions on international treaties, and in some jurisdictions those governments can block effective implementation (DiMento 2003, 154). Therefore, the strategic transnational concept may present an alternative approach for the subfederal levels; an alternative which may even be welcomed by the federal level, if such alternative results in an escape from the paralysing blocking of decision-making at federal level.

Third, the global dimension of the strategic transnational concept provides a global alternative for states, or substate/subfederal actors, where the traditional supranational or intergovernmental approach fails. The need for such alternative has become evident given the failure of the earlier mentioned 2009 COP 15 meeting in Copenhagen on climate changes. As a direct reaction to such failure, we witness growing global transnational processes involving civil and private actors at substate levels in climate management, such as the global networking initiative among major cities, the C40[18] and the equivalent networking initiative among regions worldwide the R20[19]. The strategic transnational concept may provide a constructive link between such global myriads of

[18] Ibid. note 278.
[19] Ibid. note 279.

transnational processes and the regulatory processes of international and EU environmental law.

Finally, the global dimension of the strategic transnational concept relates directly to the global role of the EU strategic transnational concept, as well as the global role of the EEA. The EEA must respond to the changing global environmental agenda. Given the global significance of the EU and the EEA, a transnational EEA has ability beyond the Community to address global environmental problems for the following reasons:

a) The EU environmental regimes in political and legal terms already today exceed the Community borders,

b) The trans-boundary environmental issues are global phenomena based upon the borderless environmental media, such as the flow of river streams, c) The EU, in general, is involved in significant international competition on global influence and interests,

d) The EEA from its beginning, rather uniquely for an EU institution, has been open for expansion and even membership of non-EU Member States, and

e) The EEA is already in its organisation a consolidated transnational institution. This makes the Agency a likely partner in global transnational management.

These global dimensions go beyond the single purpose of safeguarding the environment, and other policy objectives within the EU. Rather, it is part of a fierce competition to secure EU political and economic interests worldwide.

The EU and the EEA should be aware of these transnational possibilities, and also of the global potentials and reputation of the EEA as a world leading transnational institution. Such a position would attract interest from actors and regimes located outside the EU, and perhaps even involve the EEA in assisting transnational networking within transnational regimes outside the EU.

The global dimension will be discussed further in Part III.

Orchestration of Diversity Management

It follows from this Introduction that the strategic transnational concept is a concept of diversity management. It is a concept recognising that complex environmental management can no longer be based upon prior fixed and clear normative goals, can no longer provide clear definitions of needs in terms of input and information needed, or can no longer apply a clear comprehensive regulatory approach taking all aspects into account. It is an acceptance that links and causes can no longer be easily established as a precondition for rational choices in terms of ends and means; i.e goals and information inputs (Simon 1997, 72ss).

The strategic transnational concept implies prioritisation, and addresses organisational means and goals, orientation and objectives as "moving targets". The concept employs diversity based upon frames of references providing for structured processes of deliberation. It is a concept of risk management based upon precaution, learning, knowledge and deliberative processes involving private and public actors. It is founded upon diversity enhanced through transnational networking, and is not necessarily aimed at uniformity and heterogeneity.

By applying such an approach, transnational networking allows different priorities for different actors. It allows for fragmentation in organisation, goals setting and fact finding. It also allows for a strategic cognitive process acknowledging the rationality in choice, as guidance for stimulating the information needed to meet the strategic goals set, and at the same time recognising the risk, uncertainty and incompleteness related to the process itself (Simon 1997, 72ss). Thus, rather than explicitly formulated normative goals and pre-defined information, such procedural rationality focuses upon the entangled process of ongoing informational fact-finding and continuous re-orientation of goals in meeting the set strategy.

It is the same rationality, and the acceptance of an incomplete process based upon diversity, strategies and informational fact-finding, that constitutes the foundation of the deliberative process involving private and public actors, and the related democratic legitimacy, based upon democratic proceduralisation, as argued in Chapter 12.

In its essence, the point of diversity management is not to abolish diversity but rather to employ it in a structured manner. In other words, the strategic transnational concept provides, to use the term of Abbott & Snidal, an "orchestration" of diversity (Abbott & Snidal 2009 and 2010).

EU Harmonisation by Diversity

As discussed later, the vision presented here may be met with opposition, similar to criticism of the OMC, claiming that it is illusionistic; that is, it may be naïve to propose a vision that applies significant diversity and national self-determination, which open-endedness also could threaten the Community harmonisation process. In response to this, it can be said that the "amount" of self-determination is no more than the Community intends and controls within the institutional and legal design of the EEA, and no more than the carefully drafted transnational processes set in the secondary EU legislation. It is a process that allows for, and effectively utilises, diversity and national self-determination within an overall scheme of structured EU harmonisation.

Similarly, in the words of Slaughter in her related argumentation for a New World Order, "to achieve a better World order, we must believe that one can exist and be willing to describe it in sufficient detail that it could actually be build" (Slaughter 2004a, 17s).

1.2 Presentation of Parts and Chapters

The Thesis is divided into three parts.

Part I of the Thesis, consisting of Chapters 2 through 5, outlines transnational context and underlying problems and formulates the vision. It presents the transnational context of the EEA, discusses the general legitimacy of EU agencies, outlines the problems related to the diminishing transnational dimension and the general fatigue of the environmental agenda, and presents the strategic transnational concept as a productive continuation of the concept of experimental governance and the Open Method of Coordination (OMC).

Chapter 2 starts with the background. It provides first a brief presentation of the EEA in order for the reader to understand the primary functions and organisational set-up of the Agency – an understanding that is useful for the reading of the Thesis. This is continued with a general outline of the rationale behind and the legitimacy of the EU agencies.

Chapter 3 describes the challenges related to the increasing transnational tension between Community and Member States, which risk sending the EEA into a transnational decline. It illustrates an evolution of good intentions based upon a horizontal transnational approach, but which in reality is facing increasing difficulties in maintaining the transnational balance. The details of this development is further analysed in Part II.

In addition to the challenges faced by the EEA in regards to its transnational foundation, Chapter 3 also addresses the general decline or rather demands for refocusing of the traditional environmental agenda. This relates to a central element of the transnational strategic concept, and relates to the ability of the EEA to adjust its own agenda to this development both at the EU and global level – aspects that will be further discussed in Part III.

Chapter 4, based upon these challenges, applies the visions related to the strategic transnational concept as an innovative approach to EU environmental law and

governance. Understanding transnational law and governance is essential for the transnational strategic concept. Therefore, the chapter provides an overall understanding of transnational law and governance, and the related transgovernmental relations among national or sub-national administrations; aspects that will be discusses in detail throughout the Thesis. The chapter argues that the transnational concept is a further development of the recent horizontal approach in the EU environmental regulatory process. The chapter describes this development, especially the transnational concept, as a productive continuation of the concept of experimental governance and the Open Method of Coordination (OMC).

Chapter 5 provides a conclusion to Part I.

Part II of the Thesis, consisting of Chapters 7 through 9, illustrates the restrained legal and political meaning of the independency of the EEA, indicating that pursuing the "legal autonomy" of the EEA is troublesome and a deadlocked situation. The part will demonstrate that the attempts to match EEA legal autonomy and the responsibilities of the Commission jeopardise the transnational foundation of the EEA, and the potentials of transnational management in the EU. As a consequence, by means of agency definitions and control and influence initiated by the Community, the EEA is in risk of becoming of instrumental use of the Commission.

Chapter 6 analyses the legal constitutional position of the EEA, addressing the possible misconception of an "independent" agency in legal terms based upon the *Meroni Doctrine*.

Chapter 7 illustrates the ongoing efforts by the Commission and the European Parliament to define the legal status of the EU agencies and to adopt the definition of agencies to the legal reality following the *Meroni Doctrine*. Efforts were needed as it over the years became clear that the institutional balance of the Treaty of the European Union (TEU) would not change and that the Commission would remain the primarily responsible for the activities undertaken by the agencies.

Chapter 8 focuses, as a consequence of such attempts for an agency definition, upon the Commission regaining control and influence over the agencies and the EEA (as evidenced by subsequent external EEA reviews and reinforced by the recent internal reviews performed by the EEA itself) and thus, down-grading the transnational role of the Agency to a mere supranational instrument of the Commission. For illustration purposes, the chapter also presents the earlier proposals for a more regulatory EEA; proposals that originate from the early 1990s. It was during this time that innovative proposals for possible directions of the EEA where made and discussed. Such proposals later vanished, perhaps as a consequence of the EU legal and institutional reality. However, such proposals are to some degree still relevant for the debate of further regulatory powers for the EEA, also in a transnational context. The broader purpose of Chapter 8 in relation to the context of the Thesis is to depict the decline in ambition and optimism with regard to envisioning a further regulatory EEA, as witnessed over the past decades.

Chapter 9 provides a conclusion to Part II.

Part III of the Thesis (containing Chapters 10 through 12, as well as the conclusion of the Thesis, Chapter 13) presents the EEA strategic transnational concept in a more detailed manner. This part argues for the strategic independency of the EEA based upon transnational networking and the management of environmental risk, uncertainty and complexity. It is further argued that the consequential promotion of the generation of norms as cooperative transnational law constitutes a third level of EU integration in conformity with EU law. The part also brings the strategic transnational concept to a global level as a competent regulatory approach to managing the increasing legal pluralism and inequality in legal and institutional capacities worldwide stemming from the globalisation processes. However, an EEA based upon strategic transnational concept also enhanced the issue of accountability. Accordingly, Part III also discusses the need and possible solutions for safeguarding sound and fair deliberative processes as well as the public and democratic legitimacy of the non-majoritarian EEA.

Chapter 10 analyses the rationale behind the strategic transnational concept as a third level of Community integration based upon cooperative transnational law which addresses complexity, uncertainty, and risk management by means of deliberative transnational networking processes based upon learning and knowledge generation. Such deliberative processes set aside the traditional distinction between public and private governance in order to stimulate the generation of factual cognitive norms and legal norms that help address the complexity. The generation of such norms and cooperative law is part of the ongoing agencification process in the EU and also the transnational evolution of global administrative law, which provides a set of references of commonly agreed administrative norms in a transnational setting. Chapter 10 describes the development and potentials of the deliberative transnational networking processes and outlines the significance and potential for the EEA in these processes. The Chapter examines the incentives of transnational networking and the position and formulation of the strategic transnational concept within EU law.

Chapter 11 relates to the rationale of the legitimate role of the strategic transnational concept in managing the environmental consequences and needs arising from the globalisation processes. The basic foundation of the strategic transnational concept involves the transgovernmental relations among national administrations – or sub-units thereof. Therefore, the Chapter specifically addresses the legitimate role of the state in the globalisation process; if states do not matter then the legitimacy of the transnational concept would be of little meaning. As this Chapter concerns the global dimension, focus is on the advantage of the global strategic transnational concept as a competent regulatory approach managing the increasing legal pluralism and inequality in legal and institutional capacity. It describes the dynamics for bringing about the sound generation and distribution of knowledge and resources among states and actors with limited resources, and eventually also facilitating the generation of global cooperative transnational law. Chapter 11 additionally analyses the significance and potentials for the direct involvement of the EEA in global transnational context. It will be argued that the EEA and the EU can be a world leading transnational regime in environmental management. Such an approach would correspond to the current political and economic ambitions of the EU, as well as the already ex-territorial path of the EEA.

Chapter 12 discusses legitimacy regarding the accountability of the EEA and the strategic transnational concept in general. The deliberative processes of the strategic transnational concept are challenged by the need to preserve EEA autonomy, while at the same time safeguard balanced control and influence in deliberation. As a non-majoritarian institution, both political and public legitimacy of the EEA depends upon sound deliberation processes and clarity in legal and institutional frameworks. Public democratic legitimacy matters also for the non-regulatory EEA, as information management constitutes policy. Chapter 12 addresses these aspects in the context of the strategic transnational concept and the EEA, including the current accountability structures of the Agency related to networking and management.

Chapter 13 is the final conclusion.

Part I: The Transnational EEA - Revitalised

The first part of the Thesis presents an understanding of the background, the challenges and the visions related to the strategic transnational approach.

The part presents the transnational context of the EEA, discusses the general legitimacy of EU agencies, outlines the problems related to the diminishing transnational dimension and the general fatigue of the environmental agenda, and presents the strategic transnational concept as a productive continuation of the concept of experimental governance and the Open Method of Coordination (OMC).

Chapter 2 starts with the background. It provides first a brief presentation of the EEA in order for the reader to understand the primary functions and organisational set-up of the Agency – an understanding that is useful for the reading of the Thesis[20]. This is continued with a general outline of the rationale behind and the legitimacy of the EU agencies.

Chapter 3 describes the challenges related to the increasing transnational tension between Community and Member States, which risk sending the EEA into a transnational decline. It illustrates an evolution of good intentions based upon a horizontal transnational approach, but which in reality is facing increasing difficulties in maintaining the transnational balance. The details of this development is further analysed in Part II.

In addition to the challenges faced by the EEA in regards to its transnational foundation, Chapter 3 also addresses the general decline or rather demands for refocusing of the traditional environmental agenda. This relates to a central element of the transnational strategic concept, and relates to the ability of the EEA to adjust its own agenda to this

[20] Specific literature on the EEA, see Westbrook 1991, Davies 1994, Ryland 1994, Breier 1995, House of Lords 1995a, Ladeur 1996a, and 1998a, Lack 1996, Bailey 1997, Klatte 1997, Jiménez-Beltran 1995, 1996a, 1996b, 1997, and 1998, Murillo-Matilla 1998, Dilling 2000, Zito 2009a and 2009b, and Martens 2010.
The literature on the EEA also includes the specific evaluations and studies; Commission 2003a and 2003b, IEEP/EIPA 2003, Rambøll-Management/Eureval 2008, Rambøll-Management/Eureval/Matrix 2009, Technopolis 2008a and 2008b.

development both at the EU and global level – aspects that will be further discussed in Part III.

Chapter 4, based upon these challenges, applies the visions related to the strategic transnational concept as an innovative approach to EU environmental law and governance. Understanding transnational law and governance is essential for the transnational strategic concept. Therefore, the chapter provides an overall understanding of transnational law and governance, and the related transgovernmental relations among national or sub-national administrations; aspects that will be discusses in detail throughout the Thesis.

Further, the chapter argues that the transnational concept is a further development of the recent horizontal approach in the EU environmental regulatory process. The chapter describes this development, especially the transnational concept, as a productive continuation of the concept of experimental governance and the Open Method of Coordination (OMC).

Chapter 5 provides a conclusion to Part I.

2 The Background: The Transnational EEA

2.1 Institutional Innovation – Informational Management

The European Communities (EC) formally established the European Environment Agency (EEA) and the European Environmental Information and Observation Network (EIONET) with Regulation 1210/90 of 7 May 1990, based on then TEC Article 130s, now Article 192 (TFEU)[21].

[21] Unless otherwise stated, this Thesis uses the revised Treaty of the European Union (TEU), and the Treaty of the Functioning of the European Union (TFEU). When referring to both Treaties, the Thesis uses *EU Treaties*. The TFEU has by entering into force 1 December 2009 replaced and consolidated the former Treaty Establishing the European Community (TEC). For a general overview of the development

The 1990 Regulation has subsequently been amended three times in 1999, in 2003, and latest in 2009 by Regulation (EC) No 401/2009 – henceforth referred to in the Thesis as the "EEA Regulation"[22].

The proposal for the EEA Regulation was drafted by the Commission in 1989[23]. After consulting both the European Parliament[24] and the Economic and Social Committee[25], the Council adopted the final and modified regulation in 1990.

The Agency opened its activities on 31 October 1994 after the Council had decided its location in Copenhagen[26].

Normative Goals

The main task of the EEA is to provide objective, reliable and comparable information, which will enable the Community and the Member States to take the requisite measures to protect the environment, to assess the results of such measures, and to ensure that the public is properly informed about the state of the environment, EEA Regulation art. 1 and 2[27].

The importance of securing reliable and sound environmental information, of establishing a systematic collection, processing and distribution thereof, and of ensuring

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of the constitutional base of the European Union, including the Treaty of Lisbon (ToL), see Horspool & Humphreys 2010, 13ss and Craig & Búrca 2011a, p. 1ss.

[22] This Thesis refers to the consolidated 2009 EEA Regulation, unless otherwise stated.
The 2009 codification is found by Regulation 401/2009 of 23 April 2009, OJ No L 126, 21.5.2009, and has entered into force on 10 June 2009 repealing Regulations 1210/90, 993/1999 and 1641/2003.
The 1990 Regulation; Regulation 1210/90 on the Establishment of the European Environment Agency and the European Environment Information and Observation Network. OJ No L 120, 11.5.1990, p.1.
The amendments in 1999 by Regulation 933/99 of 29. April 1999, OJ No L 117, 5.5.1999, p.1, and in 2003 by Regulation 1641/2003 of 22 July 2003 on the European Environment Agency and the European Environment Information and Observation Network, OJ No L 245, 29.9.2003.

[23] OJ No C 217, 23. 8. 1989, p. 7

[24] OJ No C 96, 17. 4. 1990.

[25] OJ No C 56, 7. 3. 1990, p. 20

[26] Decision of 29.10.1993 taken by common agreement between the Representatives of the Governments of the Member States, meeting at Head of State or Government level, on the location of the seats of certain bodies and departments of the European Communities and of Europol, OJ No C 323, 30. 11. 1993, p. 1

[27] The full set of tasks of the EEA follow from Article 2 of the EEA Regulation.

integration of the best available environmental information into the EU environmental legislation and management has previously been recognised by the Community. The 1985 programme on Coordinated Information on the Environment (CORINE)[28] fulfilled the goals of the third Environmental Action Programme[29] concerning the collection and examination of data from Member States in order to determine the state of the environment. This network programme aimed at improving the outcome of EC environmental legislation and management, and eventually also at an improvement of the economic growth in the Community. The CORINE network is now continued through the activities of the EEA, especially in the EIONET context, as is described later.

Thus, the EEA is an institutional innovation in addition to already established information networks, with the intention of improving the flow and availability of the best available information for the EU and European decision-makers at all levels.

In the same period, international environmental law also recognised the importance of obtaining and integrating sound environmental information, as emphasised in general terms by the Rio de Janeiro 1992 UN Conference on Environment and Development (UNCED)[30], and later sustained by the Johannesburg 2002 World Summit on Sustainable Development (WSSD)[31]. Consequently, the importance of sound environmental information and the sharing, availability and distribution thereof has become among the key components of most international environmental agreements and treaties (see Louka 2006, at 121s).

"Information" networking not only refers to the exchange of scientific data on the state of the environment but also the exchange of knowledge, expertise and experiences on matters related to environmental regulation. This also includes enforcement networks among national agencies, such as the European Network for the Implementation and

[28] OJ No L 176, 6.7.1985, p.14. For a detailed presentation of the CORINE and the EIONET programmes, see Davies 1994 p. 317ss, 324ss and 330ss.
[29] OJ No C 46, 17.2.1983, p.1.
[30] http://www.un.org/geninfo/bp/enviro.html
[31] http://www.un.org/events/wssd/

Enforcement of Environmental Law (IMPEL)[32] and the International Network for Environmental Compliance and Enforcement (INECE)[33].

As argued throughout this Thesis, networking can have an even further positive impact on the management of the increasing uncertainty and complexity of environmental policy and improve formulation, implementation and enforcement of environmental law. Also, networking will generate a learning process eventually raising awareness of environmental norms, standards and regulatory processes. These aspects will be discussed in the following chapters.

TEU Constitutional Objectives

Although the creation of the European agencies is not foreseen in the EU Treaties, the wide establishment thereof in the early 1990s must be seen as a response to the emerging need of the Community to ensure its normative goals set up in the EU Treaties (Majone 1994a)[34].

Thus, the EEA contributes to the TEU normative goal of improving the European environment by providing the EU Commission, the Member States and the other EU institutions with the necessary data to enable them to integrate particular environmental concerns into general policy making of the EU, and to fulfil the environmental obligations in the EU Treaty.

The EEA is based upon the (then) TEC Article 130s (now TFEU Article 192), which underlines the constitutional environmental commitment it is supposed to fulfil. Thus, although the Agency in its present form is less regulatory it can, beside the role as independent collector of information, be identified as an institution allocated with the task of pursuing constitutional goal i.e. environmental protection, and in particular the

[32] http://impel.eu/
[33] http://www.inece.org/
[34] The EU institutions are listed in TEU Article 13. As it will be described in Chapter 6, the legal mandate of the EU agencies is based upon an interpretation of the role and competencies of the EU Commission. With the exception of the European Defence Agency, none of the EU agencies – nor the legal and institutional status of the agencies – have been incorporated into the TEU.

constitutional goal of providing available scientific and technical data, as stated by TFEU Article 191.

However, the EU constitutional objective of the EEA does not only concern environmental objectives; it also supports the economic integration. Although the EEA Regulation makes no reference to such economic objectives, the historical development of EEC/EU environmental law illustrates this context.

The need for environmental regulation supporting the establishment of economic integration has from the late 1960s and onward been a driving force for Community environmental laws and policies. Until the adoption of the 1987 Single European Act (SEA), the EEC environmental legal basis typically depended upon the earlier TEC Articles 43, 100, 100a and 235 (now TFEU Article 43, 114 and 352) aiming at integrated agriculture and economic policies[35].

The 1987 European Single Act (SEA) intensified the economic goals of the Community and introduced for the first time TEC environmental provisions, TEC Articles 100a and 130s (now TFEU Article 114 and 192), as a respond to the "green" public demand and also as a response to the above mentioned fact that intensified economic growth was in need of a solid environmental regime[36]. Thus, the period following 1987 saw an increase in EC regulation generally leading to the earlier described need for information and accordingly, for better environmental monitoring, improved network structures, better research regarding the environment, for better assessments of the impact of projects on the environment, etc. It is therefore not surprising that the Community in the

[35] This observation must not lead to the false conclusion that the pre-1987 EEC did not have an advanced environmental regime. In fact, the EEC environmental regime has from the earliest days consolidated itself significantly compared to international and national environmental regimes.

[36] The SEA inclusion of environmental mandates, as the first step in the overall "greening" of the TEU objectives subsequently improved by the Treaties of Maastricht and Amsterdam, was the result of an increasing tension in the late 1980s and early 1990s between environmental considerations and EEC economic objectives. Then, the European Court of Justice (ECJ) argued that the EEC environmental regime was supposed to support and not contradict the TEC constitutional objective of economic integration meaning that the environmental concerns would be secondary in case of conflicting interests. It was obvious that this could not continue. First of all because the EEC environmental law had developed into an intense and fully regulated EEC regime of its own, secondly because the European public increasingly demanded a greening of all policy areas and thirdly because the international legal development, and notably the 1992 UNCED (signed also by the EEC), required sustainable development and a greening/integration of environmental concerns into all other policy areas.

Fourth Environmental Action Programme for the first time recognises the need for a European institution for the coordination and sole dedication to addressing the needs of the environment - therefore an institution that should take over and carry on the functions and tasks of the CORINE Programme[37]. This institution became the EEA.

2.2 The Transnational EEA

The transnational character of the EEA, which involves the Member States in a horizontal management approach, follows from its internal organisation and network structures. This approach differs from the traditional EU vertical supranational approach.

The Management Board

The management of the Agency consists of a Management Board, which includes a representative of each EU Member State, two representatives of the Commission and two scientists chosen by the European Parliament, EEA Regulation Article 8. In addition, the Management Board may be represented by one representative of each other country, which participates in the Agency, if so agreed, EEA Regulation Article 8(1). The Management Board adopts its own rules of procedures. Each member has one vote and decisions are based upon two-thirds majority. The Agency is headed by an Executive Director appointed by the Management Board upon proposal by the EU Commission, EEA Regulation Article 9.

The Management Board has over the years grown significantly and now counts 42 members. Such size may hinder efficient decision-making. This was forseen in the

[37] Fourth Environmental Action Programme, p. 5-6. 9,-10, 15-16, COM(86)485 Final of 9 October 1986, OJ C 70, 18.3.1987, p. 3. See also the Report on the results of the half-way stage (after two years of operation) of the CORINE Programme, COM (88) 420 Final, in which it is concluded that the adoption of the European Single Act is followed by a significant growth in the need for more coherent data at Community level on the state of the environment.
Further, concerning the transfer of the CORINE Programme to the Agency, see Written questions from the European Parliament to and the answers from the Commission , E-232/94 of 24 February 1994 (94/C 336/69), OJ C 336, 30. 11. 1994, p. 36 and E 2769/94 of 21 December 1994 (95/C 103/69), OJ C 103, 24. 4. 1995, p. 35

revised 1999 EEA Regulation which recognised the need for more efficient management by introducing a Bureau to which the Management Board can delegate executive decisions according to rules set by the Management Board, EEA Regulation Article 8(2). The Bureau consists of one representative of the EU Commission and the European Parliament each, the Chairman and up to 5 vice chairmen of the Board, Article 2 of the Rules of Procedures of the Management Board and the Bureau[38]. This composition follows closely the original proposal by the Commission (Commission 2003b, 15).

As it will be further discussed in Part II, the composition of the Bureau with less Member State influence indicates the increasing instrumental use of the transnational EEA by the supranational EU Commission, and therefore a gradual decline of the original transnational character of the EEA.

Based upon the principal areas of activity in the EEA Regulation, the Management Board adopts annual and multi-annual work programmes concerning the more specific priorities of the Agency, EEA Regulation Articles 3 and 8(4).

The Scientific Committee

The Management Board and the Executive Director are assisted by a Scientific Committee of maximum 20 members[39]. The members must be particularly well-qualified in the environmental field, EEA Regulation Article 10. The Scientific Committee assists with opinions on issues mentioned in the EEA Regulation, and any other scientific matters concerning the Agency's activities, which may be submitted to it or raised by itself, Article 10 (1). The Board designates the members for a period of four years, renewable only once. The Chairman of the Scientific Committee is observer to both the Board and the Bureau (Commission 2003b, 15).

[38] Consolidated version of the Rules of Procedures of the EEA Management Board and Bureau Document adopted on 8 February 1994 latest amended by Doc. EEA/MB/54/14-MB written procedure of 30 September 2009.
[39] Article 2(5) of the Rules of the Procedures of the Scientific Committee, EEA, Doc. EEA/MB/41/11 of 06 April 2005.

The Networking – EIONET and Beyond[40]

The primary areas of networking are spelled out in the EEA Regulation[41].

First, the principle task for the Agency is to set up and coordinate the environmental information and observation network (EOINET), which is primarily based and dependent on information provided by the Member States and participating third countries, EEA Regulation Articles 2 (a) and 4[42].

Currently, 39 European states participate in the EIONET[43]. It follows from EEA Regulation Article 4 that the EIONET is set up in cooperation with the Member States, and based upon the main component elements of the national information networks. Each of the Member States designates a national focal point (NFP) to be in charge of cooperating with the EEA, and also the national coordination of activities related to the EEA work programmes. These national focal points transmit the information from the national level (i.e. from the main component elements of each Member State) to the Agency[44].

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[40] For a full listing and the details of the current networking at the EEA, see web pages http://www.eea.eu.int/networks and http://www.eea.europa.eu/networking

[41] The different network structures described in the Regulation are as follows:

- The EEA operates the EIONET with national focal points and topic centre, in cooperation with the Member States, EEA Regulation Articles 2(a) and 4,
- The EEA seeks to cooperate with EU institutions and programmes, EEA Regulation Article 15,
- The EEA is intended to promote the incorporation of European environmental information into international environmental monitoring programmes and to cooperate with international organisations and participate in international programmes, EEA Regulation Articles 2(g) and 15 (2),
- The EEA may participate in the cooperation with other bodies, such as the transnational enforcement organization IMPEL, EEA Regulation Article 3 (3).
- The EEA may cooperate with national institutions of non-Member States in areas of common interest, EEA Regulation Article 15 (3),
- The EEA is open to all third countries which share the concern for the environment in Europe, EEA Regulation Article 19, and
- The EEA is mandated to participate in broader networking and cooperation; the EEA can include all elements enabling it to fulfil its objectives, EEA Regulation Article 3.

[42] For a description of the structure, see also the answer from the Commission to question 2717/94 from the European Parliament, (95/C 213/02) of 16 December 1994, OJ C 213, 17. 8. 1995, p. 1.

[43] http://www.eea.europa.eu/about-us/countries-and-eionet/intro

[44] The EIONET structure of today remains the same as envisaged in the beginning of the EEA life span and as outlined by the EEA Annual Report 1994 (EEA 1995, 5s). This continuity has allowed for a stable consolidation of the EIONET and is one of the recognised achievements of the EEA (see in general the EEA reviews).

The Member States can, among their own national institutions, propose the so-called Topic Centres, EEA Regulation Article 4(4). If selected by the EEA, these institutions execute the specific tasks identified in the Agency's multi-annual work programmes. Each topic centre carries out its specific task within a geographical area and cooperates also with the other institutions forming part of the network.

The Topic Centres, currently five in number (water, air & climate change, waste and material flows, nature and biodiversity and terrestrial environment), are under 3-year contracts with the EEA. Their work and the overall structure are regularly reviewed. In 2002, over half of the EEA operational budget was allocated to the Topic Centres and most of the Agency's expertise in the aforementioned areas was concentrated in the Topic Centres[45].

The work of the EEA centres around the operation of the EIONET in three elements (Technopolis 2008a, 65): (i) The EEA itself, which has a coordinating role and carries out much of the data analysis and reporting; (ii) the EIONET network - the collaborative network of the EEA and its member countries; and (iii) the European Topic carrying out a range of tasks on specific issues.

In addition to the EIONET, the EEA is involved in networking with both EU and international organisations[46], with third countries, which may or may not be members of

[45] 2002 figures: € 6,5 million out of € 12,2 million. Source: EEA Annual Report 2002.

[46] See http://www.eea.europa.eu/about-us/international-cooperation.
The EEA networks with both EU and international institutions, EEA Regulation Articles 2 and 15, and Annex A and B. This concerns foremost the cooperation and coordination of environmental research, statistical and monitoring programmes within and out of the EU.
Concerning the EU institutions, the EEA shall seek to cooperate with EU institutions and programmes; cooperation is not only with the Commission, the Council and the European Parliament, but also with the Joint Research Centre (JRC) and the Statistical Office (EUROSTAT). Cooperation between the EEA and the Eurostat was first initiated by the Council Decision of 15 December 1994 adopting a 4-year Development Programme (1994-1997) Relating to the Environmental Component of Community Statistics, OJ No L 328, 20. 12. 1994, p. 58
Other networks that the EEA interacts with include environmental protection and conservation agencies in general and with EU agencies, and their scientific committee. The EEA participates in networks established under the EU Neighbourhood Programme, the EU Mediterranean Action Plan, and within the Nordic Council and the Arctic Council. International networks including those established under the UN and multilateral environmental conventions and a variety of international and European research networks (EEA Strategy 2009-2013, 13).

the EEA[47], and also engaged in "wider" networking such as with academic and research institutions, public and private interest groups, etc.[48].

Besides the networking spelled out in the EEA Regulation, the Agency is currently involved in the Network of the Heads of Environmental Protection Agencies (EPA Network)[49], the European Community Biodiversity Clearing-House Mechanism (EC-CHM)[50], and the EnviroWindows network of knowledge sharing and development[51]

In addition, the EEA is becoming further involved in other relevant networking, determined by secondary EU legislation and policy decisions. Such networking activities includes EEA involvement in the Shared Environmental Information System (SEIS)[52], which also involves the support for implementing the INSPIRE Directive[53].

[47] EEA Regulation Articles 15(3) and 19
[48] EEA Regulation Article 3
[49] See http://epanet.ew.eea.europa.eu/
This is an informal grouping which brings together the directors of environment protection agencies and similar bodies across Europe. The network exchanges views and experiences on issues of common interest to organisations involved in the practical day-to-day implementation of environmental policy.
[50] See http://biodiversity-chm.eea.europa.eu/
The objective of this Biodiversity CHM network site is to promote technical cooperation and technology transfer within the European Union and its Member States and the rest of the world.
[51] See http://ew.eea.europa.eu/
The EnviroWindows provides knowledge sharing and development support by making public available the web technologies of the EEA. A number of tools are offered to facilitate collaboration on common projects, organise partnership activities, and connect geographically distributed users working on research, policymaking, and eco-innovation.
[52] See http://ec.europa.eu/environment/seis/index.htm.
The Shared Environmental Information System (SEIS) is a collaborative initiative of the EU Commission and the EEA to establish together with the Member States a decentralised but integrated and shared EU-wide environmental web-enabled information system related to EU environmental policies and legislation.
The underlying aim of SEIS is to move away from paper-based reporting to a system where information is managed as close as possible to its source and made available to users in an open and transparent way. It is built upon existing e-infrastructure, systems and services in Member States and EU institutions.
[53] See http://inspire.jrc.ec.europa.eu/
The INSPIRE directive aims to create an EU Spatial Data Infrastructure based on the infrastructures for spatial information that are created by the Member States and that are made compatible with common implementing rules and are supplemented with measures at Community level. These measures should ensure that the infrastructures for spatial information created by the Member States are compatible and usable in a Community and transboundary context (INSPIRE Directive, Preamble 5).
INSPIRE is based on a number of common principles:

- Data should be collected only once and kept where it can be maintained most effectively.
- It should be possible to combine seamless spatial information from different sources across Europe and share it with many users and applications.
- It should be possible for information collected at one level/scale to be shared with all levels/scales; detailed for thorough investigations, general for strategic purposes.
- Geographic information needed for good governance at all levels should be readily and

These initiatives will be addressed in Part II, as they indicate the increasing instrumental use of the EEA by the Commission contrary to the independent and transnational approach of the Agency. Part III will also addresses these issues, as spreading of the EEA's activities may jeopardise clarity in priority setting and in fulfilling user expectations related to its core functions - the operation of the EIONET (Technopolis 2008a, 88ss and Rambøll 2009, Vol. III, 85). Further, the spreading of such activities may risk locking the capacity of the Agency, and thus hindering the more open-ended and experimental approach employing actively the strategic transnational concept based upon differentiated strategies and priority setting.

2.3 The Legitimacy of the EEA and EU Agencies

With regard to legitimacy, the mere establishment of a new EU institution (i.e., the EEA) and an information gathering system do not *per se* constitute any innovation at the EU level, or any benefits for the overall development of EU and national environmental law.

As described above, informational networking within the EU was established by the EU Commission already before the establishment of the EEA. Thus, in principle the EU Commission could itself further develop such information gathering based upon enhanced networking and transnational structures. It follows that, the "simple" establishment of a new EU environmental institution for information gathering purposes does not justify or legitimise the establishment and functions of the EEA.

Rather, it is in a different context that the EEA legitimacy is found. The EEA legitimacy is based upon a combination of the independent status of the EEA, and the technical and public legitimacy allocated to horizontal and transnational networking.

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transparently available.

- Easy to find what geographic information is available, how it can be used to meet a particular need, and under which conditions it can be acquired and used.

The INSPIRE directive came into force on 15 May 2007 and will be implemented in various stages, with full implementation required by 2019, Directive 2007/2/EC of 14. March 2007, OJ No L 108, 25.4.2007, p.1.

The EEA is granted individual legal status meaning independent organisation and operation, Article 7 of the EEA Regulation. The broader significance of independency – or autonomy – of the EEA will be discussed in this section. Later, Chapter 6 discusses the legal meaning of the independent EEA according to constitutional EU law.

The rationale for independent agencies is linked to the profound problems addressed in the Thesis; that increasing and complex environmental regulation leads to a need for relevant expertise and for reliable, accountable and stable regulators. It also leads to a demand for more attention on specific areas of social regulation in general, including environmental regulation - areas which often have been neglected by welfare policies of the past (Majone 1996a, 4). In this respect, independent specialised single-purposed commissions or agencies are generally considered to be the most efficient of modern administrative bodies (Majone 1996b, 9 and Everson 1995, 181s). They are regarded as being able to operate efficiently in rapidly expanding and highly specialised areas - for instance, in the environmental area.

Agencies facilitate use of experts outside the normal bureaucratic structure. They allow the "parent department to concentrate on strategic policy, and they insulate technical regulatory issues from policy change, thereby increasing the credibility of the choices thus made" (Craig & Búrca 2011a, 69). In this context, the EU agencies have the capacity to operate more smoothly than the more traditional EU institutions, given their independent nature, political neutrality, single-orientated purposes and non-dominant influence on the various participants in the network structure (Everson 1995, 185; Majone 1994a, 4, Majone 1995, 19, and Commission 2002a, 5).

A strong rationale for delegating powers to institutions independent of the electoral cycle is to increase the credibility of long-term policy commitments (Majone 2006b, 193). The delegation of powers to "non-majoritarian" institutions is meant to "restrain the temptation of democratic politicians to assign greater weight to short-term considerations and to default on long-term commitments" (Majone 2009, 167 and 179ss). Independence is important not only to enhance credibility but also to ensure that

"policies are developed to solve concrete regulatory problems in the best possible way, rather than pursuing integration or other political objections" (Majone 2005, 101)[54].

Thus, it follows that the EU concept of "independent agencies" is based upon a targeted, specialised and independent status with relatively distant institutional links to the EU Commission. This conclusion will stand for now. However, the precise legal meaning of "EU independent agencies" is contested and will be further analysed in Part II.

Based upon the general perception of the legitimacy of agencies, the advantages of allocating the functional decentralisation to EU independent agencies can be seen. Agencies contribute to greater independence, transparency and accountability because they operate at arm's lengths from the political institutions. They carry out technical tasks allowing the Commission to become the political administrator and they encourage uniform interpretation and implementation of Community law, where they form the nucleus of networks of national authorities. Furthermore agencies can enhance administrative integration and advance cooperation between national officials in charge of implementation of Community policies requiring that actors agree on the definition of a common problem and the range of possible responses, which is determined by their access to comparable data and expert opinion (Vos 2005, 120s and 132, Kreher 1997, 238, and Dehousee 1997).

It is along these lines that the Commission also acknowledges the legitimacy of the individual EU agencies. On the current 2011 EU agencies web page[55], the Commission states that:

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[54] Political science provides four policy reasons for delegation to independent agencies, as part of a functionalist "principle-agent" approach. This delegation is based upon a rational choice, as institutional choices are explained in terms of the functions that a given institution is expected to perform, and the effects on policy outcomes it is expected to produce, subject to the uncertainty inherent in any institutional design (Pollack 2003, 20ss, Magnette 2005, 5, and Majone 2009, 179s). Magnette describes the four reasons as:
"a) *Credible commitment* – when government trust is absent, delegation to an independent regulator may be considered,
b) A non-government agent can also provide *policy expertise* needed by government at low costs, and reduce the workload of the administration,
c) Resource to non-government experts can also be useful to enhance the *efficiency* of decision-making, particularly in fields characterized by a high level of technicality, and
d) Delegation decisions to a third party is also a means to shift blame for unpopular decisions from government to other actors."

"The objectives of the individual agencies are many and varied. Each agency is indeed unique and fulfils an individual function defined at the time of its creation. This function might be modified in the future but, nevertheless, there are a number of general aims underlying an agency's operation as a whole:

- *they introduce a degree of decentralisation and dispersal to the Community's activities;*
- *they give a higher profile to the tasks that are assigned to them by identifying them with the agencies themselves;*
- *some answer the need to develop scientific or technical know-how in certain well-defined fields;*
- *others have the role to integrate different interest groups and thus to facilitate the dialogue at a European (between the social partners, for example) or international level".*

In addition, the Commission evaluated in 2008 (Commission 2008b, 5) that the EU agencies have proved particularly relevant in the field of shared competences when the implementation of new policies at Community level needs to be accompanied by close cooperation between the Member States and the EU. The establishment of EU agencies can make possible a pooling of powers at EU level, which would be resisted if centred on the institutions themselves.

The Commission further states that the EU agencies have played an important role in helping certain third countries become more familiar with the EC *Acquis* and best practices. Candidate countries have been participating in Community agencies since 2000, and this possibility has since extended to the Western Balkan countries and the partner countries of the European Neighbourhood Policy (ENP)[56].

[55] See http://europa.eu/agencies/community_agencies/history/index_en.htm

[56] For the general presentation of the European Neighbourhood Policy (ENP), see http://ec.europa.eu/world/enp/index_en.htm

Regulation by Networks

A significant aspect of the legitimacy of the EU agencies is related to transnational networking. "Regulation by networks" responds to the increasing need for uniformity in the EU, and at the same time the increasing need for decentralised implementation based upon the general public reluctance to allocating further centralised powers to the EU (Dehousse 1997, 259 and Dehousse 2011b, 9ss). Dehousse sees the rise of the organised EU transnational networks as an answer to the need for a unification process based upon decentralised administration ensuring that "the actors in charge of the implementation of the EC policies behave in similar manners" (Dehousse 1997, 254).

Dehousee argues that the role of the European informational agencies, such as the EEA, is to create and coordinate networks, as their primary aim is to run networks of national administrations, which come into play in the implementation of Community policies. They accomplish this function by setting up a permanent technical and administrative secretariat, which tries not only to collect and disseminate necessary information but also to "encourage horizontal cross-fertilization among counterpart national officials". Information is central; the non-hierarchical structure of networking normally requires that the actors agree on the definition of a common problem and the range of possible responses, which in turn depends on their access to comparable data and expert opinion. In short, the actors need to proceed on the basis of mutual information (Dehousee 1997, 255 and Slaughter 2004b, 140s).

This uniformity based upon mutual information is only one of many outcomes of the network processes. This Thesis, however, focuses further; it also emphasises the dynamics of the diversity involved. As described in the Introduction, the point in diversity management is not to abolish diversity but rather to employ it in structured manners, which is not necessarily aimed at uniformity and heterogeneity.

It is in this wider perspective, that transnational networking must be understood[57]. The strategic transnational concept applies broadly and, in principle, to any interaction between different legal and administrative cultures. Therefore, besides the cooperation between state administrations, the transnational concept also applies broadly to substate levels, federal context, among regions, and even at local levels within the national state. It involves private and public actors at national, regional and international level. It furthermore covers the direct cross-border interaction among actors in different national states, which again is linked to the relevant horizontal "domestic" interaction among actors within the specific states and regions. Thus, the transnational concept refers to several levels of horizontal interactions; the direct transnational and the linked national, regional and local interactions. In other words, it concerns network of networks.

The legitimacy of transnational networking is primarily related to the prospects for the improved access to and distribution of environmental information[58]. Therefore in this context, environmental networking may be understood as the more or less informal interaction and horizontal cooperation of public and private actors across all levels to promote the generation and exchange of information and to avoid duplication and overlapping of work.

As argued in more detail later in Part III, access to sound information is important in addressing the complexity of environmental management. Such complexity also indicates that the lack of compliance and generation of effective policies is not necessarily a consequence of bad intentions of national administrations or the private market; it may be due to a lack of administrative capacities as well as administrative and societal awareness. The increasing complexity of environmental regulation means that the tasks and workload of environmental administrations do not always correspond to

[57] In general terms, administrative networks are typically capable of fulfilling various tasks, such as information generation, monitoring of the state of the environment, monitoring of the compliance of the parties to international agreements, generation of knowledge in form of experts analyses, etc. These networks often have different participants determined by the different objectives. The line of participants is in principle endless and can consists of international bodies, national governments and administrations, private enterprises, private individuals, NGO's, etc. Networking can take place as part of a mandatory scheme set out in legal frameworks, or evolve spontaneously based upon more free association among individual actors.

[58] As presented in Chapter 2.1, initially the Community applied the networking approach directly for improving the quality of and access to environmental data and information (Davies 1994, 314).

allocated resources. In many cases, needed information and resources are not sufficiently available, or are badly coordinated. In this context, the development of networks for distributing information has an important potential for development of better environmental management and development of environmental law.

Thus, transnational networking plays a major role in the legitimacy of the EEA. The key aspects of the legitimacy concerns credibility and reliability in the generation of information and also the predominately horizontal network structures of the EEA, which operates without a dominant coordinator. These structures reduce the danger of "self-blocking of the system, a danger which is more related to the more traditional hierarchically systems, and stimulates the credibility and reliability and therefore also the dynamic powers in the networks themselves and the generation of information" (Ladeur 1996a).

Networking is a central part of the strategic transnational concept argued for in this Thesis. The rationales and incentives for participation therein are discussed further in Part III.

Public Legitimacy Crisis

In addition to technical and operational legitimacy, the creation of agency networks involving all interested parties can in principle contribute to creating a better understanding and public confidence in EU actions (Vos 2005, 121s).

Similarly, it has been observed that a fundamental aspect of the legitimacy of the EEA and the change within Community environmental policy towards more horizontal governance and integration is linked to the fundamental crisis deriving from the lack of public accountability and confidence towards the traditional Community structures (Dehousse 1997, 246 and 257).

The timing and decentralised nature of the EU agencies must be seen as a response to the EU legitimacy crisis, which became apparent during and after the ratification

process leading to the 1993 Maastricht Treaty; a crisis which gave cause to question the traditional Community Method as the foremost dynamics of the European integration (Weatherill 2010, 647ss and Dehousse 2011b, 8ss). The establishment in the early 1990s of several new decentralised EU agencies, located all over the Community territory, with greater involvement of the Member States and an "overtaking" of former competence areas from the EU Commission may be seen as an attempt to improve the public image of the EU in meeting the calls for less EU centralisation by increasing the direct involvement of the Member States, and indirectly, also the European public in general. Thus, the EU agency model has been part of the EU response to the lack of public legitimacy arising from the centralistic EC integration policy in the 1980s and intensified by the 1987 Single European Act[59]. Interestingly, the current trend in the reformation of the EU agencies, now 25 years later, tends to, once again, allow for more centralisation and influence by the EU Commission. This will be discussed in the following Chapter 3.

A Smart Work Division

For the reasons outlined above, the EEA represents a unique institutional innovation bridging technical and public legitimacy. This EEA legitimacy may be summarised by the following three points:

First, the technical, specialised and single-purposed independent EEA is better positioned than the politically influenced EU Commission for operating specialised environmental management.

Second, the horizontal nature of transnational interaction aligns with the institutional structure of the EEA. As argued throughout the Thesis, the legitimacy of the Agency is sustained by its transnational operative structure and mandates, which are unique especially with regard to the supranational vertical operating level of the EU Commission. The position of the EEA allows operation at a horizontal level without being directly part of the EU policymaking process. This focused "specialisation" on a

[59] For an analysis of the discontent expressed by the European citizens in the referendums over the last two decades, see Majone 2009, 4ss.

horizontal level is a “luxury” that the EU Commission cannot allow itself, given its overall EU political and legal obligations, to initiate, establish and ensure compliance with the EU legislation. Thus, it would be difficult for the supranational EU Commission, based upon its current organisation and its vertical relationship to the Member States, to effectively facilitate networking and interaction in horizontal and transnational management.

Third, the horizontal and independent position of the EU agency model is a step towards greater EU legitimacy among the Member States and the general public (Everson 1995, 180 and 194). Similarly, the decentralised location of these agencies distant from the Commission in Brussels adds to this legitimacy. An independent EEA - as an independent source of reliable information - will also likely strengthen the stabilisation and generation of transnational networking leading to a further strengthening of the Agency's independent position (Ladeur 1996a, 13s). Similar, a positive outcome of the dynamic networking process will allow the EEA to strengthen and defend its independence from the Community which again will ensure the Agency’s credibility and thus help to further networking, which again will promote the generation of more information etc. (Majone 1995, 22 and Majone 1996a, 8s). For such reasons, the Member States also accept EU agencies in areas where national regulation are found to cause externalities. As Scott argues, this acceptance is an outcome of an evaluation up against the Subsidiarity arguments (Scott 2005, 78s).

The establishment of agencies, such as the EEA, is a strategical jackpot made by the Community. By establishing these single-purpose satellite institutions the Community introduces an innovative dual institutional and regulatory approach. By delegating specific tasks to these agencies and applying their innovative horizontal management structures, the EU Commission will likely secure and enhance relevant inputs for the EU regulatory process, which might otherwise be lost or absent due to the restraints of the traditional vertical management approach. The concept of "single-purpose" is broad enough to even include an enhanced transnational role of the EEA in securing the integration of national expertise and influence directly into the work of the EEA and thus, into the formulation of EU environmental policy.

Accordingly, the utilisation of independent and single-purpose EU agencies should be maintained and further enhanced. It seems promising that the Community, by using the agency model specifically, can target and manage regulatory areas where transnational management, and/or separation from the vertical and policy dominated structures of the EU Commission, seems appropriate for the realisation of specific EU policy objectives. The specialisation and individual design of the agency model allows the EU Commission flexibility in delegating specific tasks within a regulatory area and in tailoring the inter-action between the EU agency and the EU Commission. As a result, the Community obtains a useful tool in addition to its overall regulatory function. It is a tool that respects balance and at the same time takes advantage of the transnational approach and legitimacy of the EU agencies.

For these reasons, the transnational approach within the EU should be sustained, continued and even explored further where it proves beneficial for the development of the EU. The transnational EU should be based on an ongoing positive balance between independence, separation of operation and policy, and horizontal inclusion of national administrations into the regulatory process.

Nevertheless, as this Thesis illustrates with regard to the EEA, there is a tendency for erosion of the already establish balance; an increasing tension which irritates the transnational approach and the underlying rationale and legitimacy of the EU agencies just presented above. The EEA is in risk of becoming merely an instrumental tool of the Commission diminishing the original transnational character and the separate and independent personality of the Agency.

3 The Challenge: A Brief Overview

As this Chapter describes, the transnational approach of the EEA is challenged by the institutional balance between the Commission and the EEA. Also, the EEA is in need of redirection allowing the Agency to focus strategically as a response to the changing

priorities and significance of the environmental agenda within the EU and on a global scale.

3.1 EEA Transnational Tension

Over the last decade, by means of successive legal amendments of the EEA, secondary EU legislation and policy approaches, there has been an increasing strengthening of the position of the Commission – and to some extent also of the European Parliament - in the operation, management and control of the EEA and the networking. These aspects are analysed in detail in Part II, along with a description as to how this development is gradually taking place as a consequence of the decade-long and ongoing efforts of the Commission and the Parliament to define the legal status of the EU agencies, and to fit the agencies into the TEU constitutional institutional balance still narrowly defined by the *Meroni Doctrine*.

As described in the above Chapter 2, the EU agency model was originally seen as a transnational vehicle and as an alternative forum for the Member States to become involved in the development of the EU regulatory process[60]. As illustrated by the case of the EEA, the evolution of the EU agencies reveals a tendency of the Commission to exercise greater influence over the agencies; it has regained control and thus, side-tracked the transnational dimension of the EU agency model. This development could have the repercussion of setting the EU agency model at risk of being viewed as a less favourable governance tool by the Member States; adding to the increasing perception of the EU agency model as yet another supranational instrument by the Commission, chaired by and/or influenced of the Commission, and where the Commission enhances the EU agenda on behalf of the transnational approach and the involvement of the Member States. Such development could turn out detrimental to the general acceptance

[60] The original transnational nature of the Agency is clear from the relative decisive influence of the national government involved the original structures and powers of the Agency, as set out in the final 1990 EEA Regulation, and as described above in Chapter 2.
Interestingly, the early negotiations on the establishing of the EEA brought about other models than the transnational. The European Parliament presented a vision of a more regulatory EEA *vis-à-vis* the Member States. Also the Commission had in 1989 expressed a moderate proposal for a regulatory EEA. See more in Part II and Majone 2006b, 199s.

and legitimacy of the EU agency model, as the model risks losing appeal and thus, becoming obsolete.

Related to such instrumental use, the institutional "independence" of the agencies has recently been questioned. Schout & Pereyra state, that "although originally seen as innovations in the EU's governance by depoliticizing and professionalizing policy processes, the EU agencies have not proven, so far, to be a break with EU policy processes – thus the agencies underpin administrative stability rather than reform. As a result, doubts about their added value have remained. It is not yet clear whether the agencies are in the process of developing from organizations into institutions – and hence whether they are developing into authorities with the independence they need to function as expert bodies" (Schout & Pereyra 2010, 13).

This transnational tension (i.e. Member States disinclination – or reaction) is seen in the field of telecommunications in relation to the Commission's suggestion of November 2007 to set up an EU regulatory agency for the telecommunication markets. Instead, as an alternative model the Member States suggested a joint body consisting of a looser network between the national regulatory authorities (König et al, 2008). This new body was established in 2010[61]. Such a loose network among national regulatory agencies offers a less influential role for the Commission – and serves as an example of the Member States regaining control by rejecting the quasi-transnational agency model offered by the Commission[62].

[61] Regulation (EC) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ No L 337, 18.12.2009, p. 1. The board of BEREC is composed of the heads of the 27 national telecommunication regulators or administrators (NRAs). BEREC is assisted by an Office (being a Community Body) managed by a Management Committee in which all NRAs and the Commission are represented, see http://berec.europa.eu/Default.htm and http://ec.europa.eu/information_society/policy/ecomm/eu-rules/index_en.htm

[62] The now less influential role of the Commission is illustrated by the BEREC Regulations itself; see the thorough description Falke & Batura 2011. Falke & Batura describe that the influences of the Commission on the BEREC is significant less than compared to the influences on the previous European Regulators' Group for Electronic Communications Networks and Services (ERG). The BEREC is the successor to the ERG. The Commission now only has an observer status in the BEREC Board of Regulators. Rules of procedure do not require approval by the Commission any more (compared to the ERG) and the chairperson does not any longer need to convene the meetings "in agreement" with the Commission, as earlier required by the ERG. Falke & Batura continues "previously, the Commission provided secretarial services to the ERG. Currently, the Office established as an independent legal person shall exercise all the secretarial functions to the BEREC and also provide professional support. Besides,

Similarly, alternative loose cooperation between the Member States has also been applied in the water management sector. From the outset of the Water Framework Directive (WFD), the implementation of the directive has been supported by the Common Implementation Strategy (CIS), which gives non-legally binding guidance to national and other lower-level authorities on implementation[63]. The CIS consists of nested forums of state and non-state experts and stakeholders, ranging from the more political to the more technical and led by regular meetings of the water directors, who usual head the water divisions in the national environmental ministries[64].

Based upon learning mechanisms such as the formulation and diffusion of guidance documents derived from the national expertise, testing of the documents, and mutual information and comparison, the CIS has been instrumental in implementing the vague substantive objectives as well as the more concrete procedural requirements of the WFD (Homeyer 2009, 20).

The CIS is transnational in its structure; having allowed the national water directors to significantly expand their role in EU water policy. The CIS established an additional transnational structure on top of the national administrations and constituencies providing expertise and stakeholder feed-back. This allows for influencing the Commission's initiatives at an early stage. Based upon the national water directors' central role in implementation, it also allows for them to expand their role and influence beyond the EU to other countries interested in adopting the WFD (Homeyer 2009, 21s).

The CIS and its networks constitute a "pervasive element of "new" and of "multi-level" governance as they are characterised by a lack of formal hierarchy and by cooperation

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the Office gathers and distributes information and best practices among NRAs. Participation of the Commission in the Office is limited to one member in the Management Committee, the rest are representatives of NRAs. Moreover, the Office acts under guidance of the Board of Regulators (Art. 6 para. 2 BEREC Regulation). And finally, the less influential role of the Commission relates to the omitted involvement of the Communications Committee, which now is not mentioned in the BEREC Regulation, although the ERG Decision stated clearly that the ERG shall maintain "close cooperation" with this Comitology committee, but their work should not interfere (Recital 8)" (Falke & Batura 2011).

[63] On the functioning of the CIS, see Lee 2009, 56ss.

[64] See more on the CIS at http://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm

between different levels of governance and between private and public entities" (Lee 2009, 46).

The Commission is involved in the CIS, but in a much more minor role compared to the EU agency model[65]. As described in the above Chapter 2, the EU agency model represents a "smart" work division, where the supranational Commission applies – or rather adds – a transnational management approach by use of satellite transnational agencies. The EU agency model represents a fragile balance between (i) securing inputs for the supranational EU regime by means of transnational agencies and (ii) transnational management structures. Although it is understandable that the Commission attempts to adjust this balance to the current TEU legal institutional balance, such adjustments must be carried out in a manner which respects the delicate balance described above. This requires stimulating incentives on both side of the fence - attracting the supranational Commission and also attracting the transnational minded Member States and actors.

As the examples from telecommunication and water management indicate, the delicate balance has been disturbed. The EU agency model is losing legitimacy, as Member States prefer alternative transnational management; institutionally run by them-selves and not by an EU agency, and with lesser involvement of the Commission.

Basically, three different transnational models in the EU can be presented: the current EU agency model, the "loose cooperation" model and the "strategic transnational" concept. Each has different implications for the relationship between Commission, Member States and the transnational body, or agency:

[65] The CIS is organised in three levels; Technical Working/Drafting Groups, the Strategic Coordination Group, and the Water Directors (Lee 2009, 46). The Technical Working /Drafting Groups prepare guidance and are composed of experts from any Member State that wishes to participate. The Strategic Coordination Group is chaired by the EU Commission and made up of participants of the Member States. In addition, NGOs and stakeholders may be invited as observers and/or consulted. The Strategic Coordination Group is a political body that coordinates activities, evaluates the outcome of the different working groups and prepares documents and reports for the Water Directors. The Water Directors are the Member States representatives with the overall responsibility for the national water policy, steering the process and taking the final decisions with no participation of interest groups at this level. The Commission co-chairs the meetings of the Water Directors (CIS 2010, 2s).

The first transnational model concerns the current EU agency model being of instrumental use of the Commission. It could therefore be questioned whether such model really is transnational as it represents a mix of vertical and horizontal interaction. The model actual fits instrumentally into the vertical structure of the EU as the Commission retains its supranational position and influence on the networking. This model grants the EEA a rather limited position, despite its formal independent status, to apply an autonomous strategic approach, as prioritisation is significantly influenced by the Commission and to a lesser degree by the Member States.

The second transnational approach is based upon the loose cooperation between Member States, and a horizontal influence of the Commission. This approach has been illustrated above by the examples from the telecommunication and water sector. In these fields, and following the argumentation of Ladeur, the Member States "retain their individual strategic approach, as binding output commitments are low. The national telecommunication regulator or administrator (NRA) is obliged to consider, as far as possible, the stances of other regulating bodies. This is an intensive form of mutual binding, which is strongly influenced by the position of the Commission. However, this variant of a European administration is geared towards a relatively unified decision-making practice, and can, therefore, not be informative for a multipolar European administration" (Ladeur 2009, 234) [66]. The transnational telecommunication body BEREC, and likewise the CIS, employ little strategic influence on their own, as such bodies consist of a loose network of the heads of national regulators.

Finally, the third transnational approach is based upon the strategic transnational concept, and relates to the third level of EU harmonisation as an alternative to harmonisation by supranational Community law and by national law. The approach has already been presented in the Introduction and the significance hereof, also in relation to the two other transnational models just mentioned, will be discussed further in Chapter 10.

[66] Related, Falke & Batura has observed that the BEREC "opinions, advice, recommendations, guidelines and best practices are not binding for the NRAs and the Commission; they simply shall take them into consideration" (Falke & Batura 2011).

With regard to the loose cooperation (i.e. the second approach mentioned above), the challenge for the Community is not to let these transnational processes bypass and diminish the important involvement of the Community itself. The development in terms of increasing transnational management is, as this Thesis argues, positive. However, the development is troublesome in the sense that the potentials of the transnational process for the EU integration process cannot lose out on centrering its core within the Community. In order to sustain both the EU and the European integration process, it is important to allow the Community to have a coordinating role in the European regulatory process. This does not necessarily mean that Community coordination should be based solely upon the traditional supranational top-down Community Method as it also includes Community driven transnational regimes, such as originally established by the EU agency model.

Therefore, a transnational EU institution should idealistically anchor the transnational CIS in order to ensure stimulation of the transnational regimes, and at the same time secure the necessary ties to the Community. Taking a future perspective, the EEA would be a suitable candidate.

The EEA is already a transnational actor in its organisation, self-understanding and operation. The Commission should stay out of participating itself in such transnational regimes; the vertical supranational self-understanding, and legal and institutional position of the Commission makes it ill-fit to join a horizontal transnational regime.

The challenge for the Community is not to lose out on the potentials of a Community model based on transnational governance. The emerging Member State initiated transnational structure should, where relevant, be closer attached to the Community structures, and be coordinated by the same. In this regard, even the structures of the BEREC might imply an institutional development, which eventually moves too far away from the Community. The point is that the Community based transnational approach should not be replaced by the Member State based approach – understood as a deliberate alternative to the Community model. Rather, the Member States should be strongly incentivised to join the Community based transnational regimes in addition to

other transnational models. Therefore, the challenge of this Thesis is to re-establish the Community based transnational approach according to the original intentions and legitimacy of the EU agencies – and such "re-establishing" should follow the concept of the strategic transnational concept and third level EU harmonisation based upon transnationally generated cognitive norms.

3.2 A Changing Environmental Agenda

An additional challenge for the future development of the EEA is the global phenomena of a changing prioritisation of the environmental agenda.

From an overall perspective, it is clear that EU and international environmental law has reached new levels of complexity. They have perhaps become a victim of their own success as they have become increasingly integrated into other social objectives and subject areas, particular in the economic field (Sands 2003, xxi). This complexity creates a disorientation of the environmental agenda, and calls for new and innovative regulatory approaches.

European Environmental Regulation – Diffused Orientation

Krämer addresses the increasing disorientation of European environmental law and policy (Krämer 2007, 447s). Although the orientation of the EC environmental policy was formulated in the early 1970s and has progressively expanded since, it is increasingly difficult to determine what the European interest in environmental protection is, how far it goes in specific cases and which measures should be taken, and at which level, in order to protect the environment in Europe. In the failure of establishing a Constitution for the European Union, the interest of the European environment is predominately discussed and addressed from the perspective of the specific interests of the individual national state (Krämer 2007, 447 and 472). Krämer points out that "making EU environmental legislation under such conditions is possible, but regulatory reorientation is needed in view of the increasing diversity of culture and education in the different parts of the European Union, the difference of climate,

geography and other environmental conditions, and the difference of economic and social development and of policies within the 27 Member States and their regions. Under such conditions, European environmental legislation must be general in character and leave many details to the local, regional and national level" (Krämer 2007, 447).

This regulatory reorientation indicates a need for a shift in regulatory approach, as the Community Method no longer can meet the differentiated needs at European level. In view of the increasing myriad of national interest, the EU environmental agenda is in risk of being more or less obsolete. As illustrated in the following Chapter 4, the EU has embarked upon a regulatory approach emphasising and employing national and regional differences. However, it is more than just "getting the legislation right"; it is also a matter of securing the fundamental issue of public legitimacy for EU environmental regulation, and for the ongoing EU environmental integration process in general. As discussed throughout this Thesis, the aim of the strategic transnational concept is to combine such a differentiated regulatory approach with renewed legitimacy.

The End of the "Fundamentalist Phase"

In relation to the legitimacy of EU environmental law and policy, Majone observes rather bluntly, and based upon experiences in the US, that the "fundamentalist phase" of the environmentalism did not last more than 20 years. "When the law, politics, and economics of environmental policymaking were new academic subjects, students and teachers tended to share a deep commitment to the environmental cause viewing environmental quality as an absolute value rather than an important, but not the sole goal of public policy – ignoring that such a one-dimensional view of public policy hardly matched the preference and priorities of the great majority of voters" (Majone 2009, 3).

Majone sees the same tendency in the EU. After the "enthusiasm of the 1970s, the lack of compelling justifications for EU interventions in the environmental area has contributed to the shift of attention away from ambitious programs for the protection of an ill-defined 'European environment' towards more concrete issues such as the poor

performance of the European economy and the problems raised by the monetary union, and a greatly enlargement" (Majone 2005, 123)[67]. Along the same lines, Majone states a few years later that "even despite major and ambitious projects, such as the recent massive EU enlargement process, the Economic and Monetary Union (EMU), and the single European market, the average EU citizens are concerned about the inability of the EU in solving fundamental problems as unemployment, soaring prices of food and energy, transnational crime, the financial crisis, etc." (Majone 2009, 3).

This is not to say that environmental concerns and the environmental agenda have evaporated. It is rather a matter of a diminishing environmental agenda as other policy concerns have taken over[68]. The point made by Majone is for the EU to realise and understand the causes for the present discontent with the EU integration process instead of uncritically continuing traditional integration based upon the Community Method. The EU is in risk of losing legitimacy based upon disappointed expectations (Majone 2005, 10). In this process, "the growing perception that EU environmental policy is designed less to solve concrete environmental problems than to pursue general integration objectives may be yet another factor contributing to the current loss of dynamism of [environmental] European policy, and to the threat of re-nationalization of some of its important components" (Majone 2005, 123s).

However, one could argue that the significance of environmental law and governance will not diminish in the public eye; rather it is a matter of refocusing, as the environmental cause increasingly is being caught up in the complex interrelationship caused by globalisation. Environmental law and policy continue to matter, but in an increasingly integrated approach among other complex policy areas. This tendency indicates that the traditional focus for environmental law and governance is changing – a change that also the EEA must address strategically, as argued in this Thesis.

[67] For an overview of the development of EU environmental law and politic, "The Greening of Europe", Majone 2005, 117.

[68] An example of the changing agenda was seen during the September 2011 general elections in Denmark. Although environmental policy traditionally is highly regarded in Danish politics, it was, together with climate management, more or less absent from the political debates and election agendas, with the exception of the small far-left party *Enhedslisten* (For instance, debate between Party leaders on 26 August 2011, *Danish Radio DR1*).

Although the first round of the "fundamentalist phase" in a Western academic sense may be over, there is reason to believe that we are facing a new fundamentalist phase among a wider global audience based upon necessity. The environmental cause will most likely (re)gain significance among new generations for the two reasons described below.

First, as a consequence of the relative youth of the environmental regulatory regimes, the environmental law and institutions have been through a consolidation process[69]. This consolidation concerns not only the institutional and legal process, but also a demographic trend effect marked by an increase in environmental activism by younger generations. Specifically, the rise in the environmental movement over the last four decades predominately has been embraced by the young generation; a generation that most likely over time will increase the environmental agenda in terms of policy preference and public spending (Bhagwati 2007, 142s). This demographic trend effect might have an added geographical dimension as well, as the environmental movement mainly has been a phenomenon of the developed world. Although, the same level of activism and awareness has yet to break-through among the general population in developing countries, also here, the younger and better-educated generations are leading the way[70].

Second, as development needs and issues of global security are increasingly challenged by environmental causes, public awareness and demand for environmental prioritisation

[69] International environmental law, which also includes EU environmental law, is probably among the most dynamic international legal regimes taking into account its young age. It is after the 1972 UN Stockholm conference that a coherent and focused legal and institutional framework emerged at the international arena. This constitutes the "birth" of modern international environmental law. Prior to 1972, environmental protection was typically applied through case-law and individual international agreements (Birnie, Boyle & Redgwell 2009, 48ss, Sands 2003, 25ss and DiMento 200318ss). The current status of international environmental law reveals a well-established international legal regime (Sands 2003, xxi), which have been rather successful in terms of regulatory outputs, and in promoting general awareness of the importance of sound environmental management and the interdisciplinary and integrated efforts in order to enhance overall sustainable development.

[70] This refers primarily to the immense and increasing educated middle-class in progressing economies, especially the BRIC-SAM countries (Brazil, Russia, India and China – South Africa and Mexico). However, there may also be reason for scepticism, as the same groups also represent potential huge consumer markets likely in many years ahead to favour materialistic benefits, which have an immediate improving effect on their life-quality. If so, the pure environmental goals may become recognised but remain secondary policy objectives.

will most likely gain future momentum[71]. There is a growing awareness of the fundamental importance of sound environment management for sustained preservation of biospheres, the environment itself and also for sustainable economic growth, and global peace and security. This rising awareness extends to the harsh social-economic and geopolitical consequences following famine, flooding, drought, urbanisation, migration, lack of domestic water, deforestation, etc.)[72]. Conflicts over fresh water are already observed[73], and conflicts related to migration caused by drought and famine are seen for instance in the Sub-Saharan region[74].

Environment Versus Climate - Diminished by its Own Agenda?

A powerful example of a changing environmental agenda is the climate agenda. The climate agenda has recently politically, legally and publicly emerged as a new independent policy area; distancing itself from the environmental agenda[75]. Previously, it has been entirely part of the environmental agenda[76].

Based upon the public and political concern over global warming, the last decade has witnessed a significant increase in dedicated climate policy initiatives, climate institutions and climate actors. Even the Commission is now equipped with a climate

[71] The inter-linkage between environmental management and global security and stability has long been recognised globally. As an early example, former US Secretary of State Warren M. Christopher declared in 1996 the protection of the environment as a new fundamental principle of US foreign policy and established an "across-the-board" policy of integrating environmental concerns into US diplomacy. The declaration was in line with the expressed commitment of the 1992 Clinton administration to weave environmental issues into the fabric of national security since "world-wide environmental decay threatens US national prosperity", See *Herald International Tribune,* March 6, 1996.

[72] In addition to awareness raised by education, the direct and visible environmental impact and consequences are also important factors in raising general public awareness. For instance, the increasing difficulties in getting access to clean water and sanitation have affected many people in the 3rd world. Also, in areas within the Ex-Soviet Union environmental damages are often unpleasantly visible and of a catastrophic nature, with direct and long-lasting consequences for the local population. The nuclear accident at Chernobyl and the drying-up of the Aral Lake are primary examples. Lately, China is also acknowledging severe health and environmental problems with direct consequences for the population following the heavy pollution of waters and air.

[73] Such as water related conflicts Israel-Syria-Jordan and Turkey-Syria-Iraq, see Giordano & Wolf 2003, 164ss

[74] For more on climate changes as a security threat, and as one of the major origins of the Darfur Conflict, see Nye & Welch 2011, 313ss.

[75] For a comprehensive presentation of climate changes and law, see Wold & All, 2009.

[76] This Thesis applies "international environmental law" in broad and traditional terms. Thus, unless otherwise stated, climate management is also included as part of the overall international environmental law and management.

commissioner. Paradoxically, it appears that the environmental agenda is being diminished by its former protégée.

The issue of climate change is increasingly recognised as one of the transnational challenges with the greatest environmental, economic, and, arguably, also security implications. Nye & Welch argue that addressing global climate change as an individual environmental issue, and as transnational challenges, will become much more important in the future and "inspire new ways of thinking about international relations" intensifying the "already enormously complicated nature of contemporary international politics" (Nye & Welch 2011, 315s).

In regards to institutional development, national climate ministries as well as an EU Climate Commission have emerged alongside the traditional environmental ministries and the EU Environmental Commission, DG XI.

Clearly, the environmental agenda – with or without the climate dimension – continues to cover the immensely huge area of environmental management in general. Significant overlaps exist between the two policy areas of environmental and climate management, which may give cause for political rivalry. In terms of interest shown by news media and the general public, it is clear that currently the "popularity" of the climate debate "out-shines" the traditional environmental agenda. For instance, the EU climate commissioner and the Danish minister for climate appear more frequently and high-profiled in the Danish media than their environmental colleagues[77].

This calls for a redefinition or repositioning of environmental law and governance. In such repositioning, it must not be forgotten how closely related climate and environmental management are in reality. For instance, the climate ministries and the EU Climate Commission are significantly dependent upon information provided by the environmental institutions, such as the EEA. The EU has not (yet) established a Climate Agency indicating that the EEA also in the future continues to cover related climate

[77] A simple Google search in Danish in October 2011 on "klima" (climate) and "miljø" (environment) generated 132 million and 19 million hits respectively.

aspects. As it will be described in Chapter 12, the EEA is currently significantly involved in climate management.

One could question why the political and public interest has succeeded in separating the climate issue from the environmental agenda by creating new climate institutions. Previously, the environmental institutions have undertaken such tasks so why not just continue this proven path instead of creating more bureaucracy and need for coordination?

Perhaps the answer is rather simply that climate management has reached such proportions that it calls for separation.

It could also simply indicate a populist approach reflecting the policy priority over other issues on the environmental agenda. Climate issues sell political tickets, as news media increasingly portraits the visible and powerful consequences of global warming, such as melting icecaps, reclining glaciers, deteriorating habitats for polar bears, rising sea level, calamities of hurricanes and drought, etc.

Another perhaps more cynical observation could be that the separation of climate from environmental management has been used by the political right-wing to appease the considerable and increasing public and scientific calls for action on global warming – and at the same time to diminish the traditional environmental policy agenda, which politically used to be attributed to the political centre-left. In its prime period in the 1990s, the environmental agenda was predominately carried forth by the political centre-left governments in both Europe and the US. A change occurred in the early 2000s with the entering of European and US right-wing governments. From then on, the environmental agenda was significantly downsized, both in terms of volume and political influence. However, as the importance of the climate strategy became generally recognised, many governments have now embraced the climate agenda by separating it from the general environmental agenda. By establishing new institutions and to some extent, also a new international regulatory area, the political right gains legitimacy by presenting its own response to the climate challenge and at the same time distances

itself from the general environmental agenda, which for many is a product of the liberal left of the 1990s[78].

The findings and observations described above in regards to the changing agenda of the environmental regime are of significant relevance for the definition of the future role(s) of the EEA.

The EEA is currently serving the EU and the Member States with information related to both environmental and climate management. Interestingly, the institutional trend of creating climate ministries and also an EU Climate Commission has not been reflected among the EU agencies. Despite the recent massive increase in the number of EU agencies, no EU Climate Agency has emerged. The EEA undertakes today a significant function of providing input to the EU climate agenda although "climate" is not mentioned in the EEA Regulation. In regards to the legitimacy of the EEA, it is time for an increased focus on the climate aspects of the EEA. This is further discussed in Chapter 12.

The Need for a New Agenda – a Change in Governance

It is clear from the discussion above, that innovative approaches to the revitalisation of the environmental agenda and citizen contentment with the EU integration process are needed. It also indicates that the EEA must be able to address these global challenges in order to preserve its legitimacy. As argued above, this does not mean that the need for environmental management has evaporated. Rather, the point is that the EEA must be flexible in order to align with the demands of any area of regulatory policy for input and for integration of complex environmental management. The EEA must be able to target its operations strategically and fulfill such demands regardless of the defined boundaries

[78] However, the general recognition of the problems attributed to global warming are still being questioned to the extent they threaten the possibilities for reaching a global climate agreement. The 2010 US mid-term election gave way for a more sceptical Congress with both Democrats and Republicans questioning the climate policy of President Obama. This scepticism is based upon a mix of disbelief in the scientific conclusions, and of economic support to the US energy sector and its employees, typically in the oil and coal industry.
Without the US playing an active part, there seems little hope in reaching a global agreement.

of traditional policy areas, such as environmental policy, climate agenda, or economic policy.

Accordingly, the EEA must adapt to the ongoing transformation from the intergovernmental, or supranational environmental regulatory approach to an approach of transnational global environmental governance, as further discussed in the next chapter 4 (see related, Biermann et al 2009b, 1s). The traditional intergovernmental approach is under stress, as we observe an increased self-blocking of the inter-governmental decision-making process itself. This is for instance seen by the failures of the highly anticipated 2009 COP 15 meeting in Copenhagen, Denmark and the following COP 16 in Cancun, Mexico and COP 17 in Durban, South Africa. Such problems have established a need for alternative and innovative processes for generating legal and factual norms; processes that are increasingly facilitated by the transnational concept addressed in this Thesis.

These challenges and processes require that the EEA and the Community in the words of Joerges & Kjaer "must find a productive stand in the increasing intertwinement of European regulatory policies with global governance arrangement, as this development poses a dilemma for the EU. On the one hand, stronger global governance can be understood as a way through which the EU can project its own *raison d'être* of increased integration internally, and to the wider world. Traditionally, the EU has been strongly in favour of strengthening both the scope and the impact of global governance structures. On the other hand, the traditional design of the European project is being increasingly challenged by ever more assertive global structures; as such structures increasingly constrains the decisional autonomy of the EU with regard to both the appropriateness of its content and its external effects" (Joerges & Kjaer 2008, 1s).

Thus, the challenge for the Community, and also for the EEA, is to take advantage of these new global governance structures based upon EU transnational processes as an alternative, or supplement, to the traditional norm-setting of the Community regulatory process.

Now, the next chapter discusses the meaning of these new global structures of transnational law and governance, and the positioning of the EU strategic transnational concept as an innovative continuation of experimental EU environmental regulation.

4 The Vision Applied: EU Environmental Regulation – a Transnational Approach

An understanding of transnational law and governance is essential for the strategic transnational concept. Therefore, the first section of this chapter begins with a presentation of the meaning of transnational law and governance from both a global and EU perspective, as well as a presentation of the related transgovernmental relations among national, or sub-national administrations; aspects that will be discussed in further detail in Part III.

After that presentation, this chapter goes on to describe the strategic transnational concept as a further development of the recent horizontal and experimental approach in the EU environmental regulatory process, especially as a productive continuation of the concept of experimental governance and the Open Method of Coordination (OMC).

4.1 The transnational background – what is transnational law and governance?

Transnational and Transgovernmental Regimes

The transnational processes have implications for governance, institutions, law and actors on both a global and an EU scale. In order to further the understanding and discussion of the strategic transnational concept, these implications are outlined in general below; starting with a discussion on the global level and followed by a focus on the EU level.

Transnational governance in a further development of the traditional understanding of transnational relations or transnationalism defined as "contacts, coalitions, and interactions across state boundaries that are not controlled by the central foreign policy organs of government" (Keohane & Nye 1973, xi). This early 1970s definition remains valid and is even vitalised by the new trends of global governance as described below.

Similar, transnational governance also bases itself on the traditional understanding of international regimes and governance. Thus, similar to any other international regimes, also the organisation of a transnational regime can be defined in broad terms as "international arrangements characterised by implicit and explicit principles, norms, rules, and patterns of behaviour, practise and decision-making process based upon the convergence of expectations of different actors" (Krasner 1983b, 2, Young 1983, 93, Keohane 1983, 141 and Louka 2006, 61). Transnational governance also conforms to the general meaning of governance described as processes and institutions, both formal and informal, that guide and restrain the collective activities of a group (Keohane & Nye 2000, 12).

Although it falls within such traditional definitions, transnational governance represents a recent development in international relations. It is part of the recent shift from intergovernmental politics to global governance. In this realm, the new tendencies of global governance may be defined by three phenomena as described by Biermann et al; (i) global governance no longer confines to nation states but is "characterised by increasing participation of actors other than central governments, including networks of experts, environmentalist organisation and private governance, as well as new agencies set up by governments". (ii) "Global governance is characterised through the rise of new forms of institutions in addition to the traditional system of legally binding documents negotiated by states. Politics is now often organised in networks and in new forms of public-private cooperation negotiated between state and non-state entities". (iii) "Global governance is marked by an increasing segmentation of different layers and clusters of rulemaking and rule-implementing, fragmented both vertically between supranational, international, national and subnational layers of authority and horizontally between

different parallel rule-making system maintained by different groups of actors" (Biermann et al 2009, 2).

The transformation in global governance is also observed by Jönsson & Tallberg. They argue that "such gradual transformation has been witnessed in the dominant mode of political organisation at the international level, from interstate cooperation, negotiated and managed by national governments, to more complex forms of cooperation, involving transnational as well as supranational actors. The state-dominated international institutions of the post-war period have developed into more multifaceted arrangements, and new forms of government have emerged that involve both public and private actors" (Jönsson & Tallberg 2010, 4).

In conclusion, these transformed governance structures add to the traditional understanding of transnational relations or transnationalism defined in 1973 as described above (Keohane & Nye 1973, xi). In addition to this basic definition, today transnational relations play an increasing and significant role in global governance as the "functional outcome of a multitude of governing processes, actor-constellations and transnational policies that in sum give rise to structured behaviours of different types of actors across borders and functional domains. Such observations go beyond the well-known forms of coordination and cooperation between actors" (Pattberg 2009, 239).

More specifically, transnational relations within and among public administration and governance may be addressed as transgovernmental relations (Slaughter 2004b, 124ss). Thus, transgovernmental relations, as part of the broader transnational activities, can be defined as "sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the politics of the cabinets or chief executives of those governments" (Keohane & Nye 1974, 43).

The increasing transnational governance also calls for new directions of the traditional international organisation. Abbott & Snidal define such new "transnational new governance" by considering the full range of possibilities reaching out to private actors and institutions, collaborating with them, and supporting and shaping their activities.

Such institutional actions are helping to develop "an intricate global network of public, private and mixed institutions and norms, and with proper orchestration by the international organization, transnational new governance can ameliorate both **"**state failure" and "market failure"; problems that result when the creation and evolution of norm-setting institutions is highly decentralized" (Abbott & Snidal 2010).

This "orchestration" thus provides a significant way for international organisations to improve their regulatory performance (Abbott & Snidal 2010). As argued in the Introduction, the strategic transnational concept presented by this Thesis provides the needed orchestration in transnational governance. The strategic transnational concept provides a structured approach to managing the diversity characteristic of transnational relations, and at the same time to stimulate and even to utilise such transnational relations for the continuing development of environmental law and governance.

EU Transnational Governance

Now, let us focus upon the implications for the EU. Ladeur observes that the EU is developing ever more numerous transnational rather than supranational governance forms in which the "impermeability of state sovereignty is transcended not just by introducing a new level to the hierarchy, but through the mutual interlacing of several legal systems of the Member States" (Ladeur 2000, 282). Ladeur continues: "These forms of transnational governance designate non-traditional types of international and regional collaboration among public and private actors. These legally-structured or less formal arrangements and the norms emerging within them cannot be described or understood in terms of the more traditional legal and political institutions and processes derived from the authorities of the national-state and its sovereignty, not only because they encompass both public and non-governmental actors, but also because they link economic, scientific and technological spheres with political and legal processes". In addition, Joerges et al observe that "the emerging structures of transnational governance are challenging the type of governance, which constitutional states were supposed to represent and ensure. They have transcended the forms and limits of international and supranational law" (Joerges, et al 2004, ixs).

It follows that that the transnational concept at the EU level is a third level of governance supplementing the "continuum between intergovernmental and supranational governance at EU level. The transnational concept allows the Member States, and the individual sub-national actors wider room of manoeuvring, escaping the central role of the state, allocated by the intergovernmental approach, and likewise escaping the autonomous position of the supranational institutions able to constrain the behaviours of all actors" (Craig 2011, 24ss)[79].

The EEA is a development of such a new governance form within the EU. As already described the EEA represents a hybrid organisational structure, which has a relatively independent position *vis-à-vis* the Commission. Not only do Member States cooperate in the management of the EEA, but even more significantly "an organisational infrastructure is build up based upon such transnational foundation enabling individual national environmental agencies to take on an overall responsibility in the EU for discharging common responsibilities" (Ladeur 2000, 282s). Ladeur continues that "admittedly, this is concerned principally with informational action, and therefore not sovereign action in the strict sense, but it may nonetheless be seen as a further variant of transnational administrative cooperative law of a kind, which is incompatible with either the traditional conception of sovereignty or traditional models of limitations of national sovereignty in international law" (Ladeur 2000, 282s).

Transnational Law and Norm Generation

Recent patterns of legal development have emerged outside the traditional domestic, international or supranational governance structures. These patterns concern a cognitive legal development based upon subnational levels of interaction between national agencies, market players and other actors representing a polycentric mixture of national and international private and public governance. The outcomes of such legal processes constitute transnational law or norms.

[79] For a brief presentation of theories of integration, in particular intergovernmentalism and multi-level governance, see Steiner & Woods 2009, 19ss.

Transnational law distances itself from traditional national, international and supranational law, where norms are formulated within established and recognised regimes, and structured organisational frames, and derived from the legislative powers of the individual states. Transnational law is something between national and international law (Ladeur 2011b, 398). The transnational legal development, taking place outside such domains of the state and traditional governance, emphasises the need to redefine the role of traditional domestic government institutions to engage in activities beyond their traditional domain. This repositioning of the state and its institutions in the transgovernmental context has been labelled the "disaggregated state" (Slaughter 2004a, 12ss), as discussed further in Part III.

Thus, transnational law may be defined as an institutional framework for cross border interaction beyond the nation state. As distinguished from territorially organised national and international law, transnational law is structured as a "plurality of functionally specialized transnational law regimes, which in a pragmatic approach combines different governance mechanisms of private (norms, alternative dispute resolution, social sanctions) and public (laws, courts, enforcement) origin, where the latter are disembedded from their domestic context" (Calliess 2010).

The potential of transnational law for the further development of EU law relates to the debate on EU multi-level governance and regulation (Joerges & Vos 1999a). As it further will be described later in the Thesis, this debate has sparked new concepts as advanced responses to the inconformity between intergovernmentalism and supranationalism, such as "deliberated supranationalism" applied in Comitology[80] (Joerges & Neyer 1997, Joerges 2002 and Joerges 2006), "Open Method of Coordination (OMC)" (Regent 2003 and Szyszczak 2006), and a legal concept of networking based upon a "functional equivalence" of experiences as a common frame of references for public and private action (Ladeur 1997 and 1999).

[80] Comitology is "the expression commonly used to denote the relationship between the Commission and the range of committees composed of representatives of national administrations; Committees that the Commission is required to involve in discussing the framing of implementing measures" (Bergström 2005, 6).

But why do we experience a need for such change in law? Let us have a look at a few explanations, which will be further elaborated in the following chapters:

Kjaer observes that European integration and constitutionalisation is currently in a transitional phase. "The classic integration paradigms, such as the dual intergovernmental/ supranational paradigm, have lost their strength, but at the same time the decade-long debate on governance has not led to formulation of new paradigm. This has led to regulatory governance structures outside the classic institutional structure, being the triangle formed by the Commission, the Council and the Parliament" (Kjaer 2010, 2). These new transnational regulatory structures call for a new transnational legal framework also outside the classic institutional structures and thus, outside the traditional EU law based upon the Community Method.

Generally observed, the change in technology and communication is a vital part of the ongoing change from traditional government to transnational governance, and thus "creating a more poly-contextual situation of governing" (Ladeur 2011b, 399). This implies that transnational governance is "neither public or private, nor purely international, supranational nor totally denationalised. It therefore also concerns the erosion of traditional public law and governance and the need of ways and means to defend the normative *propria* of law" (Joerges, et al 2004, ixs).

The complexity and uncertainty attributed to modern society and law also indicates that "economic orders in the future will increasingly be characterised by legal models that no longer are based upon prior abstract law structured by hierarchical structure, as law and legal practise in a transnational setting will be of more intertwined character than traditional use of abstract rules" (Ladeur 2004c, 115). As Ladeur further states, "Traditionally, environmental regulation was based on common shared experience and knowledge allowing the regulator to establish norms or issue authorisations on the basis of sound scientific evidence with respect to the impact of the activities. To a large extent, this traditional approach no longer responds to the needs of either the regulator or the regulated, given that increasing complexity has also led to increasing uncertainty about the expected impact of environmental pollution and the regulatory means of how

to cope with these problems. This regulatory uncertainty indicates that the traditional hierarchical relationship between public and private actors is no longer adequate. Law cannot in complex areas characterised by uncertainty foresee 'ready-made' solutions – the law must adapt itself based upon ongoing experiences and learning" (Ladeur 2004c, 115).

The transnational process shall stimulate for such learning processes by means of transnational networking (Ladeur 1996a, 1996b, 1998a and 1998b). It is argued that the evolution of the EU and of global governance will be observed as a "new logic of networks, which can be regarded neither from a state-centred perspective, nor something completely new beyond the state. The acentric logic of the networks transform both the state-based and international law (including supranational European law) and opens a new perspective on the plurality of hybrid orders which might be governed by the emerging logic of experimental meta-rules of collision norms" (Ladeur 2011b, 399s). This transformation could break up of the traditional core of state sovereignty and deploy the internal dynamic of states (see also Ladeur 2004c, 118).

It follows that the strategically autonomous position of the EEA, combined with its already established transgovernmental structure and networks, will allow for a direct role in the generation of transnational norms, and for stimulating the transnational law and transgovernmental relations among the networking participants: A position that is part of the vision described in this Thesis.

The focus upon the development of EU and European law and norms based upon further transgovernmental relations has potential, as it has been argued that "Europeanization and globalization have led to ever more intensive legalization at transnational level combined with a high level of compliance – even for national and international standards - above the national state" (Zürn & Joerges 2005).

Part III of the Thesis further elaborates on the generation of cooperative transnational law and norms. Part III also addresses the related delicate issue arising from such transnational governance without a government; who bears responsibility in terms of

ensuring accountability? The term "constitutionalism" is still widely identified with the state form of democratic governance. In order to legitimise the non-majoritarian EEA employing the strategic transnational concept, we need to "reconceptualise constitutionalism or generate a discussion of its functional equivalents"(Joerges, et al 2004, preface).

This section addressed the question of why transnational and transgovernmental relations have evolved. In additions to the responses provided, the answer is also found in the evolution of EU environmental law and regulation itself. Accordingly, the following sections will present the broader background for transnational innovation as part of the development of EU horizontal and experimental approach towards environmental regulation.

4.2 From Command to Experimental Regulation

The EU environmental law introduced in the mid-1990s a new horizontal regulatory approach integrating the Member States further into the definition and implementation of EU law. This horizontal regulatory approach indicates a more open process of standard setting with more emphasis on methodological criteria and institutional and procedural norms, rather than substantive norms (Ladeur 2000).

4.2.1 The Problem of Command and Control

Part of the explanation for the poor performance of EU environmental policy is attributed to the use of outdated policy instruments often associated with the traditional concepts of hierarchical governance; relying on "command-and-control" regulation in the form of legally binding standards prohibiting or directing activities within the Member States (Bailey 1997; Collins/Earnshaw 1992; Commission 1996a; Grimeaud 2000; Knill & Lenschou 2000c and 2000d, and Majone 2005, 122).

Already in 1992 Collins & Earnshaw observed that the traditional regulatory approach fails in responding to the peculiarities of the environmental policy area (e.g. the scientific and technological complexity, the lack of adequate information on the state of the environment, the lack of finances and other resources) and to the legitimacy crisis which the Community has faced since the late 1980s (Collins & Earnshaw 1992, 217-20). The low efficiency and effectiveness of the EU environmental policy also relates to the limited institutional competence of the Union and the difficulties of adapting European legislation to scientific and technical progress (Majone 2005, 123). Related,

Until the mid-1990s EU environmental legislation was based solely upon the command and control approach. This approach was first radically challenged with the adoption of the 1996 IPPC directive, which heralded the new and supplementing horizontal regulatory approach (Grimeaud 2000, 208).

As mentioned earlier, the overall reason behind a shift in governance must be seen as a consequence of the intensifying environmental problems, and the need for new management tools, related mainly to the increase in complexity and uncertainty in environmental management. But it is also attributable to the rise of the sustainable development paradigm and efforts to integrate environmental concerns into other policy sector areas, which require planning, impact assessment, setting of targets and indicators, regular monitoring and evaluation. Additionally, the shift in governance is a response to the challenged legitimacy of EU environmental policy, as the 1990s witnessed a demand for new and flexible instruments to increase efficiency, flexibility, and legitimacy as well as the adoption of new policy instruments (Homeyer 2010, 126ss).

The problems attributed to “command and control” relate also to the nature of the EU law itself, and to many environmental directives and regulations themselves inappropriately being too sectoral, excessively detailed and insufficiently integrated, and inadequately addressing implementation and enforcement issues (Grimeaud 2000, 208). Macrory is of the opinion that it often appears that Community legislation has not been drafted or designed, or at least only to a limited extent, with enforcement issues in

mind (Macrory 1996, 12). This resulted in an inadequate overall EC regulatory process with the implementation phase as the "Achilles' heel" of the EC regulatory regime (Macrory 1996, 9)[81]. This has led to a splitting-up of the regulatory process; as put by Lord Clinton-Davies "Enacting EU legislation is one thing, implementing and enforcing it is quite different" (Lord Clinton-Davies 1996, 2).

Although it seems fair to say that the implementation phase did not and does not work effectively, it is perhaps an unfair overstatement to blame this solely on the lack of attention from the Community. Instead, it can be concluded that the faulty implementation and compliance is based upon the consequences of a deliberate, albeit failed, EC enforcement and compliance strategy. As it will be further described in the following paragraphs, this failed strategy is based on leaving the actual implementation of the EC legislation to the Member States, on allocating inadequate resources to the supervising EC Commission and on operating with an inadequate traditional top-down regulatory approach emphasising command-and-control paired with no or little possibility for legal action by the general public. These aspects give little possibility for ensuring effective or unified compliance throughout the EU or even for ensuring effective incentives among the European citizens and administrations to actively ensure compliance.

The first reason for the failed strategy relates to the fact that implementation is a national matter according to TFEU Article 288. Perhaps overly relying upon this approach, the EEC, and later the EU, has for long neglected to address the issue of a solid and respected implementation and enforcement policy and strategy (Crockett & Schultz 1991, 183ss). The consequence has been a failure of EC environmental law with poor and incomplete national implementation of norms, standards and obligations, a lack of enforcement avenues for citizens and environmental groups, a lack of national competence and resources, and a lack of political and administrative will (Grimeaud 2000, 208). Minimal efforts were made at Community level to ensure and coordinate an

[81] Macrory also states that the diversity involved in the EU enforcement strategy could be seen as something of a laboratory or experiment in the development of a new form of a supranational legal system, which may raise the intensity of international supervision to a new level (Macrory 1996, 9). Such a perspective - applying learning and diversity in the development of new legal systems - represents an early idea of the strategic transnational concept argued in this Thesis.

evaluation of the national implementation strategies in order to address common and specific problems.

The overall Community efforts that were actually provided were done so on a fragmentised and insufficient level leaving the Commission and the Member States unable to comprehensively detect and identify the problems involved and thus, unable to produce a productive response to these problems. These efforts are based on the general feed-back clause typically included as a standard provision in most EU legislation requiring the Member States to provide the Commission with information regarding the implementation of the legal act in question. Typically, the information provided are directed at a specific technical committee under the Commission, equally set up by the EC legal act, required to suggest revisions of the directive based upon the incoming information.

Although this form of reporting requirement is legally acceptable, it is insufficient. It is questionable whether the many reporting schemes provided by the full rang of EU directives adequately address the various causes for poor implementation and compliance at the national levels. The problem is that the EU Commission does not have the needed knowledge of the national conditions or resources necessary to provide for a full examination of each individual regulatory area and to transfer the results into an overall strategy for improved enforcement and compliance of EU legislation. Further, the feed-back system is primarily concerned with future revisions of the legal act and less obviously connected to an overall and general EU strategy of improved implementation and compliance of EU law at Member States level. Finally, reporting and the information exchanged on problems related to implementation vary from sector to sector, which may lead to an unclear and fragmentised approach for an overall EU enforcement and compliance strategy. For instance, Macrory notes in 1996 that in the chemical sector there is a strong tradition in ensuring that the Member States reveal and exchange relevant information at an early stage. Within other policy areas, however, there appears to have been more emphasis on policy making (i.e. norm setting) at the expense of policy implementation (Macrocy 1996, 14).

The second reason for a failed strategy relates to giving the underpowered EU Commission responsibility for supervising the implementation and for taking action in case incompliance has been detected, TFEU Article 258. A brief example highlighting the problem is the lack of inspectors. A lack of inspectors means that the Commission to a large extent has to rely on external sources, such as complains received from the public (Davies 1994, 341 and Macrory 1996, 14). But even in case of "successful" litigation at the European Court of Justice (ECJ), as Macrory puts it; "a ruling by the ECJ does not itself ensure implementation".

The third reason for the unsuccessful EU implementation strategy relates to the inadequate regulatory approach. In addition to the inappropriateness of the EU legislation described above, the EU traditional legal framework does very little to secure a wider scope of compliance mechanisms. This foremost relates to the lack of public access at the EU level to redress the inadequate implementation of EU law hindering efficient enforcement attempts (Davies 1994, 341). This is attributed to the very limited rights of *locus standi* at the ECJ for the public and even well-established international and recognised environmental NGOs being counterproductive to overall compliance and should be revised (Brinkhorst 1993, 22s). Additionally, it relates to the dualistic application by the Commission of two sets of schemes for public participation in the regulatory process; one set addressing improved participation at Member States level, and another restrictive set addressing the participation at the EU institutions. This dualistic approach is incompatible with the emerging notion of horizontal and transnational environmental management[82]. Also, active public participation at all EU policy levels is needed to make up for the absence of democratic EU institutions and thus, to overcome the EU democratic deficit. As the dual approach is still dominant today, these issues will be further discussed in Part III.

[82] Such duality will be further discussed in Chapter 12. The Commission has early encouraged access to justice in the widest terms possible; however, this has explicitly been with regard to access to Member States' courts only (Commission 1996a, 11ss). The same dualistic approach is found in international environmental law also applying different standards at national level and at the level of international organisation. See for instance UNCED Agenda 21 Chapter 8 on integrating environment and development in decision-making.

In addition to these three reasons, a fourth reason for the failing EU strategy is perhaps linked to the disorientation of pursuing a common unified regulatory approach. This disorientation has been addressed earlier in Chapter 3.2, and is linked to the inadequacy of the traditional EU regulatory approach in dealing with highly varying national conditions, including the large variation in practices and structures of national administrations, differences in national legal and political cultures, and the varying priorities given to environmental policy across Member States (Knill & Lenschow 2000b, 2000c and 2000d).

These problems attributed the traditional Community Method and its control and command approach are still valid today despite attempts to introduce new horizontal regulatory approaches. Even today, Majone attributes the main problem of EU environmental policy to the means and methods of the Commission. There still exist an absence of effective implementation and enforcement of environmental matters as the Commission and European courts have insufficient available resources to meet the need for infringement and court proceedings (Majone 2005, 123). As such problems remain, there has in recent years been an increasing call for a more integrated and coordinated European enforcement approach (Adriaanse et al 2008, 86; and Blomberg 2008, 41)[83].

Therefore, a reform of the traditional Community Method is needed. It is a need generally recognised by the Community in its White Book on European Governance (Commission 2001c). However, Majone argues that the directions set out in the White Book would transform the Commission into a full-fledged 'Government of Europe' as the approach is "too rigid to be easily adapted to the new challenges, situations and new tasks of the EU, while a fragile legitimacy base prevents its expansion into some crucial important policy areas" (Majone 2005, 180). Majone continues that "restricting the scope of the Community Method can only enhance its credibility and democratic legitimacy, while its generalisation would weaken, perhaps fatally, the process of European integration" (Majone 2005, 180).

[83] As earlier described, the desire for improved enforcement and compliance has led to innovative attempts by states to create more informal network structures aimed at coordination and cooperation among states. Such enforcement networks include for instance the IMPEL on the European level, and the INECE on the global level.

4.2.2 New Horizontal Approach

Based upon the above observations, the EU has, in line with general international environmental law starting with the 1992 UNCED, developed a horizontal regulatory approach recognising the advantages of further integration of national environmental administrations based upon differentiation and transnational interaction, and the increasing inclusion of private and public actors (Knill & Lenschow 2000d, Krämer 2000, Louka 2004 95ss).

Although classical forms of environmental regulation based upon the Community Method played an important role in Community environmental policy, the newly emerged regulatory approach described above pointed towards less hierarchical instruments. The new approach allowed more horizontal forms of transnational networking among states also integrating the public and private actors into the regulatory process[84]. The advantages were primarily based on a better utilisation and distribution of resources and on a constructive attempt to structure the use of state sovereignty.

As described above in respect of the legitimacy of EU agencies, new forms of horizontal cooperation emerged among national administrations in order to distribute knowledge and information necessary for sound environmental management and in recognition of the advantages associated with networking. Thus, from the mid-1990s and onward, the Community facilitated increased integration of the national administrations and private parties in the formulation and implementing of EU environmental law. Dehousse observes: "In contrast to earlier EC policy, the new approach represented a more systematic and comprehensive strategy in order to utilise, implement and take direct advantage of the national characteristics in order to promote and improve the implementation of EU environmental law and also the continuous development of the EU environmental law itself. The Community has thus, in principle, down-played it hitherto regulatory role and now tends to act more as a coordinator in

[84] The Commission has at an early stage emphasised the importance of public access to environmental information and participation in environmental decision making processes, as well as the importance of improved legal standing for private actors and interest groups in national courts (Commission 1996a; Kimber 2000). See also supra at note 82.

the networking among the Member States" (Dehousse 1997, 255). The establishment of the EEA must be seen as an institutionalisation of this transnational approach.

This new transnational concept leaves more leeway and discretionary powers for the Member States to participate in the European regulatory processes in light of domestic requirements. The approach is different from the earlier implementation strategy based upon the traditional Community Method presented above, as the new approach, in contrast to the Community Method, deliberately encourages the Member States to take advantage of their diversity and domestic requirement within a structured transnational framework coordinated by the Community, and for the further development of EU integration. Earlier, based upon the Community Method, the Member States were not entitled to deviate from the rigorously harmonised norms characteristic of the traditional EU regulatory approach. The new regulatory approach indicates a new flexible harmonisation process, which fully allows for enhanced transnational management.

This horizontal regulatory approach indicates a more open process of standard setting with more emphasis on methodological criteria and institutional and procedural norms, rather than substantive norms (Ladeur 2000). Naturally, a major bulk of EU environmental law concerns substantive law. The Community, however, is moving towards procedural measures focusing upon procedural integration rather than substantive harmonisation, as illustrated by the Water Framework Directive (WFD), the Directive on Environmental Impact Assessment[85], the Directive on Free Access to Environmental Information[86], the Directive on Integrated Pollution Prevention and

[85] Directive 85/337 on Environmental Impact Assessment (EIA), OJ L 175, 5.7.1985, p.40.
[86] Directive 90/313 on the Freedom on Access to Environmental Information, OJ No L 158, 23.6.1990, p.56.

Control[87], the eco-label award scheme[88], the eco-audit Regulation[89], and the EEA Regulation (Ladeur 1996b, 23; and 1999, 151)[90].

It follows that the formulation of substantive norms is also based upon an open flexible process. In addition to transgovernmental relations between the national administrations, the new regulatory approach also concerns the emerging involvement of private interest groups in the generation of substantive standards and norms. By the late 1980s, the Community established the practise of technical harmonisation based upon a "new harmonisation approach" embracing the "emerging privatisation of transnational law" (Schepel 2005, 50ss and 225ss; and Steiner & Woods 2009, 370ss). This development did not specifically address environmental concerns but indicates nevertheless a related new approach for combining enhanced economic integration and management of the increased complexity of for example, environmental management. In Schepel's words: "Recognising the slow progress of adopting sector-to-sector detailed technical harmonisation and the difficulties in completing the internal marked; the Council adopted in 1985 the resolution on the New Approach to Technical Harmonisation[91]. Based upon an EU framework, the approach allocated the working out of detailed technical standards to the European standardisation bodies, such as CEN" (Schepel 2005, 101ss, 107ss and 227ss)[92]. More directives have emerged applying the

[87] Directive 96/61 concerning Integrated Pollution Prevention and Control (IPPC) OJ No L 257, 10.10.96, p. 26. Concerning the proposal and background, see OJ No C 311, 17.11.1993, p.6 and OJ No C 165, 1.7.1995, p.9. Also Common Position (EC) No 9/96 adopted by the Council on 27 November 1995, OJ No C 87, 25.3.1996, p.8.

[88] The voluntary programmes on an eco-label award scheme (Council Regulation 880/92, OJ No L 99, 1992 p. 1).

[89] Eco-audit and eco-management (Council Regulation No. 1863/93 of 29. June 1993, OJ No. 168 L 1993, p.1).

[90] Experiences from the integration of private parties can to a large extent be drawn from US regulatory policies, [see Bailey 1997.

[91] Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, OJ C 136, 4.6.1985, p. 1.

[92] The principles of the New Approach follows from the 1985 Council resolution (Section B (III), Annex II) (the "Model" Directive) and has been described by Schepel 2005 at 227s as:
1) Directives limit themselves to elaborating "essential requirements" with which products must conform. These shall be worded precisely enough in order to create, on transposition into national law, legally binding obligations which can be enforced,
2) The task of drawing up the technical specifications is left to the European standardisation bodies. Their quality is to be ensured by standardisation mandates, the execution of which must conform to the general Guidelines for Cooperation signed between the Commission and these bodies,
3) The standards remain of voluntary application, and
4) Member States are obliged to recognise that products manufactured in compliance with these standards are presumed to be in conformity with the "essential requirements" set out in the directives.

"New Approach" involving relevant European or national standards[93]. Steiner & Woods explain the advantages of the "new approach"; first, it allows for identifying the hazards to be dealt with without predicting the technological solutions. Second, the approach leaves room for innovations as standards can be updated more quickly than legislative responses. Third, the new approach provides advantages for the legislator, as regulation by frameworks is less cumbersome than detailed substantive harmonisation (Steiner & Woods 2009, 371)[94]. This regulatory involvement of private transnational law and governance is part of the strategic transnational concept, and will be further discussed in Chapter 10.

The procedural and methodological approach described in this chapter has specifically led to the formulation of a new experimental governance approach for EU environmental policy and law. The strategic transnational concept presented in this Thesis is part of this development; aiming at advancing the current experimental approach further in transnational and institutional manners. The following section addresses the EU experimental governance.

4.3 Experimental Governance – a Transnational Focus

In the last decade new governance structures have emerged in several EU policy areas. These new governance structures are referred to as "a new architecture of experimentalist governance" (Sabel & Zeitlin 2010b).

[93] Directive 2001/95 on Product Safety and Directive 98/34/EC Laying down Procedures for Provision of Information in the Field of Technical Standards and Regulations.

[94] Steiner & Woods also refer to the shortcomings of this approach, which to some degree also relates to the accountability problems of the transnational networking processes as presented later in Chapter 12 of this Thesis. Such short-coming of the New Approach include (i) the lack of freedom of the manufactures in the meeting of the "essential requirements" stipulated by the EU directives, (ii) the significant time of the process, (iii) the membership of the relevant committees may not be representative, (iv) the technology-driven approach may not be political neutral, and (v) the limits in regulatory choices (Steiner & Woods 2009, 371).

The New EU Experimentalist Governance

The new experimental governance concept relates to the discussions on multilevel governance[95], flexibility and differentiated integration[96], and the related significance for the role of law, especially soft law measures. The regulatory mechanisms of experimental governance do not rely on command and control but "seek to encourage experimentation by a range of alternative methods, such as employing stakeholder participation to devise solutions; relying on broad framework agreements, flexible norms and revisable standards; and using benchmarks, indicators and peer review to ensure accountability" (Trubek & Trubek 2007 and Búrca & Scott 2000, 6).

The origin of experimental regulatory approach is primarily associated with the Open Method of Coordination (OMC), initially presented in 2000 as a governance instrument on employment and social policy (Craig & Búrca 2011a, 163ss, Weatherill 2010, 636ss; Regent 2003; and Armstrong & Kilpatrick 2007)[97]. Weatherill and Craig & Búrca describe the OMC applied to EU governance in general. They find that the OMC attempts to provide coordination of transnational decision making and multilevel sites without exerting hierarchical control. In this respect, the OMC also addresses the EU democratic deficit by not relying on centralised expert deliberation, but on a multitude of stakeholders at all levels. The authors also find that the OMC offers a new role for law, and is based upon experimental regulation. It does not adopt a regulatory standards approach but consists of performance standards: rules that identify the production processes best suited to achieving a regulatory goal: benchmarking, rolling out best practice rules, etc. The OMC offers open-ended solutions to regulatory problems useful

[95] Weatherill states that "Multi-level governance acts as a rather neat shorthand for describing the way in which Europe is the subject of many layers of intersecting legal and political authority, some territorial defined, others sectorally defined, not necessarily capable of subjection to a single, internally consistent rule of authority, yet working more or less successfully because of adaptation along the way and the vested interest of participants in avoiding conflicts" (Weatherill 2010, 670).

[96] Differentiated integration is a generic and neutral term used "to denote variations in the application of European policies or variations in the level and intensity of participation in European policy regimes" (H. Wallace, cited in Majone 2009, 216). The label also applies to other models, such as "variable geometry", see further under Part III.

[97] Lisbon European Council, March 23 and 24, 2000, item 5-7. Updated by the Presidency Conclusions, European Council, Brussels, 22 and 23 March 2005, p. 3, and relaunched: The Presidency Conclusions, European Council, Brussels, 23 and 24 March 2006, p. 3 – item 35-41 "Implementing a new OMC" (37-40).

for the current stage of European integration (Craig & Búrca 2011a, 163ss, Weatherill 2010, 636ss).

In the words of Majone, the OMC constitutes "a radical form of flexibility in harmonisation by employing non-binding objectives and guidelines, commonly agreed indicators, benchmarking, and persuasion, in an effort to bring about change in areas such as employment, health, migration, and pension reform – where the Community has limited or no competence. Each state shall be encouraged to experiment on its own, and to craft solutions fitted to the national context" (Majone 2009, 60)[98].

Thus, the regulatory characteristics of the OMC, or rather the new experimental governance approach concern the following six factors, as formulated by Scott and Trubek (Scott & Trubek 2002, 5s and also Weatherill 2010, 641s)[99]:

Regulatory characteristics of the OMC:

> "1) **Participation and power sharing** – involvement of civil society. Policymaking is a process of mutual problem-solving among stakeholders from government and the private sector, and from different levels of government.
>
> 2) **Multilevel integration** – Necessity for coordination at all levels facilitating dialogue and coordination.

[98] The Lisbon Summit March 23-24 2000 assert that OMC is a mean of spreading best practise, a learning process that should lead to policy convergence in the long run, based upon the main elements of the approach: General guidelines for the Union, combined with specific time-tables for achieving the short-, medium-, and long-term goals set by the Member States themselves; quantitative and qualitative indicators and benchmarks derived from the best practise worldwide, but tailored to the needs of the individual countries and sectors; policy reform actions of the Member States to be integrated periodically into their National Action Plans; periodical monitoring, evaluation, and peer review of the results (cited in Majone 2005, 60)

[99] In a perhaps more simplified way, Telo describes, despite the variations between different policy fields, the OMC based on four components: 1) the establishment by the Council of Common European Guidelines; 2) a reciprocal learning process, which includes benchmarking, peer review, diffusion of best practices and common indicators; 3) Given the quoted Guidelines and the learning process, national plans are drawn up by each government; and 4) on a regular basis, the Council carries out an evaluation of the results, which can lead to recommendations. The Commission feeds the whole process with its contributions, both in the top-down and in the bottom-up dimensions of the strategy (Telo 2002, 250ss).

3) **Diversity and decentralisation** – Support and coordination is important, coordinated diversity and, unlike traditional EU legislation advantages of leaving policy making to the lowest possible level when feasible.

4) **Deliberation** – Among stakeholders; provides some degree of democratic legitimacy.

5) **Flexibility and revisability** – Soft law; i.e open-ended standards, flexibility and revisable guidelines adopting to diversity, tolerant of alternative approaches to problem solving making it easier to revise strategies and standards in light of evolving knowledge.

6) **Experimentation and knowledge creation** – Derive from deliberate processes, local experimentation with multilateral surveillance, and from formal and informal ways of exchanging results, benchmarking performance, and sharing best practices."

Experimentalist Environmental Governance

Experimental governance has also been employed within EU environmental governance. Existing mechanisms of top-down environmental regulation have been underpinned and complemented by mechanisms which rely on broad framework goals, locally devised implementation measures, information provisions, and recursive procedures to encourage policy learning from experience (Louka 2004, Homeyer 2009 and 2010).

This experimental governance approach may improve the supply of information and knowledge to policy makers and coordinate and mobilise support for implementation of EU measures at national and subnational levels. Homeyer argues that the approach provides opportunities for pursuing long-term environmental goals and better integration of economic and social consideration. He further argues that the experimental governance architecture is characterised by institutions, which "support

recursive policymaking and learning from the experience of lower-level units. Recursiveness requires Member States and EU bodies jointly to evaluate and justify their performance at regular intervals. Among other things, this creates opportunities for continuous adjustments and learning" (Homeyer 2010, 120ss). The EU has addressed this approach by measures characterised by vague objectives leaving room for flexibility and an integrated approach[100].

The potentials of such a flexible and differentiated harmonisation for the implementation of EU environmental law have also been addressed as "controlled differentiation". Differentiation is allowed on the goals but at the same time, "prescribed detailed procedures ensure that the differentiated goals are archived. States are allowed to differ but the constraints placed on their ability to differentiate are so extensive that they inhibit differentiation unless it is absolutely necessary" (Louka 2004, 1 and 74s).

Homeyer finds the EU framework directives to be the most characteristic regulatory instruments associated with this new approach; "they have integrative ambitions, tend to have a broad scope, they can cover various environmental media, quality and emission limits, or a range of pollutants that were previously regulated separately. The framework directives establish binding procedures, such as for planning, permitting, measurements, and reporting, or on regulating the relationship between related and daughter directives, which, in turn, contain the relevant substantive requirements. This procedural approach is complemented by horizontal measures, which help to render the procedures effective, for example by enhancing the availability of information and by bestowing rights on stakeholders" (Homeyer 2009, 17s).

Further, framework directives allow for "target-based measures, for experimentation with different approaches at national or sub-national level, and for the diffusion of good practise" (Homeyer 2010, 126ss). Similarly, they leave room for variation and testing of different approaches related to economic and information-based instruments at national and subnational levels. In fact, "this stimulates the growing diversity of policy instruments, and of the respective practices itself. It also encourage for procedures

[100] Homeyer 2010, 123ss presents a comprehensive analysis of the elements of experimentalist governance architecture in EU environmental policy.

improving consultation of civil society and stakeholders, forming a pool of options from which lower level units may draw inspiration and information" (Zeitlin 2011, 138ss).

These framework directives are based upon multilevel governance based upon highly formalised institutional processes. Even though the EU and Member States work together in formulating frameworks and evaluating them, it is "the distinct role of the EU level to promulgate authoritative frameworks and oversee their enforcement, while it is the distinctive role of the Member States and subnational bodies to adapt these frameworks to their own circumstances and to report on their experiences" (Sabel & Zeitlin 2010b, 4).

The Water Framework Directive (WFD) is an example of such new framework legislation[101]. The WFD even constitutes a new advanced governance approach as a sustainable development regime with focus mainly on implementation rather than substantive EU measures (Homeyer 2009, 20 and 22)[102].

In regards to the regulatory characteristics of the new experimental governance approach, the WFD also applies techniques of governance deviating from the Community Method (Lee 2009, 36ss and Homeyer 2009, 20)[103].

[101] For a comprehensive analysis on the WFD, see Lee 2009, 29ss, and 36ss, Louka 2004, 178ss and Louka 2006, 225ss, and Homeyer 2009, 20ss, and Homeyer 2010, 141ss.

[102] In similar terms, based upon the failure of the classic Community Method in the field of health care policy, Hervey & Trubek focuses upon more experimental forms of governance, drawing an analogy to the EU Water Framework Directive, arguing for the adoption of a "transformative" directive, which would combine the articulation of framework objectives with experimentalist institutions and processes for implementation (Trubek & Hervey 2007, and Búrca & Scott 2007).

[103] The WFD contain the following regulatory characteristics:
1) Learning and information generation based upon significant planning requirements, set out in the individual River Basin Management Plan aligned with Programme of Measures, WFD Article 11.
2) Economic instruments, as the Member States shall include economic and fiscal instrument as measures (in the programme of measures), WFD Article 11. Also, the Member States shall apply the principle of recovery of the costs of water services, WFD Article 9.
3) Public participation, which is a follow-up to the 1995 UNECE Aarhus Convention, based upon an encouragement of public involvement in the planning process as early as possible.
4) The formulation of concrete targets, limit values, etc. is left for the implementation stage.
5) The implementation of measures is timely; typically spans 10-20 years or more.
6) The Member States typically have wide leeway in deciding upon particular approaches and instruments for the implementation of EU requirements.
7) The legislative measures do not impose legally binding obligations in all important respects.

Adding the Strategic Transnational Concept

The strategic transnational concept argued in this Thesis applies the same procedural and methodological approach as described for the new experimental approach.

The notion of a third way of EU governance "between regulatory competition and harmonisation, capable of opening a sustainable path for the Union between fragmentation and a European super-state", is also shared with the OMC concept (Zeitlin 2011, 136, Telo 2002, and Larsson 2002). However, in contrast to the experimental approach presented above, the strategic transnational concept distances itself by focusing primarily upon the learning process in a truly deliberative transnational context; in coordinated and institutionalised manners. Further, it adds an extra essential element; it utilises purposely such deliberative processes for the generation of cooperative norms.

As described in the earlier part of this Chapter, the horizontal regulatory approach indicates a more open-ended process of standard setting with more emphasis on methodological criteria and institutional and procedural norms, than substantive norms (Ladeur 2000). Although not used in a direct transnational context, earlier examples, as described by Ladeur, include the 1996 directives on Integrated Pollution Prevention and Control (IPPC), the Environmental Assessment Directive (EIA), and the 1996 Air Quality Framework Directive[104], "as such procedural legislation creates opportunities for the diffusion of knowledge, learning, and peer accountability". Ladeur continues "Based upon the experiences on the implementation of these directives, which refers to observations on the flexible accommodation in the implementation of the specific environmental instruments of the directives, the different national systems, and the local choices in this policy sphere, it has been possible to formulate a further experimental approach based upon mutual observation and cooperative learning between different national legal and administrative systems, rather than the imposition of uniformity through harmonisation. Such should be done upon a broader conceptual shift in the

[104] Newly amended as Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe entered into force on 11 June 2008. OJ L 152, 11.6.2008, p. 1–44.

process of European integration from supranationality to transnationality allowing for cooperation between autonomous disaggregated states" (Ladeur 2000, 292ss). The strategic transnational concept advanced here is based upon such a shift in integration; a shift that also departs from the hitherto approach in EU environmental experimental governance.

The strategic transnational concept recognises and addresses in a productive manner "the uncertainty and inability among regulators, which lead to the development of transnational networking and law in the first place. Thus, by accepting such difficulties, accepting that the new patterns of action, which emerge under these conditions are still not well understood, and by accepting that we need to explore new avenues in order to secure such certainty and stability, we also allow for new transnational governance approaches based upon trial-and-error processes and 'exploratory learning'" (Ladeur 2008, 167)[105].

Such a clearly directed transnational approach has been lacking in the early practise of the experimental approach at EU level. So far, the flexible horizontal and integrative measures have predominately addressed individual implementation within the individual states, leaving transnational relation as a secondary objective with little encouragement or binding procedural obligations. This hitherto approach may indirectly have encouraged sporadic transnational relations and thus, in some way indirectly paved the way for a transnational learning process. However, no coordinated, coherent or systemised transnational approach has been provided for[106].

[105] Ladeur specifically addresses these aspects allowing for new forms of legitimate governance as a response to the failure of the European constitutional treaty. As described in further detailed in Chapter 12.3, transnational networking is not without problems in safeguarding the needed public and democratic legitimacy.

[106] It has been observed that consultations and information exchange about implementation of European rules in transnational forums are arranged in an ad hoc way, which sometimes leads to problems. As Adriaanse et al state: "While those executing the rules organise themselves to an increasing degree in networks, national legislators turn out to have hardly any idea of the implementation choices that are made in Europe" (Adriaanse, et al 2008, 97). The implementation of European rules is in "strong need for information about the application of the European monitoring and sanction rules in other Member States. It also occurs that in the implementation stage there is little or no question of transnational consultations or information exchange" (Adriaanse, et al 2008, 97).

Such sporadic transnational application is seen in the implementation of the WFD. As previously mentioned, the WFD is one of the best examples of the implementation of the experimental regulatory approach applied in a truly transnational physical environment; it addresses the individual European rivers based upon transnational management of all rivers and catchments areas, and the setting of criteria for the national determination of water quality standards[107]. However, the actual WFD legal demands on transnational cross-border administration are relative weak[108].

Another example is the IPPC directive, which applies flexibility and learning process, although not in transnational terms, in directing the Member States to apply best available technologies (BAT) when determining the necessary measures to prevent and control pollution.

In the case of both the WFD and the IPPC, national standards are being developed leading to significant diversity in the setting of water quality standards and in the application of BAT standards, respectively. However, this development is made without applying structured and coherent transnational processes to facilitate learning and knowledge.

No current EU legal act applies the transnational approach in regulatory manners, as argued by this Thesis, as a dedicated and structured regulatory instrument for the generation of substantive norms. The closest the EU has come to the transnational approach is in the establishment of administrative transnational networks by the EU agencies, as described in the earlier chapters of the Thesis. Although these networks may have indirect impact on the development of substantive norms, their current aim is primarily procedural and administrative. The strategic transnational concept as argued

[107] The setting of water quality standards according to the Water Framework Directive is based upon the extensive and "old" but still existing EU water legislation, which is supposed to be repealed in the near future and taken over by the Water Framework Directive.

[108] For example, an international river basin district entirely within the EU, the Member States shall ensure coordination with the aim of producing a single international river basin management plan. Where the river basin district extends beyond the EU, Member States shall endeavour to produce a single river basin management plan, and, where this is not possible, the plan shall at least cover the portion of the international river basin district lying within the territory of the Member State concerned, WFD Article 13 (2 and 3), and also Lee 2009, 38.

by this Thesis provides a link between transnational administrative networks and the EU and national generation of substantive law.

In short, the strategic transnational concept adds a transnational dimension to the ongoing development of the concept of EU experimental environmental governance.

A Workable Vision

The experimental governance approach has been met with certain scepticism. Weatherill questions whether the departure from the classic Community Method will "abandon the very core of the 'constitutionalised' legal order contributed so much to stabilising the success of the integration experiment achieved so far? Can there be adaptation without fragmentation?" (Weatherill 2010, 639s). Will a "Europe at different speed" rather contribute to the disintegration of the EU as a whole? (Krämer 2000, 140 and Krämer 2007, 98)[109]. An additional concern is the risk of an unintended lack of transparency and enforceability, allowing states "to act selfishly, risking an unchecked outward drift in the scope of EU action, disempowering (inter alia) national processes and deepening the sense of alienation from the EU in a way that no 'relaunch' can adequately address" (Weatherill 2010, 643).

Critics claim that the OMC seems to have fallen short of expectations because the OMC is under the control of the national authorities and is "subject to excessive bureaucratization and a process of opaqueness with risk of lack of certainty and transparency". Also, the process "lacks legal protection as the European Court of Justice (ECJ) – and the European Parliament – is left out from the OMC procedures as the OMC includes no sanctions" (Majone 2005, 179, Majone 2009, 158s, 209ss and 224, and Majone 2011, 32s)[110].

[109] The remark by Krämer is also addressed at the possible consequences of the related flexibility arising from the enhanced cooperation, TEU Article 20, TFEU Art. 326-334, see more in Chapter 10.3.

[110] Such concerns for accountability may appear to be a paradox, as the OMC at the same time is regarded as an effective regulatory mechanism in emphasising democratic participation based upon the Subsidiarity Principle, and thus emphasising accountability (Szyszczak 2006, 501s). The concerns related to accountability are further discussed in Part III.

Concerns have even been raised about elements of the core of the approach; that the degree of flexibility and discretion is in fact "countered by the extent of procedural prescriptiveness", (Scott 2000, 280). Additionally, worries have been expressed that the OMC suffers from "a mismatch between the ambitious objectives and the little attention paid to implementation concerns" (Dehousse 2011a, 201).

The concerns described above must be taken into account when formulating and implementing the strategic transnational concept or any other future development of the experimental governance concept. However, it is far too early to conclude on "failures", as EU experimental governance is still a relatively recent phenomenon. It is both a new concept and a concept that is rooted in learning. Accordingly, , a wide time-span which leaves room for deliberation, reviews, lessons learned, adjustment of measures, etc., must be applied. This is a completely different approach to EU integration than is applied by the Community Method; a Method that operates typically with shorter time-span and pre-set substantive goals and procedural measures. Understanding EU experimental governance is also a matter of changing perception; one cannot analyse experimental governance from the perspective of the traditional Community Method. Thus, the critique and scepticism raised shall be taken into account, but rather as inputs of learning useful for adjusting the continuously development of the EU experimental governance concept.

In further regards to the concerns raised, it shall be noted that such negative consequences appear only to the extent the overall strategy for harmonisation process is unclear and/or inflexible enough to address such concerns by adjusting the structures and the strategy itself. The core idea of the strategic transnational concept is, as argued throughout this Thesis, that the transnational process shall be a deliberate policy tool for the Community, directly and coherently applied by the Community in order to advance the EU integration process and the regulatory policy process. The strategic transnational concept is a policy tool amongst others available for the Community – and its use depends on the specific circumstances and should be based on a specific assessment of the transnational needs and benefits in complex policy areas. This illustrates, in the words of Majone addressing transgovernmentalism in general, "a useful

complementarity rather than mutual exclusiveness. Embedded in information-rich environment and supported by suitable strategies of commitments, intensive transgovernmentalism will continue to be a viable and increasingly effective method for driving forward the process of European integration in areas close to the core of national sovereignty" (Majone 2005, 179).

Therefore, EU experimental governance "can co-exist with conventional legal regulation in a variety of ways; sometimes complementing one another, sometimes rivalling one another, and sometimes in a transformative way, which leads to the creation of new forms of law" (Trubek & Trubek 2007 and Búrca & Scott 2007)[111]. Similar, recent evaluation of the OMC has observed that the OMC is not to be viewed as an alternative to the Community Method, but rather "as a way to supplement it in areas where Member States were not willing to accept more intrusive forms of action, or where a degree of diversity in the pursuit of common concerns was deemed necessary" (Zeitlin 2011, 146). Zeitlin considers the OMC as one stage in a broader shift to forms of experimentalist governance in the EU (Zeitlin 2011, 138s). This Thesis argues that the strategic transnational concept is similarly such a next step in the development of the experimentalist governance approach.

To conclude, the strategic transnational concept addresses the overall calls for further evolution of the Community Method and the OMC to address the regulatory challenges of EU environmental law and policy. This also concerns the "supporting" EU institutions – as transnational governance requires transnational institutions in structure and operation.

In a broader perspective, the experimental transnational approach should not be dismissed as an unworkable approach for the unity of the EU (Slaughter 2004a, 134s and Slaughter 2004b, 137ss). First of all, the unity of the EU should be seen in the long-term perspective; longer than we so far have been used to in the EU[112]. Secondly, the

[111] Related, for basic conceptual questions about the categories of law and of new governance as well as the possible relationships between them, see Walker & Búrca 2007.
[112] The WFD already allow us to operate with "lessons learned" over 20 years, which is significantly long term from a traditional EU directive perspective.

EU has a global responsibility and must take the lead in innovative approaches for the benefit for the EU and the world surrounding it, as the EU has a significant political and economic interest in showing such leadership. Thirdly the construction of the EU is continuously in a process of renewal and accordingly the harmonisation philosophy of yesterday may not fit the needs of tomorrow – in fact, the basic reason for venturing into the transnational discussion in the first place is founded in the observation that "traditional harmonization in the field of EU environmental law is shifting towards increased proceduralization as a consequence of the inability of the traditional harmonization approach in meeting the demands for efficient environmental management and law" (Ladeur 1999). Transnational management is an attempt to advance such tendencies in a further productive way.

We must learn from the experimentation. As an example, it remains to be seen how successful the WFD will be. The WFD is "aiming for things that have not been attempted before, and its ambition requires flexibility, in order to recognise both ecological and social realities" (Lee 2009, 55). The question raised is whether this planned and methodological approach to regulation would be better than "the sole prescription of targets, the implementation of which is left to states' own devices" (Lee 2009, 55). Louka argues: "Given the lack of implementation, and especially the causes for non-implementation, the EU had no other option but to try a different approach. If successful, this approach could be transcribed into other areas of regulation" (Louka 2006, 229).

5 Part Conclusion

This Part has argued that the Community employs an increasing instrumental use of the EEA in order to fulfil its own supranational objectives. Instead of such instrumental use, the Community should allow for the development of EU independent agencies based upon their unique transnational features and also utilise the possibilities of transnational governance for the benefit of the European integration process.

EU Member States react to such instrumental use, and lessons learned from the transnational developments within European telecommunication and water management illustrate that the EU Member States no longer necessarily accept the EU agency models as a truly transnational venue taking Member State interests into account. The danger for the EU agency model, and specifically for the EEA as subject for this Thesis, is not that that the Agency will turn into a venue for conflict between Member States and the Commission. Rather, the danger lies with the risk of growing indifference and irrelevance of the EEA, as a consequence of the instrument of the Commission. Currently, as described further in Part II, the EEA is slipping quietly into a mere satellite function of the Commission. In this process, the Member States might lose interest in the EEA.

Therefore, it is essential to revitalise the transnational potentials of the EEA so as not to miss out on its possibilities and potentials. The EEA must allow the EU Member States to pursue the broader potential of the EEA to serve national and European interests - and not just supranational Community objectives. The European public and the Member States need the EEA to legitimise and balance the level of playing field in Europe, and the Community needs it to legitimise, secure and safeguard the ongoing European integration process.

The strategic transnational concept is a direct and productive continuation of the horizontal and experimental regulatory approach, as described above. The virtue of the EU transnational progress is based upon a direct positive recognition and transnational utilisation of the existing legal and administrative pluralism.

In a transnational context, the current EU experimental approach, such as the OMC, lacks clear EU central institutional facilitation and coordination. Without such institutional support there is a risk of not even getting started on establishing transnational relations. This is illustrated by the implementation of the WFD. The WFD encourages to transnational water management however, without any transnational institutional support. As a result, no structured transnational management has yet emerged. Furthermore, if such transnational relations are established without the

needed institutional support, the many “loose” and open-ended facets of the flexible approach risk confusion and non-transparency, eventual leading to genuine failure of EU harmonisation in line with the concerns raised by the critics of the EU experimental governance.

Therefore, the structured institutional aspect of the strategic transnational concept is arguably the most innovative element in providing for a productive supplement to the ongoing EU experimental regulatory approach. The EU needs a transnational lead institution in order to provide for clarity, transparency, and coordination in terms of transnational management, and also in terms of safeguarding the “feed-back” into the EU regulatory process thus ensuring the EU harmonisation process. It is a matter of managing a controlled harmonisation process allowing for variations. This transnational institutional support cannot be left alone for the Commission. As argued further in Part III, it is a misconception to directly involve the supranational Commission in the management of transnational relations. Transnational regimes require the support of a truly transnational institution.

The transnational integration of national administrations into the regulatory process at EU and national level takes advantage of and utilises the existing knowledge and expertise of the Member States in order to manage the complexity of the environmental field, and to facilitate the implementation of environmental law and policy. Each administrative system has its own regulatory approach and experiences in ensuring implementation and compliance; some approaches are more advanced and successful than other.

Thus, the transnational advantages for the generation of knowledge, the development of law and norms, and also for the implementation, compliance and effectiveness of EU environmental policy, make use of national legal, political and institutional capacities. This way, the transnational concept must fit within "the bounded space of innovation" (Knill & Lenschow 2000c, 31s and Dilling 2000, 63); i.e., explicitly taking into account the political and institutional capacities for regulatory adjustment at the both European and domestic level.

In order to implement the transnational advantages, the Community is in need of reform of the traditional Community Method. EU transnational governance requires a structured approach allowing for flexibility in governance and implementation. This transnational approach is closely related to the concepts defined by Majone as "flexible differentiated integration", "unity in diversity" and "competition with cooperation" taking advantage of the competitive synergy and incentives of networking, as further described in Part III (Majone 2009, 20, 44ss, 179ss, and 205ss)[113]. As argued by Majone, "intensive transgovernmental interaction is in a sense the reverse of the traditional integration based upon the Community Method; flexible, respectful of national autonomy, and sustained by the legitimacy of democratically elected leaders, transgovernmentalism can achieve results that are precluded to the traditional approach" (Majone 2005, 179). Majone continues that; "a Community based upon the traditional concept of separation of powers and quasi-federalism corresponds poorly to the new multi-level reality, challenges, needs and expectations both in regulatory terns and in territorial terms. A continuation of such an approach due to an outdated institutional framework risks a mismatch between ambitions and resources and implementation, leading to increasing crisis of public legitimacy" (Majone 2005).

The EEA has an important role to play in this transnational reform. At present, "the lack of a European administrative infrastructure means that between the supranational level and the national level there is an institutional vacuum, which is supposed to be filled by cooperation of the national authorities" (Majone 2005, 100). The EEA can fill such vacuum by providing the institutional and coordinating focal point of transgovernmental relations as outlined here, and by facilitating the supranational and the national, or subnational, levels of regulatory governance.

Allowing the EEA such coordinating role, the next question is how to design such role.

Based upon the growing complexity of policymaking at European level, it could be tempting to suggest a greater functional differentiation by explicitly assigning an

[113] Based upon the OMC experiences, Majone argues that the flexible and differentiated "competition with cooperation" does not necessarily have to be applied as widely as the OMC.

autonomous role to the EEA and/or to the European regulatory networks involved the Agency. The notion of a functional differentiation between the executive and the regulatory functions, currently solely performed by the Commission, would constitute a "fourth branch of government" in the EU setting (Everson 1995 and Majone 2005, 99ss). To qualify as full-fledged regulatory network, however, the EEA would need autonomous powers of rulemaking, adjudication, and enforcement, and a clear legal basis for its independence from the Commission as well as from the national executives.

Such regulatory functions could be assigned the EEA; turning it into a truly independent regulatory environmental agency based upon transnational regulatory networks.

However, such a regulatory EU agency model is not likely due to the legal constrains of the TEU. Therefore, the focus and vision of this Thesis – the strategic transnational concept - is different. It is an escape from the deadlock situation of defining the legal autonomy of the agencies. After decades of legal discourse, the TEU institutional balance is still dictated by the *Meroni Doctrine* leaving the Commission with overall responsibility for the activities of the EEA, which still today undermines the real meaning of the term "independent agency".

Although the strategic transnational concept also applies a strong autonomous position of the EEA, it does not do so in strict legal terms referring to the TEU legal and institutional constitutional position based upon separation of powers but rather, in a technical and strategic sense. This strategic autonomy relates to the technical and specialised integrity of the EEA, of the national or subnational actors, and of transnational networking.

The strategic transnational concept is not simply a pragmatic approach "giving in" to the despair of not being able in Community terms to establish a fully regulatory agency. Strategic autonomy, as a basis for the strategic transnational concept, is not a substitution, or replacement of the ongoing argumentation for such a regulatory agency based on legal autonomy. Rather, it is a parallel and supplementary instrument, as the overall autonomous position of the EEA in principle concerns both the strict legal

dimension based upon separation of powers, and the strategic dimensions based upon specialised integrity of the Agency.

Before continuing the formulation of the strategic transnational concept in Part III, the following Part II illustrates and describes the deadlocked development of pursuing legal autonomy. Based there upon, Part II outlines the related attempts by the Community to regain – or rather adjust – legal and institutional control and influence over the EEA.

Part II: EEA Legal Independence – A Road to Nowhere

The Commission has seen the agencies as a positive evolution in the EU institutional machinery, as the agencies offer a number of advantages over the regulatory methods employed previously in the EU: increased expertise on highly technical issues, enhanced visibility for the regulated sector and substantial costs savings for the regulated entities. In addition, the creation of agencies may help lighten the workload of other EU institutions, which can, in turn, focus on their core strategic functions (Geradin et al, 2005, ix).

At the time of the second generation agencies established in the 1990s the Commission clearly gave its support to the use and legitimacy of the agencies by increasing the number of agencies from four in 1993 to 16 in 2004, and now more than 35 in 2011[114]. This strategy was clearly endorsed by the 2001 White Paper on European Governance: "The creation of further autonomous EU regulatory agencies in clearly defined areas will improve the way rules are applied and enforced across the Union" (Commission 2001c, 19)[115]. Also in 2001, the Commission presented its proposal defining new forms of regulatory and executive EU agencies (Commission 2001b).

By reaffirming, embracing and accelerating the EU agency concept both in quantitative and qualitative terms, the EU Commission also defines its position on the possible transnational autonomy and independent role of the agencies, which becomes apparent in both its proposals for the 2001 regulatory and executive agencies, and also in the specific 2003 revision of the EEA. The Commission makes it clear by its actions and recommendations that the visions of further transnational autonomy of the agencies are not possible or desirable (Scott 2005, 81). The Commission does not directly state such

[114] On this evolution and the legal status of the EU agencies today, see Andoura & Timmerman 2008 and Comte 2010.

[115] The White Paper itself, including the work and processes also in academia preparing for the White Paper, gave an opportunity for a thorough evaluation of the EU agency structures by year 2000. It gave an opportunity to evaluate the first decade of the second generation of EU agencies, and to give directions for the future positioning of the EU agencies; a positioning still valid today. However, as this Part II illustrates, the Community is still in 2011 in the process of providing clear definitions to such structures. On such preparations for the Commission White Paper, see the outcome of EUI conference, Joerges, Ladeur & Ziller 2002, Vos 2000, and also the specific report to the Commission on the role of specialised EU agencies in decentralised EU governance, Everson, et al, 1999.

opposition, but it appears clearly from the process of the still ongoing efforts by the Commission (and also by the Parliament and the Council) in defining the agencies' institutional position within the EU institutional order, based upon the conclusions of the *Meroni Doctrine* limiting the possibilities for real delegation of powers from the Commission to the Agencies – which also became clear from the concurrent changes to the legal framework of the agencies. In its 2002 (unsuccessful) proposal on an operational framework of EU regulatory agencies, the Commission proposed to lessen the Member States' control over agencies by reducing the size of the Management Board to 15 members (basically by reducing the previous representation of one member per participating Member State), now including six representatives appointed by the Commission, six representatives of the national executives appointed by the Council and three members, with no voting rights, representing the interested parties (Commission 2002a, 9). In addition, concerning the EEA, a direct down-playing of the transnational approach has been observed by including the Commission further in the management and in the control over the Agency based upon the 1999 introduction of the Bureau assisting the Management Board. These aspects will be discussed later.

These aspects jeopardise the transnational structure of the agencies, where Commission and Member States in principle are equal as partners (Vos 2005, 124). The development may indicate a return to the supranational approach.

Similarly, the Member States and individual voices have been increasingly silent on possible autonomous further tasks of the agencies. Related, by 2003 the "door was closed" for the EEA, as the legal requirement of Art. 20 on further ongoing reviews on possible new EEA tasks was not applied, and eventually, by the 2009 revision of the EEA Regulation, Article 20 was repealed. As argued in Part I above, such development brings the EEA in risk of losing its transnational nature turning itself into merely instrumental use of the Commission.

As stated in Part I, there is a risk that such an approach in the long term will jeopardise the overall legitimacy of the EU agency model. Perhaps the Member States allow such instrumental role – and thus, allow that the EEA to fall under the supranational

institutional umbrella of the Commission, thus becoming less of a truly transnational vehicle applicable for the Member States - simply because the functions of the EEA do not constitute any significant decision-making and thus, that the EEA does not represent a real threat to the competences and interests of the Member States. This is in stark contrast to more regulatory areas, such as telecommunication, where the Member States have established a true transnational alternative instead of the agency model – a development that in real terms risks jeopardising the legitimate raison d'être of the EU agency model.

If such legitimacy is lost, the EEA is at risk of becoming irrelevant in terms of making no difference whether it is an agency or just another functional part of the Commission. As long as the Member States get what they want – information and networks running effectively – why rock the boat? The regained control and influence of the Commission do not in current real terms harm the interest of the Member States.

This Part illustrates the recent development and tension in pursuing a legally autonomous EEA. The following chapters demonstrate the restrained legal and political meaning of the independency of the EEA, indicating that pursuing the "legal autonomy" of the EEA is troublesome and a deadlocked situation. The part will demonstrate that the attempts to match EEA legal autonomy with the responsibilities of the Commission jeopardise the transnational foundation of the EEA and the potentials of transnational management in the EU. As a consequence, by means of agency definitions and control and influence initiated by the Community, we witness a gradual development of the EEA into becoming of instrumental use for the Commission.

Chapter 6 analyses the legal constitutional position of the EEA, addressing the possible misconception of an "independent" agency in legal terms based upon the *Meroni Doctrine*.

Chapter 7 illustrates the ongoing efforts by the Commission and the European Parliament to define the legal status of the EU agencies and to adopt the definition of agencies to the legal reality following the *Meroni Doctrine,* as it became obvious to the

Commission that the institutional balance of the Treaty of the European Union (TEU) would not change, meaning that the Commission remains responsible for the activities undertaken by the agencies.

Chapter 8 focuses, as a consequence of such attempts for an agency definition, upon the Commission regaining control and influence over the agencies and the EEA (as evidenced by subsequent external EEA reviews and reinforced by the recent internal reviews performed by the EEA itself), thus down-grading the transnational role of the Agency to a mere supranational instrument of the Commission. For illustration purposes, the chapter also presents the earlier proposals for a more regulatory EEA; proposals that originate from the early 1990s. It was the time of innovative proposals for possible directions of the EEA. Such proposals later vanished, perhaps as a consequence of the EU legal and institutional reality. However, such proposals are to some degree still relevant for the debate of further regulatory powers for the EEA, also in a transnational context. The broader purpose of Chapter 8 in relation to the context of the Thesis is to depict the decline in ambition and optimism with regard to envisioning a further regulatory EEA, as witnessed over the past decades.

Chapter 9 provides a conclusion to Part II.

6 The Independence of the EEA

Although relatively new in the EU context, the concept of independent agencies has for long been applied in the US, and also in Europe, in for example the UK, in Germany, France, and in Italy (Shapiro 1996a, 1996b, 1997, and 2011 and Majone 1996b)[116]. Like the EU agencies, these agencies have emerged where support in the regulation of rapidly expanding industrial activities was needed, aiming at socio-political issues such

[116] In general terms, independent agencies may be defined comprehensively in the sense of the US Administrative Procedure Act (APA) of 1946, where "an agency is a part of government that is generally independent in the exercise of its functions, and that by law has authority to take final and binding actions affecting the rights and obligations of individuals" (Majone 2006b, 191).

as environmental protection, consumer protection, work safety, etc. (Everson 1995, 182ss and Majone 1994a, 3ss).

However, although the terminology (i.e. "independent agency") is the same, any comparison must be approached with caution. It is not the intention of this section to enter any detailed comparative analysis of the concept of independent agencies, but it shall be noted that the concepts vary based upon the specific legal and institutional context of the regimes in question (Menon & Schain 2006). Perhaps the cautious approach is especially relevant towards the US concept because the European discussions on agencies at times have been directly referring to the US experiences more or less bluntly without taking the specifics into account - such as the discussions leading to the establishing of the EEA[117].

A Conceptual Understanding – the EU and the US

This section briefly outlines the main characteristics and differences between the US and EU settings[118].

First of all, the US model of independent agencies must be approached with caution because the US model – illustrated by the US Environmental Protection Agency (EPA) – is more of a traditional regulatory agency with powers similar to any other traditional environmental departments within most government organisations. In contrast, the EEA does not (yet) fulfil any direct regulatory functions (Zito 2009b). Rather, being an informational agency, the EEA's sole role is to support the Community and the Member States with information on the state of the environment. The regulatory functions equivalent to those of the EPA are today carried out by the EU Commission, the EEA and the Member States jointly[119]. Naturally, the current difference in regulatory competences between the EEA and the EPA does not rule out that the future EEA could

[117] See for instance the early approach by the European Parliament prior to the establishing of the EEA, referred in Majone 2006b, 199. See also Chapter 8.3 below.
[118] For the detailed comparison between the US and the EU, see Menon & Schain 2006, Zito 2009b and Shapiro 2011. See also Meuwese et al argue that the US experiences leading to the US APA can provide useful inspiration for a EU administrative procedural act (Meuwese et al 2009).
[119] The federal EPA operates independently by its main centralised branch in Washington DC together with the EPA regional and state branches.

or should be empowered with regulatory powers similar to those of the US EPA. However, for now the point is rather to understand that the current levels of competence differ. In this context, even the European Medicines Agency (EMEA), which comes closest to being a fully fledged regulatory body in the EU sense, does not take decisions concerning the safety and efficacy of new medical drugs, but submits opinions concerning the approvals of such products to the Commission (Shapiro 2011, 112s). Similarly, the European Food Safety Authority (EFSA) is only allowed to assess risk, not to manage it. Only the Commission can make final determinations concerning the safety of food (Majone 2006b, 194). Such aspects will be addressed later in Part III.

Secondly, and more crucial for the comparison, is the understanding of "independence". The EU agency model seeks its legitimacy in a combination of targeted expertise and independence from the normal political structure within the Community, namely by distancing itself from the direct influence by the EU Commission. As described earlier in Part I, the transfer of powers from the Commission to these agencies does in principle stimulate the legitimacy of the Community regulatory system in general. The EU agencies take part of the EU institutional balance, TEU Article 13 representing "a balance of powers of mixed governance" (Majone 2006a, 122ss).

This differs significantly from the fundamental legitimacy of the "Independence" by US standards referring to the relation between presidential powers and the US Congress safeguarding the constitutional principle of Separation of Powers (Yataganas 2001, and Geradin 2005, 215). The US independent status refers in specific terms to the President's direct authority over the agencies, thus being "independent" from the direct influence of the US Congress - however, then instead in reality making the agencies subject to significant legislative regulation by the Congress (related Zito 2009b).

The distinction between the EU balance of powers and the US separation of powers explains to some degree the different approach of the US and the EU to the delegation of rulemaking powers and the functioning of the independent agencies. The strict non-delegation doctrine still prevailing in the EU, as described in the following section, has for long been abandoned in the US (Majone 2006a, 131ss).

Further, the US agency model does not concern the transnational relationship and accountability among the states and the federal level equivalent to the EU relationship between Member States and the EU institutions. The US concept of "independent agencies" is a horizontal issue of inter-institutional organisation at federal level concerning control over the executive branches. The nature of this issue is similar to the EU inter-institutional position of the agencies within the EU institutional framework. However, the EU "independence" concept goes further in addressing the vertical issue of accountability towards both the Member States and the EU public (Saurer 2009, 487)[120]. Therefore, a straightforward presentation of a principal agent relationship must be approached with caution. Within the widest regulatory scope, the US EPA acts "within a number of overarching constraints set by the principals. The EEA has a far less regulatory scope and, compared to the US setting, the EEA is also more marginal in terms of policy impact. Nevertheless, the EEA must follow a careful balancing act as it faces not only multiple principals but other competing agents (a key one being the Commission whether the staff also see themselves as principals over the EEA)" (Zito 2009b).

Based upon such differences, it appears difficult to establish European equivalents to the US federal agencies. The US agency solutions are thought to be "the first-best solutions to the need for federal – or supranational - regulatory coordination. In contrast, the EU had to settle for mid-level networked institutions coordinating national regulators, but not as efficient as stand-alone authorities with comprehensive powers" (Sabel & Zeitlin 2010b, 9s).

Thus, the concept of autonomy differs, as it refers to different settings in the US and the EU context. Both the US and the EU settings enjoy autonomy, as argued in this Thesis

[120] Saurer 2009 at p. 487: "One of the most idiosyncratic features of the EU agency system is the structural relationship between agents and principals. Whereas in the United States the President and Congress constitute the two major principals of federal agencies, the multiple-principal-system of European governance is at least fourfold; E.U. agencies are held accountable to the Council, the Commission and the European Parliament and to the Member States. The latter accountability relation hints at the most genuinely supranational feature in the accountability regimes for E.U. agencies, which is a specific horizontal accountability mode applied by the Member States".
More on the EU principal-agent relationship between Member States, the Commission and the EEA in Part III.

based upon technical integrity, strategy and prioritisation. However, the US setting also refers to autonomy related to the separation of powers at federal level, which is not equivalently matched by the EU agencies in the EU balance of powers. However, in contrast to the federal position of the US setting, the EU agencies employ autonomy based upon their transnational position separate from the supranational EU institutions. Also, as this Thesis will describe, such transnational positioning and the related European agencification processes boost the autonomous position of the individual EU agency, and also of the national European agency; it allows for a positioning of the EU agencies distancing themselves from their multiple principles. Further, it allows the national agency an autonomous position not only related to the transnational processes but also in terms of distancing themselves with regard to their domestic principals, and the domestic political and regulatory agenda. Such autonomous positioning of the national agencies is part of the repositioned role of the "disaggregated" state. These aspects will be discussed in Part III.

The EU Constitutional Position

The Agency is a legal person of its own, which in principle is a logical consequence of its independent status, EEA Regulation Article 7. The Agency has autonomous legal power and responsibility in relation to its daily operation, such as taking and being subject to direct legal action, to the negotiation and conclusion of agreements and to the exercise of its discretionary powers; naturally all within the frames of the EEA Regulation.

However, there is a legal limitation for the degree of independence. In general, the establishment of "truly" independent EU agencies seems to be in conflict with the EU constitutional principle of institutional balance of powers as set out in TEU Article 13 (Everson 1995, 189ss and 196).

The creation of new EU institutions is not prohibited by the TEU, but the current EU institutions cannot delegate competencies with linked responsibilities, which are assigned to them according to TEU Articles 13. The ECJ has made it clear that the

institutional balance of powers, TEU article 13, does not prohibit the establishment of more or less independent Community bodies in order to attain specifically defined Community policies and also to allocate these bodies the appropriate powers needed in order for them to fulfil their mandates[121].

Thus, the setting-up of an EU institution with allocated powers can only take place within narrowly defined frames (Foster 2009, 134ss). The ECJ has previously applied TEU Article 13 as a reason for delegation of powers - in the leading case *Meroni*[122]. However, the ruling is marked by the then early stage of Community policy and the less developed accountability of independent bodies and the related judicial review. The Court stated that only very restricted delegation of executive powers - based upon objective criteria subjected to strict review and determined by the delegator - was admitted, provided that the responsibility remained with the delegator (Everson 1995, 197). Schermers & Blokker analyse *Meroni* from a traditional perspective of constitutional law, including international law. They find that the *Meroni* decision "applies the two general restrictions to the power of delegation to other, inferior, organs: 1) no more powers may be delegated than the organ itself possesses; all delegation should contain the same restrictions, which may exist in the powers of the delegating organ. 2) Responsibility may not normally be transferred" (Schermers & Blokker 2003, 168ss).

The two ECJ rulings mentioned above show that the principle of institutional balance in TEU Article 13 allows for the establishment of additional Community bodies. However, such bodies must remain under the responsibility of one of the TEU established institutions. The ECJ applies this view for safeguarding the necessary possibility for judicial review of the balanced institutional powers in TEU article 13 - a review of importance since the Community does not have any clear distinction between the exercise of executive, legislative and judicial functions (Lenaert 1993 and Everson 1995, 197). It follows, that the "more intensive instruments the EU agency disposes of,

[121] Opinion 1/76 ECJ 1977, p. 741ff (specially p. 755f) concerning the EC Transport policy and the legality of the statute establishing the international institution; the European Laying-up Found for Inland Water Vessels". See also Kreher 1996a, 5 and Lenaert 1993, 39

[122] Case 9/56, (1957-58) ECR 133 ff. See also the parallel judgement of June 13 1958, in Case 10/56, (1957-58) ECR 157 ff.

the higher the necessity to legitimate the powers conferred to it" (Majone 2007). Thus, independent and discretionary authority for a new institution was very limited.

In addition, perhaps by these rulings the ECJ also indicates that it would (then) have no direct jurisdiction over the activities of such an independent institution detached from the Commission, as the EEC Treaty did not provide the needed jurisdiction for the ECJ over these independent institutions. Thus, the responsibility had to remain with the Commission eliminating the possibility for genuine independent agencies within the EEC. A direct ECJ jurisdiction over these "external" EU institutions would have to be secured by other means, such as specific secondary EEC/EU legislation, e.g. the EEA Regulation. It was not until the entering into force of the 2007 Treaty of Lisbon that such direct jurisdiction covering the EU agencies was secured, as will be described later.

Although the Commission described agencies as a mechanism of decentralised governance (Commission 2002a, 2s), it appears that the EU agencies only represent decentralisation in the very narrow sense relating to their locations and functional organisation within the Commission itself. In other respects, and in particular vis-à-vis the Member States, EU agencies are instruments of centralisation, as agencies have no fully regulatory powers (Scott 2005, 71s and Everson et al, 1999, 178). Schout & Pereyra conclude that "independent agencies, originally seen as innovations in the EU's governance by depoliticizing and professionalizing policy processes, have not proven, so far, to be a break with EU policy processes – thus the agencies underpin administrative stability rather than reform. As a result, doubts about their added value have remained" (Schout & Pereyra 2010, 13).

It follows that the outcome of the 1957 *Meroni* decision still limits the scope of delegations to agencies, and it may easily be concluded that the EU agencies are not fully independent (Shapiro 2011, 114s, Scott 2005, 69 and Curtin 2005, 93s). Based upon these findings, the EEA cannot be considered a fully independent body but rather a "satellite" function of the EU Commission. This means in legal terms that the EEA might perform certain delegated tasks. However, the responsibility for any action by the

EEA remains with the EU Commission. This reduces the EU concept of "independency" to minor institutional functions with limited legal binding consequences[123].

This does not imply that the "independency" of the EU agencies is unconstitutional. Instead, it is a matter of legal interpretation of the concept of EU "independence", which refers to decentralisation and technical integrity rather than autonomous regulatory powers[124]. Thus, the "independence" in the EU setting concerns the decentralisation of functions formerly performed by the Commission emphasising, at most, a more direct involvement by the Member States.

These findings based upon TEU Article 13 makes it troublesome to accept that any significant and individual legal powers have been transferred to the EEA. The findings also indicate that the assumption of "independent" agencies with their own legal personality - as stated in the EEA Regulation Article 7 - "only" refers to autonomy concerning trivial institutional tasks, leaving the overall regulatory responsibility to the EU Commission.

Such conclusions are a bit troublesome in relations to the EEA. The visions, intentions and negotiations behind the establishment and the following revisions of the EEA, and also the legal wording of the EEA Regulation itself, both in the preamble and in Article 7, give cause for a different interpretation and thus produce legal uncertainty and potential legal conflicts jeopardising the further development of the EEA.

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[123] As argued further in Chapter 7.2, it means that the EU regulatory agency can only issue individually decisions in a narrowly defined area and thus, cannot issue legislative measures of general application, although its decision-making practices "might result in codifying certain standards", (Commission 2002a, 8).

[124] This adds to the definition of the „independent agencies" in the EU context. This constitutes an additional deviation from the US concept of independent agencies as presented earlier in this chapter.
Beyond these rather refined constitutional links between the Commission and the EU agencies, the same constitutional requirements have given cause for the widely concern that the Community's use of private bodies for the New Approach for European standardisation, as described above in Chapter 4.2, falls far short of fulfilling these requirements. The powers of the European standardisation bodies go far beyond "implementation" as there are no control or supervision of the Commission or possibilities of judicial review. For this discussion for such private bodies, see Schepel 2005 at 227 and the reference to the extensive literature.

Therefore, there is an inadequacy between the scope of TEU Article 13 and the legal intentions stated in the EEA Regulation. Naturally, the wording of the EEA Regulation must be interpreted narrowly, subject to the institutional balance based upon TEU Article 13. Such an interpretation is supported by the general principle of legal hierarchy; the Regulation must, as any secondary legislation, always respect a higher constitutional norm. However, such interpretation cannot in the longer term solve the fundamental problem of legal uncertainty. Thus, the EEA Regulation would need revision to clarify these fundamental legal issues by stating the precise legal responsibilities of both the EEA and the EU Commission directly in the preamble and possibly also in the legal text of the EEA Regulation.

It has earlier been suggested that a solution to this legal uncertainty could be based upon a legal interpretation of the principle of institutional balance, TEU Article 13 allowing for the "true" independency of the agencies. The EU agencies represent a new "Fourth Branch of EU Government", and thus, are in need of new methods of oversight in addition to the traditional ECJ judicial review allowing for effective and legitimate operations outside the accepted hierarchy. Such oversight could be ensured by homogeneous procedural justices, by increased judicial oversight and by scrutiny via parliamentary committees (Everson 1995, 180ss). Hereby, the TEU constitutional principles would be safeguarded, not only by direct judicial review performed by the ECJ, but supplemented by such new methods as mentioned.

Such an approach based upon “procedural justice” or “administrative constitution” (Everson 1999) is useful in securing the needed accountability of the EU agencies and their operations. This is a fundamental aspect of the public legitimacy and procedural democratisation, as argued by this Thesis in Part III, especially Chapter 12. Thus, applying such an approach is instrumental in safeguarding operational accountability. However, the same approach cannot easily be applied in order to allow for a TEU constitutional interpretation.

First, such an interpretation has not yet been applied by the ECJ or been endorsed by the EU Council. Naturally, the proposed interpretation could be a promising first step in this

direction. However, it seems unlikely that such endorsement will take place in the near future. It is notable that the EU throughout the successive Treaty amendments, and now at the recent 2007 Treaty of Lisbon still does not address or correct this legal uncertainty. It could be done by including the agency structure formally within the EU institutional framework and thus include the agencies as part of the institutional balance, TEU Article 13. It is remarkable that the issue of the institutional position of the EU agencies is still absent from the EU Treaties – especially considering the recent direct inclusion by the Treaty of Lisbon of administrative norms and review mechanisms, as illustrated in the next chapter. Taking into account that this legal problem has been known for decades - it has often been discussed professionally and in academia, especially after the significant increase in EU agencies in the mid 1990s - and also taking into account that the EU have seen several constitutional amendments within the same time period, it appears that the exclusion of the EU agencies from the institutional balance, TEU Article 13, is a deliberate decision and not an opportunity lost[125]. Hence, there have been plenty of opportunities to clarify this issue. Also, this gives little reason to believe that such constitutional changes will occur in the near future.

Second, such a constitutional interpretation also becomes uneasy as the proposal aims at an extended interpretation of TEU Article 13 by means of introducing yet another visionary legal proposal applying enhanced proceduralisation and democratisation. Thus, in fact, the proposal in total addresses an EU constitutional problem by suggesting the utilisation of another problematic issue, yet undeveloped area of EU law and governance. Perhaps such a suggestion is too ambitious, attempting to address and solve two major EU problems at the same time[126].

Therefore, it seems difficult to apply the sound principle of procedural justice also as a constitutional norm altering the institutional balance of TEU Article 13. The legal uncertainty would continue to prevail.

[125] Similar, Craig & Búrca 2011a, 70.
[126] The concept of "Procedural justice" is directly linked to the problems and discussions concerning the democratic deficit within the EU governance, see further at Accountability at Part III.

An EU based upon an uncertain legal and institutional framework risks jeopardising the overall legitimacy and stability of the EU, which could even have a negative impact upon fragile national regimes. The enlarged EU now includes a significant number of new Member States, of which many are young democracies characterised by democratic and accountable institutions still in the process of maturing. Thus, an uncertain EU legal and institutional framework could serve counterproductive to the difficult democratisation processes, providing nutrition to anti-democratic movements. In the process of securing a democratic Europe, the EU must not underestimate its value and impact.

Further, such uncertainty is also in contradiction to the basic principles for membership formulated by the EU itself[127]. Taking the ongoing enlargement process and also the perspectives of transnational management into account, it even seems worrying to embark on further and advanced EU regulatory management without the backing of an adequate legal and institutional basis. Thus, a clear correction of the institutional position of the EEA and the other EU Agencies, which now exceeds 35 in number, should be adopted at the EU Treaty level.

These legal concerns cannot be diminished as purely academic with reference to the current "modest" role of the EEA. As it will be argued later, already the current informational function of the EEA constitutes regulatory policy, and any reform with or without enhanced regulatory powers necessitates a clarified legal and EU constitutional stand. Besides, the operation of the EEA and the other EU agencies has a direct significance for the development of EU and European administrative and procedural law, areas which have so far been little regulated by the EU law.

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[127] The 1993 Copenhagen European Council (Council 1993) establishing the criteria for membership requiring that the candidate country must have achieved:

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union;
- the ability to take on the obligations of membership including adherence to the aims of political, economic & monetary union.

See: http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm
Also, the UNECE Aarhus Convention, which is signed by the EU and the Member States, requires democratic processes aimed at decision-making and institutions. The Aarhus Convention is discussed later in Chapter 12.4.

Now, let us turn to the significance of these facts for the further development of a transnational EEA:

From a realistic perspective, it would be a legally absurd for the EU Commission to remain overall responsible for functions delegated to any legal and political independent units (!). As long as legal uncertainty prevails concerning the definition of the scope of "independent" EU agencies - and as long the EEA is an EU institution actively involved in the formulation and implementation of EU environmental law under the overall responsibility of the EU Commission - it seems reasonable to limit the scope for institutional and legal "independency".

Nevertheless, regardless such a conclusion it is also a fact that the EEA due to its technical integrity currently falls under a kind of *de facto* "independence" from the EU Commission, which in reality has restrained the political and legal influence and control by the latter. Thus, there clearly exists a need for legal clarification, especially because the EU agencies in numbers and structures are developing into more or less executive and regulatory EU institutions, as described in the next chapter.

Despite the narrow scope following TEU Article 13, the current constitutional position of the EEA provides legal room for allowing the Agency enhanced participation in EU transnational environmental management. The transnational reform of the EEA as suggested by this Thesis can take place already now.

A transnational EEA involved in extensive EU transnational environmental management would not for its operation *per se* need full legal independence from the EU Commission. What really matters is whether the EEA has/obtains the adequate legitimacy among the participants, regardless of the EU constitutional and legal reality - the "*proof of the pudding is in the eating*" - which is the precondition for successful enhanced transnational networking, as will be discussed later in Part III.

Thus, the issue of “independence” for enhanced transnational activities is in reality less of a legal orientation. Instead, it is rather a matter of autonomy based upon strategic use or potentials of the technical integrity of the EEA. For this discussion, the degree of legal independence of the EEA becomes of minor relevance.

To sustain the strategic autonomy, what seems needed is to distance the Agency from the daily political operation and influence of the EU Commission. This is already to a certain degree done by its decentralised location in Copenhagen and by potentials of “un-interrupted” management of the transnational management.

The notion of strategic independency might be stronger than the actual legal meaning: Taking the goodwill and legitimacy the current EEA enjoys today into account there is reason to be optimistic about such a future transnational EEA, even within the current and narrow EU constitutional scope.

Thus, the EU concept of "independency" is rather unclear. Although the present uncertainty is unfortunate - in terms of violating the basic principle of legal certainty - the strategic meaning of "independent agencies" has a strong significance of its own. The potential of strategic autonomy is the core of this Thesis and will be further discussed in Part III.

However, such focus upon strategic autonomy does not solve the legal uncertainty. The legal inconsistencies should still be solved. Otherwise, the “acceptance” of such legal uncertainties could generate a “snowball effect” with the risk of leading to the acceptance of increased constitutional uncertainties. This is not acceptable for any regimes based upon the Rule of Law, and it would further risk jeopardising the needed public legitimacy, which is also needed for sustaining the strategic autonomy.

Thus, it is understandable that the legal situation based upon the *Meroni Doctrine* has sparked criticism (Dehousse 2008, Chiti 2009, Majone 2005, Majone 2009, 186ss, Majone 2011, 26 and Everson 2005, 148ss). Majone puts it rather bluntly combining such criticism with his overall concerns of legal and institutional capacity of the EU in

meeting its future challenges, as described in Part I: "The refusal to adopt the independent agency model, a model whose advantages are today generally acknowledged, is a striking demonstration of the difficulties of modernizing the traditional methods of governance. The design of the Community system as a latter-day version of mixed government, with representation of interests and institutional balance as its organizing principle, is one of the roots of the difficulty of reforming an outdated institutional architecture" (Majone 2009, 188). Majone continues; "This inability to innovate is an important reason why the Community Method is increasingly perceived as too rigid to accommodate the needs of an increasingly complex and diverse policy. The refusal of the Commission to delegate rule-making powers to the European agencies is a striking illustration of this rigidity" (Majone 2005 and Majone 2011, 26).

Also Dehousse is concerned that, based upon the current weakness of a true delegation of powers to the EU agencies, regulatory agencies may not be established (Dehousse 2008): "Whereas a principal–agent model has widely been used to analyze the establishment of manifold autonomous agencies at the European level, it fails to capture some key elements of this process, such as the recurrent inter-institutional struggle of agency institutional design or the Commission's basic ambivalence vis-à-vis independent regulators. In contrast, acknowledging the absence of a clearly defined principal in the EU enables us to understand the relative weakness of existing agencies and the multiplicity of controls to which they are subjected. In such a system, strong EU regulators are unlikely to be established". These concerns address regulatory agencies, and thus not foremost the EEA. However, the concerns expressed are relevant also for the EEA as they aim at the core of the problem: the legal uncertainty and the related risk for the overall legitimacy of the EU agency model – a risk that increases as the EU continues to establish agencies upon an uncertain legal foundation.

In getting closer to the core of this Thesis, Chiti has observed that "the legal uncertainties related to the interpretation of the institutional balance, the lack of truly administrative rule of law principles and judicial review are problematic for the legal framework of the EU agencies. More or less intentionally, such uncertainties have resulted in new types of agencies and an agencification process beyond the Commission

in an attempt to escape these problems" (Chiti 2009, 1426). The problem is, however, that the expanded agency agenda adds to the overall uncertainty and does little in providing for a clear EU agency definition.

Now, what should the Commission do, and what has the Commission done in order to provide for such definition? Sandwiched between the *Meroni Doctrine* and the expectations for agency independency, the Commission finds itself between a rock and a hard place in providing for such definition.

The problems in providing for such definition are illustrated by the next chapter on the recent story of the EU agencification process and the long and still ongoing struggle of the Commission and the European Parliament in providing for a legal definition.

7 EU Agency Definition

The EU Commission values decentralisation and delegated power to agencies having "genuine autonomy in their internal organization and functioning if their contribution is to be effective and credible" (Commission 2002a, 5). In general, the Commission favours the autonomy of the EU agencies sharing the same reasoning as presented on the legitimacy of independent agencies above in Part I, Chapter 2.3 (Craig & Búrca 2011a, 69 and Commission 2003b, 12).

However, the EU Commission seems unable to define this "autonomy" or independence in any further details. In the 2002 Communication at page 5s, the EU Commission argues that the autonomy must respect the institutional balance of powers as defined by the TEU Article 13. This means in real terms that the EU Commission will eventually remain overall responsible for the agency performance[128].

[128] By the 2002 Communication, the Commission provided the political rationale for limiting agency powers. Although supportive of agencies, the Commission nonetheless argued for preserving the "unity and integrity of the executive functions" and for ensuring "that it continues to be vested in the chief of the Commission if the latter is to have the required responsibility vis-à-vis Europe's citizens, the Member States and the other institutions". The participation of agencies should therefore be "organised in a way which is consistent and in balance with the unity and integrity of the executive function and the

In the previous chapter it was argued that the EU does not conform to the general definition of independent agencies, such as applied by the US APA. This brings the Commission into some kind of fix when it comes to providing for clear legal definitions for the EU "independent" agencies. This chapter illustrates the ongoing deadlocked attempts by the Commission and the Parliament to make the two impossible ends meet: to provide for a definition that takes the concept of independence serious and at the same time responds to the strict responsibilities upon the Commission following the *Meroni Doctrine*. As it will be described below, three attempts have so far been made, and a fourth is on the way[129].

Finding a solution is becoming increasingly important. The development of EU agencies has gone from few to more than 35 agencies. As the following describes, the development is not even homogeneous. Agencies today represent a kaleidoscopic universe of different institutional set-ups.

7.1 The EU Agencies

The creation of decentralised Community bodies dates from the 1970s, with the establishing in 1975 of the European Centre for the Development of Vocational Training (CEDEFOP) and the Foundation for the Improvement of Living and Working Conditions (EUROFOUND). However, in the 1990s, and in the dynamics of the finalisation of the internal market, a series of new agencies appeared, giving "a new dimension to what constitutes a community model of European agencies at present" (Pollack 2003, 395ss, Commission 2008b, 4 and Commission 2008c, 1s).

Commission's ensuring responsibilities" (Craig & Búrca 2011a, 70 and Commission 2002a, 1 and 9). Further, Craig & Búrca point out that "the emphasis placed upon the unity and integrity of the executive function was not fortuitous, given that the 2002 Communication was issued during the deliberation of the Convention of the Future of Europe, where the location of executive powers was one of the most divisive issues".

[129] As it will be described, the latest attempt by the Commission to provide for such definition took place in 2008 (Commission 2008b), see the legal and institutional status in Andoura & Timmerman 2008 and Comte 2010.

These so-called second generation agencies were an answer to a desire for geographical devolution and the need to cope with new tasks of a technical and scientific nature. The majority of the agencies started their activities in 1994 or 1995, after a decision by the European Council in Brussels on 29 October 1993, which set the headquarters of seven agencies, some of which had already seen their basic regulation adopted by the Council several years previously[130].

Since 2000, a new wave of agencies has emerged, which now also relates to matters of Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters, see just below. This group of agencies can be called the "third generation" agencies.

Currently, the EU has established 36 decentralised EU agencies. As will be further described below in Chapter 7.2, the Commission has proposed to group the agencies into two main categories: Regulatory agencies and Executive agencies.

Regulatory Agencies

The Commission defines[131]:

1) Community, traditional or "policy" agencies – being bodies distinct from the Community institutions (Council, Parliament, Commission, etc.) having their own legal personality. They are individually set up by an act of secondary legislation in order to accomplish specific technical, scientific or managerial tasks.

These agencies can be sub-divided into four main categories according to function (Commission 2008c, 2):

a) Agencies adopting individual decisions, which are legally binding on third

[130] Decision of 29.10.1993. The Representatives of the Governments of the Member States, meeting at Head of State or Government level on the location of the seats of certain bodies and departments of the European Communities and of Europol, OJ No C 323, 30. 11. 1993, p. 1
[131] See http://europa.eu/agencies/

parties[132].

b) Agencies providing direct assistance to the Commission and, where necessary, to the Member States, in the form of technical or scientific advice and/or inspection reports[133].

c) Agencies in charge of operational activities[134].

d) Agencies responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information/networking[135].

The EEA is among the last category of agencies specifically labelled as an "information agency" (Commission 2002a, 4 and Commission 2003b, 4).

2) Common security and defence policy agencies - agencies having been set up to carry out specific technical, scientific and management tasks within the framework of European Union's Common Security and Defence Policy[136].

132

- Community Plant Variety Office (CVPO),
- Office for Harmonisation in the Internal Market (OHIM),
- European Aviation Safety Agency (EASA),
- European Chemicals Agency (ECHA).

133

- European Maritime Safety Agency (EMSA),
- European Food Safety Authority (EFSA),
- European Railway Agency (ERA),
- Translation Centre for the Bodies of the European Union (CdT),
- European Medicines Agency (EMEA) – successor to the European Agency for Evaluation of Medicinal Products
- Agency for the Cooperation of Energy Regulators (at planning stage) (ACER),

134

- European GNSS Supervisory Authority GALILEO (GSA),
- Community Fisheries Control Agency (CFCA),
- European Agency for the Management of Operational Cooperation at the External Boarders of the Member States of the EU (FRONTEX).

135

- European Environment Agency (EEA),
- European Centre for the Development of Vocational Training (CEDEFOP),
- European Foundation for the Improvement of Living and Working Conditions (EUROFOUND),
- European Training Foundation (ETF),
- European Monitoring Centre for Drugs and Drug Addiction (EMCCDA),
- European Agency for Occupational Safety and Health (EUOSHA),
- European Network and Information Security Agency (ENISA),
- European Centre for Disease Prevention and Control (ECDC),
- Fundamental Rights Agency (FRA) - successor to the European Monitoring Centre on Racism and Xenophobia,
- European Institute for Gender Equality (EIGE).

136

- European Defence Agency (EDA)

3) Police and judicial cooperation in criminal matters agencies - another group of agencies having been set up to help the EU Member States co-operate in the fight against organised international crime[137].

4) EURATOM agencies and bodies - bodies having been created to support the aims of the European Atomic Energy Community Treaty (EURATOM)[138]. The purpose of the Treaty is to coordinate the Member States' research programmes for the peaceful use of nuclear energy, to provide knowledge, infrastructure and funding of nuclear energy and to ensure sufficiency and security of atomic energy supply.

Executive Agencies

Executive agencies are defined[139] as organisations established in accordance with the 2003 Council Regulation with a view to being entrusted with certain tasks relating to the management of one or more Community programmes. These agencies are set up for a fixed period. Their location has to be at the seat of the European Commission (Brussels or Luxembourg) [140].

137
- European Union Institute for Security Studies (ISS)
- European Union Satellite Centre (EUSC)

138
- European Police College (CEPOL)
- European Police Office (EUROPOL)
- The European Union's Judicial Cooperation Unit (EUROJUST)

- EURATOM Supply Agency (ESA)
- European Joint Undertaking for ITER (The International Thermonuclear Experimental Reactor) and the Development of Fusion Energy (Fusion for Energy)

139 See also next Chapter 7.2.

140 Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, (OJ L 11, 16.1.2003). For the background of the executive agencies, see also the 2000 and 2002 communication from the Commission (Commission 2000a and Commission 2002a) and also the Working Group preparing for the 2001 Commission White Paper on Governance (Commission 2001b).
The executive agencies are currently;
- Education, Audiovisual and Culture Executive Agency (EACEA)
- European Research Council Executive Agency (ERC Executive Agency)
- Executive Agency for Competitiveness and Innovation (EACI)
- Executive Agency for Health and Consumers (EAHC)
- Research Executive Agency (REA)
- Trans-European Transport Network Executive Agency (TEN-TEA)

7.2 Four Attempts to Define the EU Agencies

As the following sections illustrate, the EU is still in the process of providing for the legal definition including the autonomy of the EU Agencies.

Already in 2002, the Commission acknowledged the legal and operational uncertainties arising from the lack of a firm legal and institutional definition (Commission 2002a)[141]. This became more and more evident as the EU agencies were growing in numbers[142]. Thus, already by 2002 the Commission proposed such definitions (see below), and in 2005 presented a Draft Inter-institutional Agreement, which included clearly defined operational responsibilities for the agencies, including conditions relating to the creation, operation and control of agencies, which could also be used to review, formally or informally, how existing agencies were working (Commission 2002a, 2005 and 2008b, 6).

However, the 2002 proposed definitions were never formally adopted, and the Commission later recalled the Draft Inter-institutional Agreement due to legal reservation of the Council concerning the legally binding nature of an inter-institutional agreement (Commission 2008c, 3). Instead, in 2008, the Commission called upon the Council and the Parliament to re-start the dialogue (or rather the "Trialogue") on formulating the clear scope and operational definitions for the EU agencies (Commission 2008b)[143].

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[141] A criticism substantiated by the Commission by 2005:
"The European agencies have been set up in successive waves in order to meet specific needs on a case-by-case basis. They are typified by their diversity. If these agencies are set up in an uncoordinated manner, without a common framework having been defined, this is likely to result in a situation which is rather untransparent, difficult for the public to understand, and, at all events, detrimental to legal certainty" (Commission 2005, 2).

[142] As the problem persists, the President of the Commission, Mr. Barosso now also refers to the likewise criticism from political scientists (Commission 2010, 3): "Political scientists have criticised the increase in the number of agencies. What is clear is the broad diversity that exists, the wide-ranging responsibilities, the different issues and competences that the agencies have. And the Commission recognised in its 2008 Communication that the establishment of agencies on a case-by-case basis has not always been accompanied by an overall vision of the place of agencies in the Union".

[143] For the Trialogue, the Commission includes many of the issues raised in the 2005 Inter-Institution draft. Once again the Commission states its concerns:
"The varied role, structure and profile of regulatory agencies make the system untransparent, and raise doubts about their accountability and legitimacy. The diverse role of agencies fuels concerns that they might stray into areas more properly the domain of the policy-making branches of the EU. The responsibilities of the other institutions toward agencies, and of the Commission in particular, suffer from the lack of a clear framework and defined lines of responsibility" (Commission 2008b, 6)

This process has been met positively by the Council and the Parliament and the process is ongoing by means of an inter-institutional working group on Regulatory agencies, as described later (Commission 2009a).

However, the process also indicates that no commonly agreed definition of the term "European regulatory agency" yet exists to date. This gives cause for some confusion, and, as it will be described in this section, the Commission and the Parliament do not yet even have a commonly agreed terminology, although some consistency has emerged concerning the conceptual meaning.

As the legal uncertainty persists, the Commission currently states (Commission 2008b, 5):

> *"There are clear and strict limits to the autonomous power of regulatory agencies in the current Community legal order. Agencies cannot be given the power to adopt general regulatory measures. They are limited to taking individual decisions in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions and without genuine discretionary power. In addition, the agencies cannot be entrusted with powers which may affect the responsibilities which the Treaty has explicitly conferred on the Commission (for example, acting as the guardian of Community law)."*

The following sections illustrate that the Commission and the Parliament have since 2002 made three attempts to provide for an understanding, yet legal definition of the EU agency model(s) - neither of them fully addressing the fundamental legal uncertainty. A fourth is currently on its way, based upon the mentioned inter-institutional working group established in 2009.

First Attempt - The "Regulatory" Concept of an EU Agency

In 2002, 2005 and 2008, the Commission has presented proposals for defining the regulatory concept of the EU agencies – proposals that have not formally been legally endorsed and that have sparked ongoing discussions with especially the European Parliament.

In its 2002 Communication, the Commission recalled the 2001 White Paper on European Governance, which envisaged that one possibility for improving the way rules and policy are applied across the Union was to use regulatory agencies (Commission 2002a, 2 and Commission 2001c, 19ss).

Hence, the 2002 Communication argues for a clear operating framework and definition of the EU agency model by introducing the concepts of the EU regulatory and EU executive agencies (Commission 2002a, 3 and 8, Scott 2005, 71ss and Curtin 2005, 94s and 100) [144]. Both types of EU agencies are under the responsibility of the EU Commission.

Still, by 2008, the Commission upholds such definitions. These two types of agencies - regulatory and executive - each has different characteristics and raises different issues (Commission 2008c, 1):

"Regulatory" or "Traditional" Agencies

"Regulatory" or "traditional" agencies have a variety of specific roles, set out in their own legal basis, case-by-case. They are independent bodies, with their own legal personality. Most are funded by the EU budget - as well as, in some cases, by the direct receipt of fees or payments. There are no general rules governing the creation and operation of these agencies. They have been set up in successive waves in order to meet

[144] However, in adding to the initial confusion in terms, the Commission had difficulties in applying a consistent terminology of the scope of these definitions. In its 2002 Communication; at page 8 the term "decision-making agency" is applied instead of "regulatory agencies", and now "regulatory agencies" is used as the overall heading for both executive and decision-making agencies (see for instance the box at page 11 in the Communication).

specific needs on a case-by-case basis. They are "typified by their diversity" (Commission 2008c, 1).

The Commission proposed in its now recalled 2005 Draft for an Inter-Institutional Agreement the following definition for a "European Regulatory Agency (Commission 2005, 11):

> *"The term "European regulatory agency" shall mean any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy.*
>
> *The agency shall be invested with a public service role. It shall help to improve the way in which Community legislation is implemented and applied throughout the European Union.*
>
> *This definition shall not include the so-called "executive" agencies set up by the Commission to carry out, under its control and responsibility, certain tasks relating exclusively to the management of Community programmes. The executive agencies are the subject of Council Regulation (EC) No 58/2003 of 19 December 2002[145], which lays down their statute."*

Further, the Commission points out that a distinction must be made between "regulatory" activities and the adoption of legal rules or binding legal norms.

Regulatory activities do not necessary involve the adoption of legal acts. They may also involve measures of "a more incentive nature, such as co-regulation, self-regulation, recommendations, referral to the scientific authority, networking and pooling good practice, evaluating the application and implementation of rules, etc. It therefore follows that a European "regulatory" agency does not necessarily have the power to enact

[145] Ibid. note 140.

binding legal norms" (Commission 2005, 4). EU regulatory agencies can take legally binding decisions, although not issuing legal bindings acts[146].

With the broad definition of "regulatory agencies", the EEA is positioned as a Community Agency with the responsibility for gathering, analysing and forwarding objective, reliable and easy-to-understand information/networking.

Executive Agencies

Executive agencies have a more defined place in the Union's institutional framework. They are set up under a Council regulation adopted in 2002[147]. They are under full responsibility of the Commission. Their tasks must relate to the management of Community programmes, they are set up for a limited period, and they are always located close to Commission headquarters. The Commission creates them, maintains "real control" over their activity, and appoints the key staff. Their annual activity reports are annexed to the report from their parent Directorate-General. A standard financial regulation adopted by the Commission, governing the establishment and implementation of the budget, applies to all executive agencies. Working arrangements to govern executive agencies have recently been agreed with the European Parliament Committee on Budgets (Commission 2008c, 1).

The executive agencies have "only" management functions on behalf of the EU Commission and no decision-making power.

[146] The executive responsibilities of the regulatory agencies refer to the active part in exercising executive powers at Community level (Commission 2005, 5s): "The agencies, which adopt individual decisions, will be given the power to implement laws. However, this power will be limited to applying the rules of secondary legislation to specific cases, in accordance with the institutional system and the case law of the Court of Justice (i.e. the Meroni Doctrine). The other tasks allocated to the agencies must allow them to provide the Commission, in particular, with the experience and expertise it needs so that it can fully meet its responsibilities as the Community executive".
[147] Ibid. note 140.

Second Attempt - The Budgetary Concept of EU Agencies

In the 2008 Resolution on Institutional aspects of Regulatory Agencies, the Parliament responds positively to the call from the Commission on establishing a dialogue on defining the scope of the regulatory agencies (European Parliament 2008). For such definition on "bodies set up by the Communities having legal personality", the European Parliament refers to the previous 2007 Trialogue[148] and suggests continuing applying Article 185(1) of the Financial Regulation (European Parliament 2008, 6). The Parliament:

> *25. Recalls, in this respect, the definition of an "agency" established in the Trialogue of 7 March 2007, when it was agreed that, for the purposes of applying Point 47 of the IIA of 17 May 2006[149], the definition of an "agency" would be determined by whether the body in question was set up pursuant to Article 185 of the Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (Financial Regulation)*[150]*;*
>
> *26. Would like to emphasise the importance it attributes to a clear and coherent general terminology with regard to agencies that should be established for common usage; recalls that "regulatory agencies" are merely a sub-group of decentralised agencies;*

Referring to the Trialogue of 7 March 2007, it was agreed that the definition of an "agency" would be determined by whether the body in question was set up pursuant to Article 185 of the Financial Regulation applicable to the general budget of the European

[148] Trialogue refers to the "dialogue" between the Commission, the Council and the European Parliament.
[149] Point 47 of the Inter-institutional Agreement of 17 May 2006:
"When drawing up its proposal for the creation of any new agency, the Commission will assess the budgetary implications for the expenditure heading concerned. On the basis of that information and without prejudice to the legislative procedures governing the setting up of the agency, the two arms of the budgetary authority commit themselves, in the framework of budgetary cooperation, to arrive at a timely agreement on the financing of the agency", The Inter-institutional Agreement of 17 May 2006 on budgetary discipline and sound financial management (IIA of 17 May 2006), OJ C 139, 14.6.2006, p. 1.
[150] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (Financial Regulation), OJ L 248, 16.9.2002, p. 1.

Communities. This definition would exclude all European agencies that do not benefit from a Community subsidy (Inter-Institutional Working Group 2009, 1).

This reasoning was in line with the opinion of Parliament's legal service, dated 16 February 2007, on the legal nature of the European Institute of Technology (EIT), which concluded that "despite the lack of definition of "agency" in Community law, the establishment of the EIT has two main budgetary implications: Firstly, ... Article 185 of the Financial Regulation will apply to the EIT because it receives a contribution from the general budget; and secondly, paragraph 47 of the IIA of 2006 applies to the EIT for the following reasons: it is established by an act by the Parliament and the Council, it shall have legal personality, it shall have functional and budgetary autonomy vis-à-vis the Community institutions and it is created in order to help implement a Community policy ..." (European Parliament 2007b, 2s).

The Council's legal service confirmed this interpretation in its opinion of 27 February 2007 regarding the proposal for creating the European Joint Undertaking for ITER[151], which reasons that, since it is a body based on Art. 185 of the Financial Regulation, "it should be regarded as a Community agency for the purpose of applying point 47 of the IIA" because "the Joint Undertaking for ITER shares the main characteristics of a Community agency, in particular legal personality, funding from the Community, and application of the Staff Regulations to its personnel" (European Parliament 2007b, 2s).

Therefore, the 2008 Parliament resolution does not directly embrace the proposed Commission definition of regulatory and executive agencies. According to the Parliament, the definition of an EU agency shall be based upon the Financial Regulation, a definition that also allows for budgetary control. However, the Parliament adds to the multitude of ideas and proposals for defining EU agencies, as a 2006 study on the discharge of the agencies made externally for the Parliament Committee on Budgetary Control defines the EU agencies in the following way (European Parliament 2006, 7):

[151] The International Thermonuclear Experimental Reactor, http://www.iter.org/

> *Article 185(1) of the Financial Regulation defines agencies as "bodies set up by the Communities having legal personality". Within this definition, three distinct categories of agency may be identified: decentralised agencies, executive agencies and other bodies fitting this definition such as joint undertakings and the proposed European Institute of Technology".*

Bearing in mind that the 2006 external study not necessarily represents the views of the Parliament (European Parliament 2006, 2), the Parliament has yet officially to endorse the Commission definition of agencies – in full or parts - based upon the distinction based upon regulatory and executive agencies. However, it is rather clear from the two exerts just presented that the Parliament finds the current definition by the Commission incomplete; the Parliament clearly states in item 26 above that the term "regulatory agencies" does not cover all decentralised agencies.

Without a clear statement from the Parliament, it becomes somehow apparent that the Parliament prefers to emphasise the term "decentralised agencies" in its formulation of a comprehensive agency definition or concept. Such understanding is sustained by the 2007 working document on EU decentralised agencies of the Parliament Committee on Budgetary Control. The Committee applies the term "decentralised agencies" as the general term for the traditional agencies stating: "while the term "regulatory agency" is increasingly used as generic term, it should be noted that not all decentralised agencies have regulatory tasks" (Parliament 2007b, 3).

Third Attempt - The Treaties of the EU

A third attempt to provide for a legal definition concerns the agencies directly established within the TEU.

As discussed in Chapter 6, the Treaty of Lisbon (TOL), the Treaty on the European Union (TEU) or the Treaty on the Functioning of the European Union (TFEU) present no specific legal definition of the EU agency or legal definition of the constitutional position of the EU agencies within the institutional balance.

The only exception is the European Defence Agency (EDA) established directly by the TEU Art. 42(3) on the common security and defence policy.

This establishment of the EDA has encouraged a rather optimistic statement by the President of the EU, Mr. Barosso, in a speech to the heads of the EU agencies that "*agencies are now explicitly mentioned in the Treaty and this represents a confirmation of the role that they play in the creation of a stronger and safer Europe"* (Commmission 2010, 8).

Such statement might be true for the creation of an agency within the "hard policy areas" of common security and defence. However, it does not provide for a general definition of the EU agency and does not confirm or relate to the constitutional role or position relevance for the 35+ remaining and future EU agencies. The Treaties are silent concerning the definition and institutional position of the EU agencies.

However, Mr. Barosso may be right as the TFEU and TEU now address the EU agencies in direct manners concerning good governance and financial, judicial and administrative control. In short, by these provisions the EU Treaties ensure that also the agencies apply the general Community provisions on administrative norms[152] and that the agencies are accountable and subject to control by the Court of Justice of the European Union (CJEU)[153], the European Ombudsman (EOM)[154], the Court of Auditors[155], and the European Parliament[156].

Preparing for a Fourth Attempt

It appears that the Community is still in the process of establishing a unified and commonly accepted definition of an EU agency. It has not yet been possible to establish

[152] On democratic principles and equality, TEU 9.
On Good Governance, openness, access to information and public participation, TFEU Art. 15.
On protection of personal data, TFEU Art. 16.
On open, efficient and independent European administration, TFEU Art. 298.
[153] TFEU Art. 263ss, and on preliminary rulings on acts from agencies, TFEU Art. 267.
[154] TFEU Art. 228.
[155] TFEU Art. 287.
[156] On combating of fraud, TFEU Art. 235.

even an officially accepted non-legal binding definition – and it shall be noted that the Parliament above in item 26 merely pleads for a clear and coherent terminology for common usage – it is not even a plead for a legally binding definition (!)

Such uncertainty in definition is critical, especially taking the current legal uncertainty into account concerning the TFEU constitutional position of the EU agencies following the independent status provided by their mandates.

As indicated, the Community institutions realise the need for clarity. Therefore, in order to present a thorough study of the EU agencies and to present a comprehensive legal and operational, defined framework of EU regulatory agencies, the Commission, the Council and the Parliament decided in March 2009 to establish the inter-institutional Working Group on regulatory agencies (Commission 2009a).

On 10 March 2009 representatives of the three institutions met for the first time in the Inter-institutional Working Group on Regulatory Agencies. The group agreed that the objective should be to agree on a common approach on agencies between the three Institutions (Commission 2009a, 1).

Rather accurately, the Working Group starts out with merely observing that “no commonly agreed definition of the term "European regulatory agency" exists to date” and that “European regulatory agencies are also referred to as "decentralised agencies", "traditional agencies" or "satellite agencies" (Inter-Institutional Working Group 2009, 1).

The outcome is foreseen within the next years[157].

[157] Related, for an analysis of follow-up, to the 2008 Communication by the Commission, and how the Commission intends to continue the inter-institutional debate, see Comte 2010.

8 The EEA: From Visions to Instrumental Use

The ongoing uncertainty in defining the legal scope of the EU agency model, as just described in the above chapter, may also have had implications for the functional and organisational development of the EEA.

This chapter addresses such development of the EEA, illustrating the changes from an initial visionary outlook to a focusing upon consolidation of core tasks, and an increasingly instrumental use of the EEA by the Commission, and also by the European Parliament abandoning the original transnational outset.

The first part focuses upon the evolution of the mandates for reviews of the EEA over the years. It will illustrate the abandoning of the legally required review, representing visions and future possibilities, to be replaced by policy required reviews mandated by the Commission and the Parliament consolidating instrumental influence and control, and at the same time focusing upon the core original tasks of the EEA.

The second part analyses the actual instrumental influence gained by the Commission on the organisation, functions and the recent networking of the EEA. It focuses primarily upon the changes following the 2003 review and the implications for the transnational nature of the Agency. The 2003 review represents a "cross-road" from the "earlier" days of the 1990s towards the future of 2003 and beyond. A change in expectations and perception of the EEA emerged in these years, evolving from rather visionary ideas of future regulatory tasks of the EEA to a more modest view focusing merely upon improving the original mandates given by the 1990 EEA Regulation.

The third part concerns such "pre-2003" visionary ideas for the regulatory EEA. These ideas are still valid and relevant today, but have nevertheless evaporated as a consequence of the falling-back of the EEA into the instrumental role of the Commission. Nevertheless, perhaps the strategic transnational concept advanced by this Thesis may bring some of these earlier visions back to life, yet in a strategic transnational setting. The aim of this Thesis is not to advance these early visionary

ideas. However, the presentation illustrates vibrant possibilities, visions and ideas based upon the transnational origin.

8.1 Required EEA Reviews

The Legal Review

The earlier EEA Regulations required a review of the EEA functions within a few years after the Agency started its operations. The review was required by the earlier EEA Regulation Article 20 (2), however, worded with different objectives by the 1990 and the 1999 Regulations: The 1990 required review on possible further tasks in specific areas[158]. This was changed in 1999 to concern a review on "performance and efficiency" and "progress of, and tasks undertaken by, the Agency"[159].

The Commission responded to this legal obligation by the 2003 EEA review (Commission 2003b) based upon the detailed study prepared by the IEEP/EIPA (IEEP/EIPA 2003) and the study prepared by the Commission itself, the 2003 Meta-Evaluation of the Community Agency System (Commission 2003a).

[158] **Art. 20 of the 1990 EEA Regulation**:
"No later than two years after the entry into force of this Regulation, and after having consulted the European Parliament, the Council shall, on the same basis as this Regulation and on the basis of a report from the Commission with appropriate proposals, decide on further tasks for the Agency in particular in the following areas:
- associating in the monitoring of the implementation of Community environmental legislation, in cooperation with the Commission and existing competent bodies in the Member States,
- preparing environmental labels and criteria for the award of such labels to environmentally friendly products, technologies, goods, services and programmes which do not waste natural resources,
- promoting environmentally friendly technologies and processes and their use and transfer within the Community and in third countries,
- establishing criteria for assessing the impact on the environment with a view to application and possible revision of Directive 85/337/EEC (1) as provided for in Article 11 thereof."

[159] **Art. 20 of the 1999 EEA Regulation:**
"1. The Agency shall conduct an evaluation of its performance and efficiency before 15 September 1999 and submit a report to the Management Board, the Commission, the Council and the European Parliament.
2. Not later than 31 December 2003, on the basis of a report from the Commission, the Council shall review the progress of, and tasks undertaken by, the Agency in relation to the Community's overall policy on the environment;"

The 2003 EEA review by the Commission is comprehensive in its findings and recommendations and covers the visions and ideas of the EEA in the context of the overall EU agency structure until 2008-2010. However, the Commission did not propose any functional changes to the Agency, as the Commission was of the opinion that the (then) current EEA Regulation could satisfactorily address the concerns and changes proposed by the Commission in the Review[160].

The 2003 EEA review is the most recent official EEA review presented by the Commission.

Beyond 2003 - Policy Mandated Reviews

In its 2003 review, the Commission recommended a next general review at the end of the next multi Annual Work Programme of the Agency, i.e. 2008, as the reform of the EEA Regulation should be part of the general EU adjustment of its policies and regulation on the EU agencies[161].

Beyond the 2003 Review, the EEA Regulation did not spark any further specific reviews - although EEA Article 20 remained until 2009. The 2009 EEA Regulation formally repeals the Article 20 review. Therefore, today there no longer exists a specific legal obligation for the Community to perform an EEA review of tasks, performance and/or efficiency.

However, a general legal obligation for *ex ante* and *ex post* evaluations of the agencies exists as a principle of sound financial management and in order to improve decision-making. Article 25(4) of Financial Regulation (EC, Euratom) No 2343/2002 states that "the Community body shall regularly carry out *ex ante* and *ex post* evaluations of all programmes or activities. Such evaluations shall be applied to all programmes and activities which entail significant spending and evaluation results shall be sent to the Management Board".

[160] Commission 2003b, 19.
[161] Commission 2003b, 20.

In addition, both the Commission and the European Parliament have by policy statements committed the EEA, and the Commission itself to undertake and present frequent reviews on the EEA and the EU agencies in general.

It is rather evident that the EEA should be subject to frequent review of organisation, performance and programmes. Such reviews are needed in order to make the necessary adjustments to the rapid development in environmental management and also to the changing institutional and legal reality of the EU. Also, reviews are needed taking the legal uncertainty concerning the independent status of the EU agencies into account. However, the reviews requested by the Commission and the European Parliament are also for sustaining the influence, or rather control, over the EEA. This is not necessarily caused by any mal-intention purposely attempting to reduce the independent status of the agencies. Rather, as already described, it may be seen as an unfortunate consequence of an uncertain constitutional institutional balance and an attempt to keep the "independent" agencies in an accountable balance.

In its 2005 Draft Inter-institutional Agreement on the European regulatory agencies, the Commission states its intention to "undertake periodic evaluations of the implementation of the basic act, of the results obtained by the agency and of its working methods, in line with the objectives, mandate and tasks defined in the basic act and the indicators established by the *ex ante* evaluation and set out in the agency's annual work programme" (Commission 2005, 21).

Following such evaluation, the Commission will present, where necessary, "a proposal for the revision of the provisions of the basic act. If the Commission feels that the very existence of the agency is no longer justified with regard to the objectives assigned to it, it may propose that the act in question is repealed. The European Parliament and the Council shall use the Commission's proposal as a basis for examining whether the basic act should be amended or repealed" (Commission 2005, 21).

Similar, in its 2008 Communication, the Commission states its intention to undertake a horizontal evaluation of regulatory agencies, to refrain from proposing new regulatory

agencies until the work of the evaluation is complete, and to undertake a review of the Commission's own internal systems governing its relations with agencies, as well as the methodology for conducting impact assessment of agencies (Commission 2008c, 1ss)[162].

The European Parliament responded positively to the 2008 Communication from the Commission adding its desire for the Commission to carry out a horizontal evaluation of the regulatory agencies by 2009-2010 and to submit a report on the conclusions of that evaluation as soon as possible to Parliament and the Council. The evaluation and report should be presented before the end of the 2009-2010 period, so that the conclusions could be taken into account by the Inter-institutional Working Group (European Parliament 2008, Preamble f and Item 16).

In addition, the Budgetary Committee of the European Parliament called for the added value of already existing decentralised agencies to be regularly evaluated. In their joint statement on Community agencies agreed at the Trialogue of 18 April 2007, the two arms of the budgetary authority "invite the Commission to regularly evaluate the existing Community agencies, focusing particularly on their cost-benefit, and agree to assess the evaluation of the analysis prepared by the Commission for a selected number of agencies" (European Parliament 2007a, Item 1.4 and Technopolis 2008a, 12).

Based upon these commitments, the Commission commissioned the 2008-2009 meta-study on decentralised agencies to be prepared and undertaken by an external, independent consultant (Rambøll-Management/Eureval 2008 and Rambøll-Management/Eureval/Matrix 2009). The Commission has yet to present its position on the findings and recommendations provided by the meta-study.

[162] In order to base such evaluation upon commonly agreed criteria, the Commission proposed the mandate for the 2009 Inter-institutional Working Group on Regulatory Agencies also to address the "key issues facing agencies, ….. in particular covering "building blocks" about the structure and working of agencies, accountability and regulatory agencies' relationship with the other institutions, better regulation and the work of agencies, process for establishing and ending regulatory agencies" (Commission 2008c, 1ss).

Concerning the agencies' own role, the Parliament (European Parliament 2008, 4, Item 15) "stresses the need to establish parliamentary control over the formation and operation of regulatory agencies, which should consist principally in:

- submission to Parliament of the annual report by the agencies themselves,

- possibly inviting the director of each agency to appear before the competent parliamentary committee during the appointment process, and

- Parliament granting discharge for the execution of the budgets of those agencies which receive Community funding;"

Earlier in 2005, when the European Parliament's Committee on the Environment, Public Health and Food Safety adopted its draft opinion on the budget discharge for 2005 for the EEA, the following amendment was adopted (Technopolis 2008a, 12):

> *"[The European Parliament] requests that before 1 January 2010 and every five years thereafter, the Agency shall commission an independent external evaluation of its achievements on the basis of the Regulation and the work programmes decided by the Management Board. The evaluation will assess the working practices and the impact of the Agency. The evaluation will take into account the views of the stakeholders at both Community and national level.*
>
> *The Management Board of the Agency shall examine the conclusions of the evaluation and shall draft recommendations issued to the Commission and the European Parliament as may be necessary regarding changes in the Agency, its working practices and programmes. The evaluation and the recommendations shall be made public, for example on their website."*

The most current EEA review, the 2008 efficiency review of the EEA, is a response to these requests by the Parliament. The review is commissioned by the Management Board of the EEA, and undertaken by an external independent consultant (Technopolis

2008a). The Management Board presented its response to the review by March 2009 (EEA 2009b). The findings and recommendations were taken into account by the Management Board of the Agency when preparing the new strategy for 2009-2013 (EEA 2009A, 9). The Commission has yet to present its own conclusions based upon the results of the efficiency review.

As stated above, the earlier 2003 EEA review is still today the most recent official EEA review presented by the Commission. With regard to the 2008-2009 meta-study and decentralised agencies and the 2008 EEA efficiency review, the Commission has yet to present its own report and recommendations[163].

So, when will the Commission present its position and recommendation on the review of both the EEA and the general aspects of the decentralised agencies? The Commission has stated that it intends to report on the results of this evaluation (i.e. the 2009 Meta-evaluation) by 2009-2010 (Commission 2008b, 9). However, it is likely that the Commission, before making further recommendations, will await the findings and recommendations by the 2009-established Inter-institutional Working Group on Regulatory Agencies.

These requirements described in the above sections illustrate an increased say of both the Commission and the European Parliament in the ongoing reviews of the EEA. The subject for review has not been questioning the potential future tasks of the EEA. No voices are heard for a change in function, or any other innovative approach. In fact, even the EEA internal review (i.e. the 2008 efficiency review) is silent on such innovative approaches. Instead it is argued that the Agency should increasingly focus upon the already set main objectives and not be "tempted" to respond to the many demands from the broad range of stakeholders (Technopolis 2008a, 88ss). Therefore, the objective of the 2008 EEA reviews was to focus on the optimisation of the existing role of the EEA and the EIONET. Similarly, the 2008 EEA efficiency review does not

[163] The Commission stated in February 2010 that *"the results of last year's independent evaluation of the agency system…… will soon be made public by the Commission"*, (Commission 2010,7). It is not clear whether the omission simply refers to the "raw" versions by the external consultant, or the Commission intends to present its own review based upon the evaluation.

evaluate the legal base or address the underlying question of whether the EEA serves a useful purpose – as these aspects have been addressed and positively confirmed by the previous 2003 EEA evaluation (Technopolis 2008, 13).

As mentioned, this mere acceptance of status quo could be a consequence of the legal uncertainty related to the institutional balance, the limited resources available for the EEA and also the desire for a consolidation of the current tasks. However, it may also be the result of a fading interest among Member States in pushing for a visionary EEA, as a result of the increasing instrumental use by the Commission. The next part addresses this instrumental turn and the implications for the transnational nature of the Agency.

8.2 The Return of Supranational Management?

The EU Commission has, as already described earlier in the Thesis, in principle a favourable view of the independence and functioning of the EU agencies.

However, the Commission has also expressed some reservations concerning broader mandates; concerns based both upon the restraints posed by the TEU institutional balance and also based upon safeguarding its own institutional prerogatives. Related, the Commission argues for improved internal accountability or control in the suggested framework for the European Regulatory Agency (Commission 2002a). First, it finds that the Commission legally shall be given special consideration, as "guardian" of and ultimate responsible body for the implementation of EU policy and law. Second, the Commission suggests an improved political accountability allowing the Council and the Parliament certain powers of supervision over the (regulatory) agencies such as requirements for hearing of the agency director and also for regularly drawing up reports on the agency operation (Commission 2002a, 13).

These two positions indicate a delicate balance between the need for autonomy and the need for control.

The Commission recognises such needs. It argues that the need for autonomy takes several forms: granting of legal personality, budgetary autonomy, collective responsibility and own powers of the Management Board, the independence of the director, of the members of the scientific committees and of the boards of appeal, etc. Concerning the control of agencies with autonomous responsibility, the Commission calls for direct accountability towards the EU institutions, and towards the Member States and European citizens, as these agencies should be subject not only to *ex ante* and *ex post* evaluations but also to clear control mechanisms (Commission 2005, 5s).

On a mere general note, the Commission states that in order to strengthen the legitimacy of Community action it is important to establish and delimit the responsibilities of the institutions and agencies. The decision to set up and to revise these agencies must be taken prudently on the basis of an impact assessment conducted by the Commission. Moreover, the principle of accountability requires that a clear system of controls be put in place (Commission 2005, 2).

The question is how well the Commission (and the Community) has managed this delicate balance (?)[164]. The following illustrates the balancing so far:

The 2003 Review of the EEA

The extensive remarks made by the Commission by its 2003 review capture the expectations for the EEA quite well (Commission 2003b, 18):

> *"Expectations for Agency support increase. In part this is due to the fact that EEA has successfully established itself as a provider of reliable and high quality*

[164] The Commission realises its own position in this balance (Commission 2008b, 5):
"There are different rules on the size and composition of the Management Board, but though the Commission is normally represented, it is always in a minority, sometimes even without the right to vote. This raises issues about the extent to which the Commission can be held accountable for decisions taken by agencies. The issue of accountability is complicated by the Commission's involvement in other aspects of agencies' work – which can include producing a shortlist of names for the Director of an agency, being consulted on work programmes, and conducting evaluations. In addition, the Commission's internal auditor performs the same role in respect of agencies as for Commission departments.
The need for clear lines of accountability to govern agencies' actions is at the core of the debate about agencies."

products and services. Expectations rise as well because of the changing nature of environment policy. The 6th Environmental Action Programme puts emphasis on basing environment policy on a solid knowledge foundation. This applies to preparing the basis for a policy but equally to selecting the best option, monitoring the implementation and measuring the impacts. Ex-ante and ex-post evaluations of policy are now becoming an important feature of environment policy and the EEA can significantly contribute to these. Further developments that will lead to demands on EEA are the continuation of the process of integration of the environment into other Community policies and the framing of environment policy in the context of sustainable development – within Europe and in the global context".

According to the review, the EU Commission considers these EEA potentials as a long-term objective, as the Commission regards the broad EEA mandates as confusing and unproductive taking the limited EEA resources in terms of institutional capacity and financial means into account. Rather, the Commission suggests a more "realistic" work programme supporting in particular EU environmental policy as stated in the 6th Environmental Action Programme. Also, long-term planning should be joined with key users, in particular the EU Commission. Such prioritised attempt "would hopefully provide clarity for the EEA and the user and is not indented to halt or modify any flexibility" (Commission 2003b, 7, 9 and 19).

Related to the prioritised approach, the Commission argues that the EEA should still focus upon its main objectives; once the core tasks – to establish the state and trends in the European environment and to support the Community and the Member States in their reporting obligations – have been achieved, the EEA could gradually extend its activities into other stages of the policy cycle in close cooperation with the Commission, "which has the primary responsibility in the definition of policy options" (Commission 2003b, 10).

These remarks indicate that the EEA should continue focusing upon the reporting of environmental information and not enter into any evaluating and policy-formulating

role. The Commission reserves these roles for itself as the "primary responsible" for the execution of EU policy. The Commission finds that often the EEA studies have policy and evaluating significance, and the line between pure observation and evaluation can be difficult to draw. The Commission recognises such cause for potential conflicts, which has been present since the beginning of the EEA activities. The Commission argues that a clarified and prioritised EEA agenda, as is being recommended in the Review, has already eased and will most likely eliminate such discrepancies in the future (Commission 2003b, 10 and 12).

The prioritised focusing upon EU policies could also be seen as part of the rationale for establishing a temporary halt to further EEA expansion - although the main reason is perhaps rather simply just to allow for the maturing and consolidation of the current work environment among the already vast number of members, which have joined rapidly over the last few years. Thus, the first priority would be to ensure full integration of the current members[165].

In addition to the relationship between the Agency and the EU Commission, the 2003 EEA review also recommends improved EEA cooperation and information-sharing with international organisations and the other EU institutions. This concerned foremost further cooperation, clarification of priority areas and coordinated annual planning. It was suggested to step up the information system for Europe beyond the EEA's own data sources (i.e. the EIONET), which should include the reporting obligations under EU law and under various Multilateral Environmental Agreements (Commission 2003b, 11 and 18).

The 2003 EEA review indicates that the EU Commission suggests a stronger tie between the EEA and the Commission. It also indicates that the EEA should prioritise more precisely its agenda and operations in fulfilling EU environmental policy objectives (Commission 2003b).

[165] However, the stop did not apply to the position and future membership of Switzerland, Commission 2003b, 13 and 21.

The Revision of the EEA Regulation

The views of the Commission have to some extent made their way to the revised EEA Regulation. Based upon the EEA reviews and the two revisions of the EEA Regulation in 1999 and 2003, the EEA has downplayed some of the transnational foundation of the first EEA Regulation of 1990. Or perhaps it would be more accurate to state that the revisions still favoured transnational interaction (such as in the EIONET), however, subject to increasing top-down control by the EU Commission.

The EEA Regulation and the EEA management have introduced changes in line with these ideas, which will be discussed below.

First, the financial rules on the annual budgeting and accounting were significantly updated by the 1999 Regulation, allowing the EU Commission a significant say, EEA Regulation articles 11-14.

Second, the EU Commission has obtained a greater say in the EEA management, especially by its role in the added Bureau established under the EEA Management Board.

Third, the additional networking introduced (the SEIS and the INSPIRE networking) is initiated and influenced by the Commission, and entangled by the traditional Comitology approach.

Finance

Concerning the financial control, the EU Commission has a significant say in the annual budgeting and accounting processes. Through the budgetary procedures, and especially through the preliminary draft budget, the Commission, the Council, the European Parliament and the Court of Auditors can exercise potential influence on the work of the Agency[166]. The 1999 and 2003 revisions of the EEA Regulation have significantly

[166] Articles 11-14 in the EEA Regulation.

strengthened these budgetary procedures reflecting the responsibility of the EU Commission with regard to the general EU budget as stated by TFEU Article 317[167].

First, the Commission receives the Agency's annual statement of revenue and expenditure and forwards this together with the preliminary draft budget of the EU budget to the budgetary authorities, being the EU Parliament and the EU Council, EEA Regulation Article 12. In this process, the EU Commission provides the estimations it deems necessary in accordance with the general EU budget. Upon adoption by the Budgetary Authorities, the EEA Management Board adopts the budget of the Agency, EEA Regulation Article 12 (5).

Second, the EEA accounting officer shall forward the annual provisional accounts including a financial report to the auditing controller of the EU Commission, who shall send the EU Court of Auditors a consolidated account including his/hers own report, EEA Regulation Article 13 (2 and 3). Based upon the observations of the EU Court of Auditors the EEA Executive Director shall establish and forward the final accounts to the EU Commission, the European Parliament, the Council and the Court of Auditors, EEA Regulation Article 13 (4 and 6).

Third, the detailed financial rules for the Agency shall be adopted based upon consultation of the EU Commission, and the rules shall be in accordance with the Commission's financial regulations, EEA Regulation Article 14.

Management Board

Despite the representation and participation of stakeholders at the Management Board, the actual influence is not even.

[167] See also Commission 2002a at 10 stating that the EU financial Regulation No. 1605/2002 of 25.06.2002 contains provisions, especially (then) Article 185, which are directly applicable for the EU agencies concerning budget, audits and accounting rules. (Then) Article 185 also requires the Commission to adopt a framework financial regulation, which, in principle, applies to all EU agencies that receive subsidies from the Community's budget. Thus, the Commission argues at page 11 that the procedures for agency budgeting and auditing must be subject to straightforward procedures and approval by the Commission.

The EU Commission is exclusively entitled to propose the Executive Director of the EEA[168], give its opinion on the annual and multi-annual work programmes before the Management Board adopts these[169], and appoint two members of the Board[170].

Also, the European Parliament appoints two scientific members of the Management Board[171].

In contrast, the Management Board consists of one representative of each Member State. In addition, there may be one representative of each other country participating in the Agency, in accordance with the relevant provisions[172]. In the early stage of the EEA, the non-EU Member States represented on the Management Board would be without any voting right[173].

The EU Commission has obtained a greater say in the EEA management by the Bureau established under the EEA Management Board, which adds to the uneven influence on the EEA.

In principle, the Bureau is simply an effective mechanism - an executive unit - assisting the expanded Management Board. However, the composition of the Bureau indicates a proportional shift in institutional competencies that deviates from the proportional

[168] EEA Regulation Article 9(1). The Commission argues; "the Director must have the confidence of the Management Board and especially of the Commission as the authority ultimately responsible for the implementation. The Commission proposes that for executive agencies, the appointment shall be done by the Management Board based upon a list of candidates presented by the Commission. For decision-making agencies, the Commission should appoint in order to ensure the responsibility of the Commission", Commission 2002a, 10

[169] EEA Regulation Article 8 (4 and 5). For its proposal for executive agencies, the EU Commission argues that such influence is necessary in order to ensure that the work programmes will enable the Commission to discharge its own responsibilities correctly, Commission 2002a, 8.

[170] Article 8 (1.1).

[171] Article 8 (1.2). In its proposal for a legal framework for EU regulatory agencies, the Commission argues that the appointments of members by the European Parliament could seem inappropriate in view of the nature of the regulatory agencies' work and the fact that the Parliament must be free to exercise external political supervision over their activities, without feeling tied by its membership of the Management Board, Commission 2002a, 9.

[172] EEA Article 8 (1.1).

[173] See Article 3.2 of Protocol 31 to the Agreement on the European Economic Area, OJ No L 253, 29.9.1994, p.32 and 34; Decision of the Joint Committee of the European Economic Area No 10 and 11/94 of 12 August 1994 amending Protocol 31 to the Agreement of the European Economic Area, on Cooperation in Specific Fields Outside the Four Freedoms. See also the Commission's answer on question E272/95 from the European Parliament.

composition of the EEA Management Board. The Bureau consists of the ”Chair and all the Vice-Chairs of the Management Board as well as one Member each of the Management Board representing the Commission and the European Parliament ”, Article 2 of the Rules of Procedures of the Management Board and the Bureau[174]. This alters the balance of influence by the EU institutions and the Member States. The composition of the Bureau allows the EU institutions more influence on the EEA management. Such influence would preserve efficient management, and preserve the interests of specific EU objectives. By such influence, the EU wanted to shield its interests against those of non-EU members in an EEA, as the number of non-EU members was rising. By the early 2000s, the EEA non-EU members outnumbered the EU members and thus could endanger the focusing upon EU environmental policy objectives. However, the weighted influence by the Commission, as exercised in the Bureau, also hampers the influence by the individual EU Member States in the EEA management. In reality, the shift from the Management Board to the Bureau backtracks the transnational founding nature of the EEA. Hereby, the institutional characteristics of the Bureau represent a step "back" to the traditional EU supranational approach allowing the EU Commission a greater say over the management of the EEA.

Related to the introduction of the EEA Bureau, the Commission proposed in 2002 for all agencies in general a smaller and effective Management Board “reflecting and serving the unity and integrity of the executive functions at European level based upon a Community dimension” (Commission 2002a, 9). The Commission proposed a 15-member Management Board, including six members appointed by the Commission and six by the Council - representing the national executives - and three with no voting rights, representing interested parties.

Such a proposal would most likely promote the efficiency of the Management Board. However; it would once again further erode the transnational notion of the EU agencies and allow a supranational structure significantly influenced by the EU Commission. The introduction of the EEA Bureau, as described above, has been a small step in this direction. However, an additional Management Board as proposed by the Commission

[174] Ibid. note 38.

would be a significant step and likely also a fatal blow for the transnational agency model. For instance, the proposal leaves out any influence by non-EU Member States (unless now categorised as "interested parties" allowing some influence) and significantly reduces the say of the individual EU Member States. The proposal was not followed.

The Member States have little direct influence on the EEA operations and activities and thus, little direct control. However, the accountability towards the Member States is mainly to be found in the composition of the Management Board of the Agency, where each Member State is represented by one member. In this regard, legitimacy is not only a matter of separation from the political influences, as discussed in Part I, but also a matter of achieving a common uniform orientation and strategy for the Agency due to the very different political and administrative cultures and traditions in the EU and non-EU Member States (See also Ladeur 1996a and Knill 1998).

Originally, the Agency structure is horizontal in nature, which represents a deviation from the traditional and predominant vertical supranational approach characteristic of the EU institutional framework. This horizontal approach is still apparent, although the EEA reviews seem to introduce more influence by the EU Commission. However, as this Thesis focuses upon a transnational institutional structure, the recommendation of the Thesis is that the EEA should allow for improved levels of even playing fields for the participants involved in the management of the Agency and involve the transnational interactions as outlined by this Thesis[175].

[175] The 2003 EEA review recommends that the EEA Management Board should be given further responsibilities, such as more control over the Agency including finances and administration. The functions could be supported by an independent secretariat and by powers to create sub-committees. Besides the issue of efficiency, such recommendations are also based upon the mentioned objective of strengthening the EU agenda and allowing the EEA to enhance its ability to "direct" the activities including the EIONET (Commission 2003b, 14)

Additional Networking

In addition to the EIONET networking - and as described in Chapter 2.1 - the EEA is involved in the SEIS and INSPIRE initiatives[176].

Although the initiatives take advantage of the networking possibilities among Member States, and the already consolidated position of the EEA in generating information based upon such transnational relations, the initiatives are also an expression of the traditional Community Approach, and a step back from the transnational approach.

Despite the transnational elements, the projects are initiated and influenced in operation by the Commission. The Commission is directly involved in the management of the initiatives, and the initiatives are referring directly to committees under the Commission. In contrast to the EIONET operated and revised based upon the EEA work plan and strategies, the INSPIRE is set and revised by the Commission and Comitology.

It appears that the SEIS and INSPIRE, and the involvement of the EEA, are of instrumental use to the Commission. The Commission makes it clear that the Agency has "a crucial role to play in implementing the SEIS, in being a leading proponent of many of the principles described". The Commission continues that in fulfilling "its mandate to provide timely and reliable environmental information, it will be essential for the EEA to make the SEIS the centre of its strategy" (Commission 2008a, 9s).

The initiatives, the involvement in management, and the reference to Comitology indicate a significant influence by the Commission. All such elements belong to the supranational setting of the Community and do no sit well together with the transnational legitimacy of a transnational regime.

[176] The principles of the SEIS are related to the objectives of the EEA and the EIONET (Commission 2008a, 2s). The Commission states that "while there is a vast amount of data collected by public authorities across the EU (whether at local, regional, national or European level), this data is not always used efficiently, either because the existence of such data is not widely known or because of a range of obstacles of a legal, financial, technical and procedural nature" (Commission 2008a, 2s).

Thus, the SEIS is a transnational vehicle involved directly in a supranational setting – and thus, it resembles the development of the EEA as just described in the sections above. This brief description is not about evaluating the benefits of the SEIS and the INSPIRE. The point here is just to observe that these initiatives illustrate the development of stepping down from transnational towards a supranational approach.

The SEIS and INSPIRE initiatives are likely a positive development, and the involvement of the EEA and the transnational relations in Europe are promising. It is a rather natural development by the Community in its efforts to strengthen the generation and access to environmental information. The purpose of this Thesis is not to abandon these approaches but rather, to re-orient them taking advantage of the transnational approach, as advocated by this Thesis.

Part III will further address these aspects in terms of accountability and balanced, deliberative processes.

8.3 The Early EEA Regulatory Vision

The final part of this chapter illustrates the change in expectations and perception of the EEA and focuses upon the "pre-2003" original visionary ideas of future regulatory tasks of the EEA. The aim is not to advance these ideas and go into discussions of such other regulatory EEA models[177]. However, the presentation illustrates vibrant possibilities, visions and ideas based upon the transnational origin. These ideas are still valid and relevant today, but have nevertheless evaporated, perhaps as a consequence of the falling-back of the EEA into the instrumental use of the Commission.

Nevertheless, the strategic transnational concept advanced by this Thesis may bring some of these earlier visions back to life, yet in a strategic transnational setting.

[177] For an early, however still valid overview of other regulatory models for the EEA, see in general Bailey 1997 and Westbrook 1991.

Most of these ideas were raised during the discussions leading to the final establishment of the EEA in the 1990s. In general, these aspects do not represent competing models to the transnational model as advanced in this Thesis. As no model is exclusive, the transnational model can very well include several of the aspects presented.

The pre-2003 EEA Regulation Article 20 described particular areas of future tasks for the Agency, although not binding or exhaustive, such as the preparation of environmental labels, the promotion of environmentally friendly technologies, the establishing of criteria for assessing the impact on the environment with a view to application and the possible revision of the Environment Impact Assessment Directive, 85/337, and the association of the Agency in the monitoring of the implementation of Community environment legislation[178]. As already described, the current 2009 EEA Regulation no longer requires any review. Frequent reviews are now formally based upon the (political) decisions made by both the EU Commission and the European Parliament.

Common for these visions in the following discussions is the focusing and utilisation of the transnational position and independent status of the EEA.

A Regulatory Agency

The European Parliament was originally to some extent in favour of more regulatory and enforcement powers to the Agency inspired by the US Environmental Protection Agency (Horspool & Humphreys 2010, 538, Hedemann-Robinson 2007, 436ss, Majone 2006b, 199s, and on investigative powers extending to Member States territories; Wennerås 2007, 254)[179].

[178] Originally, the review was postponed until the end of 1997, see Commission Proposal, COM (95) 325 final, 7 July 1995, European Parliament resolution A4 234/95, OJ No C 287, 30.10.95, p.233 and Council Conclusion adopted 9 November 1995, doc. 11175/95 (Press 310). On 13 June 1997 the Commission forwarded a proposal for amending Regulation 1210/90, Proposal for a Council Regulation (EC) amending Regulation EEC No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network, COM (97) 282 final.

[179] See also House of Lords 1991, paragraphs 38, 110-114 and 148.
See also written question No. 1888/92 from the European Parliament to the Commission of 23 July 1992 concerning the setting up of inspectorates - a question the Commission actually did not answer, OJ C 141, 19. 5. 1993, p. 18.

Even the Commission recognised early the need for improved quality of EU environmental regulation and in 1989 proposed regulatory aspects for the EEA – "although reluctant to surrender regulatory powers to an agency operating at arm's length" (Majone 2006b, 199)[180]. However, eventually no political will among Member States and Community institutions was present to render such regulatory powers to the EEA[181], and perhaps as a consequence hereof - or as a compromise - it was formulated by the earlier Article 20 that further tasks for the Agency would have to be decided no later than two years after the entry into force of the Regulation. Thus, the revision should have taken place in November 1995 but was extended, allowing the Agency to consolidate the then already ambitious establishment of the EIONET[182].

Today, although the issue of a fully regulatory EEA appears to attract little political interest, the arguments for a regulatory model are still rational. In view of the persisting problems concerning compliance, implementation and enforcement of EU environmental policy - and the ongoing review of the EEA - an improvement could be to embody the EEA with explicit executive and regulatory power taking advantage of its independent and predominantly horizontal position. Thus, in addition to being responsible for the provision and exchange of environmental information only, the EEA should also be given executive powers with respect to environmental regulation, inspection, control and enforcement comparable to the regulatory competencies of the EU Commission and the national authorities in the field of competition law. Already in 1991, Crockett & Schultz made a proposal equipping the EEA with such regulatory powers. They argued that the enforcement and implementation gap with the EC environmental law requires a centralised Community body integrating policymaking,

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However, the Economic and Social Committee of the Parliament did not share the opinion of the European Parliament stressed that comparison with the EPA was not relevant (see note 184 below).

[180] In its proposal of 21 June 1989, the Commission outlined four functions for the coming EEA: a) to coordinate the enactment of EC and national environmental policies; b) to evaluate the results of environmental measures; c) to provide modelling and forecasting techniques; and, d) to harmonize the processing of environmental data, OJ No C 217, 23.8.1989, p.7 and COM (89)303 final, 12.7.1989, p.2.

[181] Westbrook 1991 at p. 260ss provides an account of "the reciprocal aversion" among the Member States and the Community to render competencies to a fully independent body.

[182] The Commission recognises that the creation of the network structure is time demanding, see answer to Written question E 2717/94 from the European Parliament (95/C 213/02) of 16 December 1994, OJ C 213, 17. 8. 1995, p. 1.

implementation and activities. A coordinating institution facilitating such interaction was proposed to be the EEA (Crockett & Schultz 1991, 185ss).

However, as already described earlier in the Thesis, the present political attitude within the Community opposes any transferring of further executive powers from the EU institutions and/or from the Member States to the EEA. Accordingly, the recent Treaty of Lisboan (TOL) does not address the issuing of further powers to the EEA or the EU agencies. On the contrary, the tendency is to maintain the present institutional balance in the Community.

Also, it may be argued that the European national administration at the current stage would face difficulties embracing a transnational regulatory body. Such an option could imply far-reaching institutional repercussions on well-established regulatory traditions at the domestic level. It would be questionable that such fundamental institutional adjustments would take place in "a smooth and swift way; hence increasing the risk that the effectiveness of regulatory changes will suffer from the inertia of domestic regulatory traditions" (Knill & Lenschow 2000c, 27ss). Naturally, this is not to say that a regulatory EEA could not be successful over time. The point is rather, as it is argued by this Thesis, that a transnational regulatory organisation must develop in symbiosis with the national levels.

Therefore, an EEA with enforcement and inspection powers such as the US Environmental Protection Agency does not seem likely in the near future due to the current political attitude. However, such political attitude might change rapidly, especially as the persistent environmental and climate problems intensify. Despite the declining environmental agenda, as argued above in Part I, the problems may yet again gain importance in terms of European public interest calling for policy prioritisation and action at Community level.

Related, the opposition to a regulatory EEA is perhaps not merely a matter of a declining public environmental interest. Another plausible reason may be far from rational in terms of arguments for the needs of the European environment as the

political opinion of the established EU and national political institutions might include an element of biased self-interest in preserving and protecting the current political balance and powers of these institutions. Therefore, the ongoing argumentation and public and political pressure for establishing a powerful regulatory EEA should continue as the environmental problems persist.

However, the vertical nature of a fully developed regulatory EEA somehow conflicts with the horizontal nature of transnational management and likewise, a transnational EEA. This means that an EEA with strong regulatory powers would not necessarily be a suitable model for a transnational institution. However, although such incompatibility exists it should not preclude a possible combination of regulatory and transnational element into a revised EEA. As the discussions in this Thesis show, the precise formulation of the transnational legal and institutional framework, including the position of the lead transnational institution, shall be determined by the specific conditions of the individual regime.

Monitoring, Inspection and Enforcement

EEA monitoring concerns two aspects. The first aspect concerns the monitoring of the state of the environment. The second aspect concerns the monitoring of the implementation of EU environmental law. Both monitoring functions have been suggested for the EEA, whereas only the first one has been mandated so far. The latter was found among the areas of possible future activities mentioned in earlier EEA Regulation article 20 (1) and is the main subject of this section.

Just a few words on the first aspect of monitoring: the environmental monitoring. The EC Commission suggested originally in its own proposal the establishment of a European Environmental *Monitoring* and Information Network[183]. The Commission specifically noted the absence of any monitoring of environmental quality in Europe as well as the significant gaps in existing national environmental monitoring networks.

[183] Ibid. note 180.

This approach was changed due to the reaction of the European Parliament, which found the “monitoring” function insufficient with the intended tasks of an agency[184].

The monitoring function of the EEA is today a significant source of information for the European public and European decision-makers. Examples of the vast production include online newsletters and traditional publications, which are all freely available to the public.

With regard to the second aspects concerning inspection and compliance monitoring, the European Parliament was, as described in the section above, in favour of a more regulatory agency with enforcement and inspection powers. However, a compromise emerged establishing the European Information and Observation Network (EIONET) and the then Article 20 of the EEA Regulation, requiring the revision of tasks within two years, notably article 20 (1) suggesting an "associating in the monitoring of the implementation of Community environmental legislation, in cooperation with the Commission and existing competent bodies in the Member States". This monitoring function, postponed for later review, was more or less in line with the original intentions of the European Parliament and some Member States, as it will be described in this part. However, the extension of the Agency’s “association” was and still remains unclear.

In the earlier days of the EEA, some proposals where made on the expanded EEA role involving inspection and compliance monitoring. Such proposals have not been included in the functions of the EEA but remain relevant for the discussion on the future role of the Agency.

In 1992, the UK House of Lords proposed inspection powers to the Agency similar to the powers of the EC Fisheries Inspectorate (House of Lords, 1991). Such mandates would have provided the EEA with inspection powers similar to those of the US Environmental Protection Agency (Westbrook 1991, 267ss). It was recommended that

[184] However, the Economic and Social Committee of the Parliament did not share this opinion of the European Parliament. The Committee welcomed the monitoring function and stressed that comparison with the EPA was not relevant, Points 2.2.1 and 3.3.7. Debates of the European Parliament No 3, 386/74, 13 February 1990, p. 75. See also Davies 1994, 316s and 340s and Macrory 1992, 363.

an environmental inspectorate should have power to verify information through spot checks of the data collected by national authorities and at the same time monitor compliance with the standards laid down. The House found that such an inspectorate should be placed outside the Commission and inside the Agency since the inspection could also concern the Commission's own role.

Such a proposal for setting up a traditional strong regulatory agency may seem tempting, but at the same time, such proposal would also lead to abolishing the transnational approach, as argued in this Thesis. It would be difficult to combine directly the horizontal transnational approach with the vertical regulatory function. Perhaps also in recognition hereof, and also due to the political opinion in the Member States and the limited capacity of the EEA, the House in 1995 reconsidered its previous recommendations (House of Lords 1995a, 14 at point 47). The House now recognised that a cautious approach to a European inspectorate was needed and that embodying the Agency with inspection power could jeopardise the goodwill of the Agency and therefore also the function of the just established network structure. Therefore, the House suggested - as a review in relation to the above-mentioned Article 20 - that the Agency in cooperation with the national authorities, as providers of the relevant information, should report annually on the Member States' compliance, and this report should be made public. Non-compliance should be reported to the Commission and other EC institutions for further action. The House still supported that a powerful inspectorate should be considered but no longer prejudged whether the inspectorate would sit better within the Agency or within the Commission (House of Lords 1995a, 14 at point 48-49).

The proposed annual reporting on the implementation and compliance was in line with a similar proposal of 1993 made by the Institute for European Environmental Policy (IEEP), in which the Institute suggested that the Council - or the EEA - should make an annual review of the compliance and implementation of the Member States and the EC Commission (IEEP 1993, 5 and 9s).

Also the 1995 Molitor Report on the simplification and reducing of legislation on the employment and competitiveness suggested that the EEA could contribute to the implementation and enforcement of EC environmental law by producing such an annual report (Commission 1995).

Today, the EEA has yet no specific mandate on monitoring the compliance of and implementation by the Member States. However, the Agency has for long indirectly performed such monitoring as part of its monitoring on the assessment of the state of the European environment[185].

Concerning regulatory enforcement functions, it has been suggested that the EEA should be integrated as a coordinator and supervisor among the existing national inspections ('Inspecting the Inspectors') (House of Lords 1995a. Opinion at 46 and 47). This includes the suggestion to integrate the Agency as a coordinating factor into the transnational enforcement network for the Implementation and Enforcement of Environmental Law (the IMPEL Network). Such a linkage would support the general intention of integrating the EEA into the implementation of Community environmental legislation (Davies 1994, 339 and 346). Besides, such an initiative based upon coordinating national efforts would be in line with the intentions of 1990 EEA Regulation Article 20 (1).

However, concerning the possibility for any direct EEA involvement, Hedemann-Robinson describes that the Council in 1997 stated "its clear rejection of the establishment of a centrally and supranational organised system of European environmental inspectors, which also eliminated any further proposal on providing the EEA with such powers"[186]. As a consequence, the operations of the EEA have so far not entered into law enforcement, although "the idea of establishing a central European

[185] For instance, the EEA states in its multiannual strategy 2009-2013 (European Environment Agency 2009b, 11): "In 2010 we will produce the EEA's regular integrated environmental assessment on the state and outlook of Europe's environment (SOER) focusing on operational and strategic policy priorities, including those of the candidate and potential candidate countries (6th Environment Action Programme and EU Sustainable Development Strategy) and a scoreboard of environmental performance".
[186] OJ 1997 C321/1. This position was endorsed in recital 5 of the Recommendations 2001/331 providing for minimum criteria for environmental inspections in the Member States (OJ 2001/ L118/41).

supervisory body is not without precedent in EC administrative law, as illustrated by the field of competition" (Hedemann-Robinson 2007, 438 and 460).

However, despite the Council's rejection of the establishment of such European inspection, the EEA is encouraged to take a facilitating role in the informal networking of the IMPEL[187]. IMPEL has no legal basis in EU legislation, although it is (now) directly referred to in EEA Regulation. The Commission has for long encouraged the IMPEL networking to develop (Commission 1996a), and a direct mandate was introduced by Article 3 (3) in the 2003 EEA Regulation on the closer cooperation between the EEA and the IMPEL. The IMPEL gains official legal recognition by the 6th Environmental Action Programme, Article 3 (Commission 2001a and 2002b)[188], confirmed by the Commission's 6th Annual Survey on the implementation and enforcement of EC environmental law (Commission 2005b, 25).

This allows the EEA to undertake a strategic approach in the IMPEL, advancing the national enforcement inspections (Hedemann-Robertson 2007, 457s). Such strategic transnational concept would correspond to the ideas related to the EEA strategic transnational concept, as addressed by this Thesis.

Like the EEA, the IMPEL is also based upon the basic concept of transnational networking between European states and thus, it could make some sense to combine efforts. However, the current EEA Regulation "allows only for" the exchange of information between the EEA and enforcement organisations. Perhaps this modest cooperation might be seen as the reluctant willingness among the European states to

[187] Ibid. note 186, Recital 6 suggests a EEA facilitating role:
"The European Environment Agency can advise the Member States on developing, setting up and extending their systems for monitoring environmental provisions and can assist the Commission and the Member States in monitoring environmental provisions by giving support in respect of the reporting process, so that reporting is coordinated".

[188] Article 3 of the 6th Environmental Action Programme:
The aims and objectives set out in the Programme shall be pursued, inter alia, by the following means:
(……)
2. Encouraging more effective implementation and enforcement of Community legislation on the environment and without prejudice to the Commission's right to initiate infringement proceedings. This requires:
(……..)
— improved exchange of information on best practice on implementation including by the European Network for the Implementation and Enforcement of Environmental Law (IMPEL network) within the framework of its competencies

have an EU organisation with inspection and/or enforcement powers in the environmental area[189].

Equally to the development of the IMPEL, the EEA could be further involved in other similar enforcement and compliance initiatives, such as the International Network for Environmental Compliance and Enforcement (INECE)[190], which would complement the global transnational role of the EEA, as described in Part III.

In order to overcome the persistent problems relating to the implementation and enforcement of European environmental policy, such proposals on facilitating inspection and reporting on the compliance and implementation of environmental legislation are still valuable for the future role of the transnational EEA. As argued earlier, it may not be the best option to place directs inspection authority within a transnational oriented EEA, as this could jeopardise the transnational interaction and legitimacy. However, the model presented here applies the transnational and horizontal approach by facilitating the national inspectorates[191]. This could provide the adequate legitimacy of the participants. In case this is not possible, it is probably more suitable to place such activities outside the EEA[192].

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[189] A comprehensive study on the background and functioning of IMPEL, see Hedemann-Robertson 2007, 454ss. For more on the early, however still valid proposals on the EEA and the IMPEL enforcement network, see Collins/Earnshaw 1992, 238, Davies 1994, 339 and House of Lords 1995a, 13; Letter from and Memorandum by Mr Osborn CB, Director General of Environmental Protection, UK, Department of the Environment.
The IMPEL history starts with the Chester Network concerning the implementation and enforcement of European environmental legislation, initiated by the Dutch Ministry of Housing, Physical Planning and the Environment in 1989. This was an informal cooperation among the Member States until 1993 where it was formally transferred into the European Community Network for the Implementation and Enforcement of Environmental Law - the ECONET. Due to the problems related to the transborder shipment of waste the Dutch ministry in 1992 also took initiative to a transnational European enforcement project (the TFS project) in order to build up a network of monitoring enforcement and implementation on the shipments in the EU (See paper "Transboundary Shipments of Waste, Successes and Problems with the Enforcement of Supranational Legislation" by Mr. Jan Poelstra and Mr. Ruud de Krom, Dutch Inspectorate for the Environment for the conference on "The Export of Waste in Practice", 15 and 16 April 1996, arranged by the European Academy of Law, Trier). Early on, the EEA participates in the work of the Chester network but not in the TFS project (House of Lords 1995a, Beltran, evidence, question 101).
[190] Concerning the emerging international networks, see in general *Rest*
[191] On an early account on the harmonization of national regulatory approaches in the EU with regard to transnational implementation and enforcement, see van Waarden 1999. Likewise, Vervaele 1999b on transnational cooperation between national enforcement agencies in the EU.
[192] Brinkhorst refers to the informal suggestion by 1992 Dutch EC presidency setting up a department of the EEA, aligned to the IMPEL networking, to monitor the quality of national enforcement systems and

Nevertheless, the further strengthening of the IMPEL with the participation of and coordination by the EEA seems promising because it closely follows the transnational notion as argued in this Thesis. Again, the EEA could carry out the coordination and "inspecting the inspectors" by simply observing and reporting, leaving any further steps to the EU and national enforcement and compliance mechanisms. In doing so, the EEA would take advantage of the transnational interaction combined with the links to more powerful regulators.

Allowing the EEA a more direct coordinating role of European environmental inspectors would add an additional network to the current EIONET function of the EEA.

Assessment on EU Policies and Legislation

Based upon the knowledge generated by the strategic transnational processes, the Agency may undertake assessment and recommendations on EU policies, EU legislation and implementation. Such assessments and recommendations complement the possible EEA role on monitoring, inspection and enforcement, as just described above.

When it comes to the involvement in assessment and recommendations of policies, the EEA mandate is rather blank. Today, the EEA is only mandated to provide the Community institutions and the Member States with information. On behalf of the information received, the Community and the national authorities are able themselves to evaluate the state of the environment and also to measure the significance of new proposed EU legislation and measures.

It follows that the EEA itself has no direct influence on the integration of its data into the EU or the national decision-making processes. Neither does the Agency have any

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to improve them when necessary (Brinkhorst 1993, 23). Davies discussing both direct and monitoring inspection is of the opinion that an inspectorate shall be under the EEA and not the EU Commission (Davies 1994, 343s and 348).

consultative role in this process. Further, the Agency is not supposed to measure the consequences of the EU environmental policy, but only obliged to provide the Community and the Member States with information enabling *them* to assess the results, EEA Articles 1 (2) and 2 (b). However, the distinction between information provision and environmental assessment has in reality proven difficult to define. In recent years, the Agency has in real terms undertaken research and publicity, which can be characterized more as assessments and policy-making than purely information generation (Shapiro 2011, 117 and Zito 2009a, 1236s). As indicated earlier in Part II, this has led to some tension between the EEA and the EU Commission; a tension that the EU Commission believes can be eliminated by defining clearer terms for the Agency (Commission 2003b, 10 and 12).

Already when discussing the original tasks of the EEA in the early 1990s, the UK House of Lords suggested periodical EEA evaluation of the implementation of EU environmental policies and of the environmental laws and policies themselves (House of Lords 1995a)[193]. Also, the House proposed the EEA as an independent "clearing house" for EU environmental proposals[194].

In relation to the first proposal proposed by the House of Lords, the 2003 EEA Review argued that the EEA has not always been able to meet the expectations of the European Parliament concerning more information on the state of implementation and *ex-ante* impact assessment of policy proposals[195]. It is likely that the EEA "inadequacy" in meeting these expectations to some degree was rooted in the tension between the EU Commission and the EEA concerning the latter's involvement in policy assessments[196]. As the European Parliament had originally argued for a stronger regulatory EEA, these expectations may also be a surviving aspect of such aspirations. The 2003 EEA Review

[193] Among the evidence in the report there is an explicit demand for allowing agency assessment of Community environmental policy.
[194] Similar, Davies proposes the EEA as a clearing house by processing all information (from the networking) and making recommendations to the Commission with a view to revising relevant EC legislation (Davies 1994, 334).
[195] Commission 2003b, 17.
[196] As indicated at Commission 2003b, 10.

notes that the European Parliament and the EEA should develop a more effective mechanism for defining appropriate EEA support[197].

The second proposal of the UK House of Lords on the EEA as an independent "clearing house" concerns the technical appraisal either by commenting upon the proposals made by the Commission or by directly contributing to the proposals. However, in addition to the technical approval suggested by the House of Lords, the approach may also concern three additional legal aspects of relevance in the early assessment of policy proposals:

First, an evaluation of the environmental significance of EU legislative proposals would be useful in order to determine the correct legal basis of the proposed legislative act. Currently, the problem is of less relevance compared to the internal EU institutional disputes of the 1990s[198]. At that time, the EU institutions had several times disagreed upon the environmental significance of specific legislative proposals and the related choice of the TEC legal base, typically the former TEC Articles 100a or 130s, now TFEU Articles 114 or 192. In reality, the conflicts concerned not so much the environmental significance but rather the protection of institutional prerogatives determined by the choice of legal basis and as a result, different sets of institutional decision-making procedures (Wennerås 2007, 303). The ECJ made it clear that the legal base must be determined by the "centre of gravity" of the legislation - an objective evaluation of the purpose and intention behind (Horspool & Humphreys 2010, 535)[199].

Such "gravity" assessment is still relevant. The assessment is no longer relevant to safeguard the mentioned institutional prerogative as later EU Treaty amendments successfully have provided for such safeguarding. Rather, a "gravity" assessment is relevant today as the choice of TFEU legal base determines several aspects with regard to the type of harmonisation and thus, the potentials for individual Member State action in terms of implementation (Jans & Vedder 2008, 10).

[197] Commission 2003b, 9.
[198] Mainly because of ECJ case law based upon these disputes, and also because of the later changes to the EU Treaties reassuring the institutional prerogatives of especially the European Parliament.
[199] See case law concerning the development of this principle in determining the legal base; Case 62/88 (Chernobyl) 1990 I ECR 1527, Case 300/89 (Titanium Dioxide) 1991 I ECR 2867, Case 155/91 (Waste) 1993 I ECR 939, Case 405/92 (Mondiet) 1993 I ECR 6133 and Case 187/93 (Shipment of Waste) referred in 1995 2 CML Rep. 309.

An early inclusion of an expert opinion from an independent EEA upon potential proposals would legitimise the decision-making processes and reduce the risk for capture by special interests and also for later challenges to the proposed or enacted legislation.

The second area for EEA involvement concerns an early assessment of proposals for new EU legislation assisting the Commission in indentifying potential areas for transnational management. The independence and expertise of the Agency would secure a competent input in the overall transnational evaluation.

The third involvement concerns an assessment of the integration of environmental considerations into other EU policy areas, TFEU Article 11 [200]. Crockett & Schultz stated already in 1991 that, besides providing environmental information, the progress of EC environmental policy will depend on the successful implementation of the integration principle, cf. then TEC Article 130r (2.2), now TFEU Article 11 (Crockett & Schultz 1991). Thus, one aspect of securing the principle would be to allow for independent environmental evaluations and recommendations upon legislative proposals, programmes, plans, etc.[201].

The strategic transnational concept may also allow the EEA to assess and recommend upon the implementation of EU environmental law. This would respond to calls for allowing the EEA a central role in the IMPEL and in advancing the national enforcement inspections by providing for better inspection standards at national level (Hedemann-Robertson 2007, 163s and 457s).

Also, the EEA involvement, based upon the generation of knowledge and learning, would strategically correspond to the need of the Commission. It has for long been recognised that the Commission on its own is underpowered in terms of ensuring

[200] For such early, however still valid discussions see Commission 1996b, 103ff, IEEP 1992 and Kamminga 1994.

[201] Grimeaud suggests in similar terms an early environmental impact assessment/review of EU environmental proposals facilitating the integration into other policies (Grimeaud 2000). The EEA could serve as advisory body.

compliance and enforcement of environmental law (Macrory 1992, 363 and Hedemann-Robertson 2007, 164 and 550).

Therefore, the strategic autonomous position of the EEA may play a direct part in a possible reform of enforcement and compliance of EU environmental law. Instead of shifting enforcement responsibilities and powers to the EEA, it should instead be considered how to restructure such responsibilities around the Commission (Hedemann-Robertson 2007, 553). Already, the Commission and the Council have been favouring better inspection standards at national level (Hedemann-Robertson 2007, 163s), and this could be a task for the EEA[202].

The independent status of the EEA, as argued earlier, makes it equally well suited in conducting such reviews concerning the activities of both the EU Commission and also the Member States. Naturally, such a mandate must be approached with caution without jeopardising the dynamic structures within the horizontal networking and without challenging the independent status of the EEA. Allowing the EEA such an evaluated function would perhaps still have to await a further consolidated position of the EEA towards both the EU institutions and the Member States. Thus, based upon repeatedly successful network management it is likely that the EEA over time - if not already now - could be further engaged in such evaluating and reporting activities.

Also of concern is the risk for a significant increase in workload based upon the realisation of these proposals. Thus, the involvement of the Agency must be targeted systematically, taking the need for and availability of resources into account.

The involvement of the EEA into such assessment functions could take place within the legal basis of the current EEA Regulation. Concerning the integration of environmental considerations into other policy areas, the Preamble of the EEA Regulation already recalls the Agency's role in improving the integration of environmental policy into the

[202] Based upon the strategic transnational concept, the EEA could assist in flexible strategies on inspection and enforcement, acknowledging that inspection and enforcement cannot be addressed homogeneously in Europe. In such enforcement strategies, NGOs could be actively used as "information gatherers" and thus be involved in the strategic transnational processes. Such active NGO involvement implies once again the breakdown of the traditional private and public governance sphere.

other EU policies, a formulation which is similar to the wording of the previous EEC-Treaty Article 130r (2.2), now TFEU Article 11.

Therefore, such advisory functions of the Agency do not in principle require further delegation of power to the Agency and thus, would be in conformity with the TEU institutional "balance of powers", cf. Article 13 (TEU). However, in order to provide for clear structural framework for the strategic transnational concept it is recommended to insert firm legal mandates for such EEA assessment. Clarity is a precondition for accountability, which will be further addressed in Chapter 12.

9 Part Conclusion

This part has demonstrated the development of the EEA from visions to instrumental use by the Commission and the European Parliament in pursuing their constitutional objectives. Based upon the legal notion of non-delegation, it may be concluded that while Member States' control over the agencies has diminished, the agencies "retain an advisory function while the Commission is appointed a final decision-making function" (Everson 2005, 147). It indicates a shift from transnational towards increasingly supranational setting.

It is apparent from a financial and organisational point of view that the EU agencies are not fully legally independent. The financial "dependence" is based upon the Community financial regulation. The organisational "dependence" concerns the attempts by the Commission to influence and limit the transnational role of the Member States in the management of the EEA, emphasising that it has the final responsibility for the executive function and thus also has a responsibility towards the agencies (Vos 2005, 124s and 132).

In addition, the Commission and the Parliament have significant influence on the screening and selection of board members, monitoring and reporting, and mechanisms of additional institutional checks and balances (Curtin 2005, 102ss).

Based upon general studies of the agencies, it is clear that an independent position of the EEA in legal terms is without meaning. Not only is the Commission responsible for appointments to and financing of most of the agencies, but it also possesses key decision-making powers within the policy domains, even in case of the European Medicines Agency (EMEA), which comes closest to being a fully-fledged regulatory body (Scott 2005, 79, Majone 2009, 177s, and Everson et al 1999, 178).

Naturally, such a conclusion does not have to be problematic. Regardless of the visions expressed by this Thesis, it is a valid point to make that the current functions of the EEA are sufficient and institutionally balanced for the objectives of the Community. Such a conclusion is partly true, taking the already significant work undertaken by the Agency into account. As stated already in the 2003 Review, the Commission finds the EEA Regulation and functions sufficient (Commission 2003b, 19) – an argument still valid, as the Agency functions were confirmed by the current 2009 EEA Regulation

Also, over the years the Agency has become "a loyal partner to the Commission in the European administrative system, balancing the ability to have a credible voice on the one hand and the need for stability and a secure resource supply on the other" (Martens 2010).

Naturally, eventually it is a policy choice whether the EU will allow the EEA to develop into a fully transnational organisation or will rather maintain it on a "low key" transnational level, serving instrumentally the current regulatory process. However, in taking advantage of the potentials arising from enhanced transnational interaction, the best option is to anchor the transnational interaction within the EEA instead of the EU Commission. Enhanced EU transnational management presupposes an enhanced transnational EEA.

For the reasons expressed by this Thesis, a transnational reform of the EEA should take place. Such transnational reform undertaken by an independent EEA emphasises the need for clear constitutional and operational legal norms within the EU legal and

institutional order. However, the fundamental constitutional meaning of the "independency" of the agencies remains unclear. Such legal uncertainty is unsatisfactory for the current operations of the EEA and jeopardises the future possibilities for a further development of the role of the Agency.

Also, a transnational reform would assumably be in line with the earlier political "optimistic" notion expressed by the revision clause in Article 20 of the pre-2009 EEA Regulations. The current political attitude focuses "narrowly" upon the implementation of the existing Regulation, which could indicate little interest in an enhanced transnational EEA. However, it would perhaps be right to assume that the change in attitude is more an issue of a pragmatic political approach. As the state of the European climate and environment is declining, it would be reasonable to assume that there still exists strong public interest in moving towards a stronger, regulatory and independent EEA.

If so, it is important to maintain the focus upon the visions for further development. It is possible that such discussions arise again in the future, depending on whether there remains "sufficient satisfaction with and support for the current EC Treaty framework which endows the Commission with the dual roles of the guardian of the EC Treaty and of Community institutions charged with environmental policy development" (Hedemann-Robertson 2007, 436ss).

Pursuing the notion of horizontal and equal participation, it is jeopardising to provide the EU Commission with the described prerogatives allowing influence on the EEA management and activities. In principle, it is also improper to exclude the non-EU Agency members from voting rights at the Management Board. Such inequality seems in opposition to the notion of equality of horizontal and transnational interaction. In the worst case, potential participants could be discouraged from joining and working within the networking. However, this is not *per se* an argument for allowing increased direct external influence on the Management Board at the expense of a diminishing influence by the EU Commission. As long as the EU Commission remains overall responsible for the formulation and implementation of EU environmental law and policies, overall

responsible of the Community budget, and also overall responsible for the activities of the EEA, regardless of the definition of independent status of the Agency, it is hard to argue against allocating the EU Commission a greater say in the management of the EEA[203].

Again, this is not an argument for maintaining status quo, however; the point is simply that enhanced horizontal participation and influence at the EEA must be accompanied by an adequate relocation of responsibilities and accountability as reflected by the TEU institutional balance.

As concluded above, it is clear that the legal autonomy of the EEA is rather illusive. Therefore, a shift in perception bringing us instead towards a genuinely strategic autonomy based upon of the technically specialised EEA may help us move forward escaping the deadlock in trying to define for the impossible: a legal autonomous position for the agencies - a deadlock that increasingly may have fatigued and stalled the inspirations and aspirations towards the proper role and potentials of the EEA.

The strategic transnational concept distances itself from the current institutional position of the EEA, as the instrumental use by the Commission must cease in order to allow for true EEA transnational organisation and networking. Such reform would require a significant organisational change of the current EEA. It would also require a significant change in priority and resource allocation, and it would require a major change in perception within the Community and among the stakeholders.

It appears that the practical application of the strategic transnational concept could fit within the current EU constitutional institutional balance. It is not an easy task to balance the interests involved in allowing for adequate accountable measures and at the same time secure the EEA autonomous transnational management, while also moderating the Commission influence on the strategic approach, priorities and agenda setting, and the transnational networking itself. The actual legal and institutional design

[203] In addition, the main EEA objective is to promote Community environmental policy, EEA Regulation Article 1 (2), which is also the Commission's responsibility. See more on the EEA objectives in Chapter 12.2.3.

hereof must be developed, perhaps based upon institutional experimentation over time in order to find the optimal set-up. In formulating this design, autonomy of the EEA also requires a stand against the risk for instrumental use by direct influence and control of the Member States. Such legal and institutional design, and the autonomous positioning of the EEA "between" the Community layer and the Member States layer, will be addressed in the following Part III.

The shift in focus from legal to technical strategic autonomy may be positively recognised, as the Commission already in 2005 acknowledged the so-called structural autonomy of the agencies based upon the technical and scientific capacity (Commission 2005, 5s):

> *"The autonomy of European regulatory agencies is the key to their effectiveness and credibility in the long term. It must allow them to take account of all the information concerning their environment while freeing themselves as far as possible from external influence. Particularly with regard to the technical and scientific assessments they must make, it is important that they be given a significant degree of autonomy in their dealings not only with the EU institutions but also with the Member States and the operators themselves".*

Now, the next Part III addresses the strategic transnational concept in more detail.

Part III: EEA Strategic Independence - Transnational Networking

The discussions have so far concerned the greater lines of the transnational strategic concept and the promising escape from the deadlocked discussions on the legal autonomy of the EEA.

Now, this Part addresses the strategic transnational concept in more detailed manners. The following chapters 10-13 will define and apply the concept to the EEA.

Before turning to the chapters this introduction will briefly present the general rationale for the strategic transnational concept – aspects which will later be analysed in detail. First, the rationale relates to the deliberation processes involved in the emerging third level of EU integration. Such deliberation presupposes a structured framework providing for procedural norms and accountability based upon procedural democratisation. Then, the introduction will present the rationale for the strategic transnational concept in global governance as a productive response to the legal and institutional demands arising from the globalisation processes setting new demands for the role of the national states and national administrations. Such global rationale also involves the positioning of the EEA in a global context.

The Rationale of a Structural Framework

Ladeur argues that the third level integration applies a "flexible learning approach based upon cooperation and transnational networking, which play a creative and productive role in the field of EU harmonisation and integration based upon the learning under condition of complexity". It constitutes an alternative to supranational and national decision-making "in shifting the stress to procedural and methodological criteria integrating knowledge generation into decision-making" (Ladeur 1999, 164ss and Ladeur 2000).

The outcome of such processes may be an "Europeanization of law, which is neither supranational Community law, nor national law" (Ladeur 2002b). It is a "body of

cooperative law deliberated, generated and shared by the experiences embedded by the national administrations themselves, freely evolved without the demands for implementation of specific substantive Community norms" – an implementation process that has earlier been observed to underplay and underestimate the role and potential development of national procedural law (Krämer 2007, 450ss and Ladeur & Prelle 2002)[204].

The deliberation processes involved in the third level integration must be based upon clear procedural criteria in order to balance the influence and use by the participants and to avoid the risk of capture by dominant interests or of instrumental use, such as argued earlier in Part II.

Thus, procedural norms must safeguard and balance the autonomous position of the EEA and the sound deliberative processes based upon fair influences and control of actors. This calls for a structured legal and institutional framework.

As it will be described, such norms for transnational processes at European and global levels are to some extent emerging as internal administrative rule – or global administrative law - generated from the transnational processes among administrations. Again, in the words of Ladeur this constitutes "a Europeanization of administrative law neither supranational community law nor national administrative law"[205].

The structural framework supports the essential processes of recursive deliberation, which is a fundamental element of the strategic transnational concept. As it will be argued, the deliberative recursive process is in need of accountable measures safeguarding due diligence, fair and even participation and decision-making processes. But why the need for accountable measures?

[204] Although the development of the EU environmental policy also defines procedural rules, such as public information, see Knill 1997.

[205] Much rule-making in national and global fora occurs under such circumstances – "beyond the ken of "command and control" relations characteristic of the modern state – that administrative lawyers speak of the production of "anomalous" global administrative law (GAL)" (Sabel & Zeitlin 2010b, 11, and Kingsbury et al 2005). Such rule-making, cooperative law and GAL is discussed later in Chapter 10.1.4

First of all, because accountability is considered a necessary condition for legitimacy in the field of experimental governance (Benz et al 2007, 442).

The development of recursive framework in the field of EU experimental governance is "prompting the emergence of new forms of dynamic accountability and peer review protecting the rights of the participants. Peer review accountability induces participation in its processes to explore novel possibilities, and respect for its outcome of informed deliberation draw on official authority, focusing upon mechanisms such as duty to present public justification, to present explanation, and the right to challenge/review. This implies a shift in regulatory focus from rules to frameworks for creating rules" (Sabel & Zeitlin 2010b, 5ss and 13s). This also indicated the need for "procedural democratization based upon transparency and participation as procedural requirements" (Sabel & Zeitlin 2010b, 18ss).

As suggested by Magnette, it may be argued that such procedural democratisation is a "soft accountable", democratic substitution for electoral accountability – which actually promotes democracy based upon transparency, duty to consult, access to information and documents, weighting the arguments, reasoning the decisions. This is not necessarily a replacement of the true democratic institution with a non-democratic (technocratic) logic. Rather, the point is that "the ambitions of a democratic polity, in such non-majoritarian regimes, is to produce public deliberation about collective issues: a democratic constitution should organize a sound process of confrontation of different views, so as to produce the best possible policies, well informed and responding to citizens' expectation" (Magnette 2005, 12s). Deliberation may be considered as a functional equivalent to democracy, making up for the democratic deficit of the EEA as a non-majoritarian organisation (see also Kjaer 2010, 35s and164s).

Also the EU agencification process gives cause for new innovative patterns of accountability generated by the flexible learning approach and based upon cooperation between the EU and national agencies. Agencies may be breeding grounds and leaning sites for "state-of-the-art participatory practises that ultimately may be generalised

across the wider spectrum of EU administration" (Curtin 2005, 113)[206]. Such innovative pattern of accountability is a mechanism of representative democracy, alongside the more vertical forms for accountability (Curtin 2005, 113) – and a productive addition to the traditional schemes of accountability of regulatory agencies in the EU, which "tend to focus upon their legal status and on the procedural conditions imposed upon them to hold them accountable" (Magnette 2005, 17).

It follows for the above argumentation that a structured deliberation process makes up for the democratic deficit of the non-majoritarian agency. As we will discuss in detail later, any degree or level of independent agency status raises issues of legitimacy because such autonomous status seems to break the "chain of delegation" of the parliamentarian state. The classic majoritarian model, which gives the elected authority the power to sanction its agent, is not compatible with the agent's independence, meaning that "another mechanism must be forged to hold the regulatory accountable" (Magnette 2005, 11s). This is further discussed in Chapter 12 in an EU context, as the relevant question here is: accountable to whom? Are the EU agencies, at least in their technocratic, scientific character, "reflective of a vision of the European governance as an apolitical and independent "fourth branch of government""? (Vos 2005, 126 and Everson 1995, 183 and 2005, 142, referring to the works by Majone). In theory, the independent status of an EU agency places it somehow outside the direct influence from other EU institutions and outside the traditional political control of the EU in general, which means that the usual political and democratic control exercised over and known from more traditional governmental branches is retrained (Majone 1994b, 92). Thus, the separation of the EEA from the traditional EU institutions makes the Agency part of the "fourth branch of EU government" (Everson 1995, 183ss, Majone 1994a, 16ss and Majone 1996a, point 7).

Therefore, well-defined accountable measures are needed, as "transnational networks that arise outside the framework of international organizations and executive

[206] Curtin refers to the Management Boards of the European Aviation Safety Agency and the European Medicines Agency developing proactive participatory procedures for stakeholders prior to decision-making (being a system of notice and comments); procedures ahead of any (in 2005) initiative proposed by the Commission (Curtin 2005, 113)

agreements are most likely to spawn fears of runaway technocracy" (Slaughter 2004b, 136). Mashaw also warns about such technocracy: "*Bureaucracy* is closely related to *technocracy*, and from there, the symbolic shift to *undemocratic*, *elitist*, and *secretive* is but a short hop" (Mashaw 1983, 223). Such technocratic developments would in negative terms contribute to jeopardising the legitimacy of the transnational approach.

Related, the lack of defined participatory mechanism risks leading to "street democracy", emphasised by the lack of common administrative norms among administrations (Shapiro 2001, 374ss). For administrative law, this "democratic deficit" problem rests largely with the transparency, or rather the lack of transparency, in transnational decision-making. Shapiro observes: "Traditional diplomatic norms of multinational negotiation emphasize secrecy and consequently favour a narrow range of participants. For this very reason, individual democratic States can hardly develop their own stances in multinational negotiations through the transparent and participatory processes they may use for deciding domestic issues. It is not at all clear, that is, whether procedural rules that emphasize transparency and participation can simply be moved "up" from national to transnational settings" (Shapiro 2001, 375).

However, procedural legitimacy is not without limitations and risks. US experiences may tell us to "avoid establishing autonomy regimes of procedural rational on their own based upon absolute maximising pluralism". Instead, we need to focus upon a structured approach attending the decision-making process - and not focus upon the substantive review and the "correctness" of the decision itself (Shapiro 2002). A greater emphasis by European courts on procedural judicial review on complete administrative rule-making records, reasoning and proof of due diligence, will "lead to greater substantive judicial review as well – and the resort of administrative law to a discourse of "deliberation" is more likely than not to push courts further into substantive review" (Shapiro 2002, 22).

Also, the technicality and the detail level of the agencies and/or the regulatory policies are so wide and intricate that the public (understood in broad terms) cannot meaningfully get involved. In Dewey's words; "there is "too much public" and "too

many publics", a public too diffuse and scattered, and too intricate in composition". "Each of the publics crosses the others and generates its own group of persons especially affected with little to hold these different publics together in an integrated whole; creating an antiThesis between individual and social, as an ambiguous obstruction" (Dewey 1927, 146ss and 185ss). Viewed as such, the EU would not be democratic because accountability remains confined to institutional actors and elitist stakeholders, and it will not be democratic as long as "it will be deprived of an "integrated equivalent to national political competition by parties and individual seeking office" (Magnette 2005, 19).

Such aspects will be further discussed in Chapter 12.

Now, how do these aspects relate to the EEA? The EEA is an information-gathering agency and currently not involved in decision-making. The vision here employed on a strategic transnational concept does not suggest an EEA involvement in such regulatory powers. Being a "purely" informational agency providing input for other decision-making institutions, is there a need for EEA deliberative processes? What is the need for accountable measures, and which are the democratic values to be safeguarded? The EEA makes no binding legal decisions, which means that any legal interest would, in traditional terms, instead address the decision-making competent authority issuing the binding decisions, in this case typically the Commission or the national authority. In this perspective, one could argue that the relevance of discussing democratic deficit with regard to the EEA is limited, as such discussion should concern the decision-making institutions. However, such a conclusion is wrong:

First, the informational role of the EEA constitutes policy and is recognised to have decisive influence upon the decision-making process. This is argued below in Chapter 10.

Second, the EEA is an integrated part of the *agencification* of the EU; meaning that the position of the EEA raises the same constitutional and democratic concern within the

TEU institutional balance as the position of any other EU agency, regardless of formal powers allocated.

Third, the agencification process constitutes a double delegation, i.e. from Member State to Commission, and once again to the agency (Pollack 2003, 391ss). Hereby, the EU agency constellation represents a further distancing from the national democratic control, which in itself emphasises the need for defining accountable measures of its own supplementing such vertical democratic control (i.e Curtin 2005, 113).

Fourth, the signal value of the EU to ensure democratic institutions should not be underestimated, which underlines the importance also for the EEA to be subject to public legitimacy/control.

Fifth, diversity management by the EEA is orchestrated among large numbers of actors with different professions, languages, and worldviews. In such settings, the amount of "misunderstandings, ignorance, and misinterpretations of the position of the actors on the other side of boundaries may be significant. Perceived differences jeopardize the creation of a common understanding" (DiMento 2003, 157). Although the strategic transnational concept applies diversity and allows for different strategies for different actors, such risk of "perceived differences" must not be underestimated. This calls for deliberation processes to minimise such risk.

Finally, EEA accountable measures are needed in order to safeguard fair, balanced and representable stakeholder involvement. The EEA might not be at risk of being captured by special interests due to its non-decision-making authority. Nevertheless, the role of information and the potentials in information strategies make such potential risk of capture relevant.

It is not only a matter of safeguarding stakeholders' rights to participate in the deliberation. It is equally important to ensure that the EEA is not missing out on potential valuable inputs – voices lost due to lack of interest or possibility of participating. There is a risk of loosing out on the non-scientific actors in the

deliberative process. As will be described in the following chapters, currently the EEA leaves little room for non-scientific actors, such as industry and public interest groups, for influencing, controlling or adding in structural manners to the agenda-setting or decision-making in the EEA. Leassons have already told us that the unforeseen risk of loosing out on the "non-scientific" actors is real. Concerning the regulatory European Medicines Agency (EMEA) it is observed that "the multi-tiered oversight mechanism in fact restricts the non-scientific actors involved in the authorization of pharmaceuticals, as a consequence of the agency mandate of producing scientifically convincing decisions" (Gehring & Krapohl 2007). The EEA may face the same risk in its similar quest of producing scientifically convincing recommendations.

The challenge is to combine the necessary structures of accountability with the strategic autonomy of the EEA. This is further discussed in Chapter 12.

Global Rationale

The search for rationale behind the third level of EU integration must find its origin outside the EU, in the changing pattern of global governance - the EU transnational development is part of the global transnational tendencies.

For the understanding of the shift towards such global tendencies, we may learn and apply from international relation theory and the works of Bellamy & Palumbo. In general terms, "the neo-liberal reforms and globalization have deeply transformed the institutions of the traditional welfare state, and set the ground for the development of a new type of polity and style of government emphasizing a change from government to governance" (Bellamy & Palumbo 2010, xi).

The shift from government to governance entails three major innovations – innovations that also go hand in hand with the structural framework outlined above for third-level EU integration: First, at the institutional level, the "inception of governance entails a shift away from traditional hierarchical forms of organization, and the adoption of network forms of organization. Second, politically, the passage entails a revision of the

relationship between state and civil society in a more participatory direction. Third, from a judicial point of view, governance is finally responsible for having shifted the emphasis from hard law to more flexible forms of soft law and stressed the superiority of targets and positive incentives as means for implementation" (Bellamy & Palumbo 2010, xi).

Bellamy & Palumbo state that these innovations have led to more efficient and effective policies "less dependent upon command and control logics and hubristic development visions, and therefore less susceptible to government failure" (Bellamy & Palumbo 2010, xi). These innovations are also held responsible for "enabling the national-state to restructure itself so as to meet the challenges posed by the globalization of markets and the process of cultural and ethnic creolization the latter brought out. The centralized national-state is thus being superseded by a 'networked polity' where authority is progressively developed to task-specific institutions with unlimited jurisdictions and intersecting memberships operating at sub- and sovra-national levels. For this new entity, the goal of government is not that of homogenizing the political and social space enclosed within clear-cut and permanent national boundaries, but that of enabling local communities to operate autonomously in an increasingly open world and promoting sustainable forms of development" (Bellamy & Palumbo 2010, xi).

Such general perspectives on the transformation in global governance are useful for the discussions to come in the following chapter.

Central to the Thesis is the future role of national administrations and the national states in such transformation of global governance. It will later be argued that transnational governance is based upon the national state, and that the individual national administration is the backbone of the transgovernmental relations. It will also be argued that transnational governance is a potential instrument in managing the increasing inequality globally. In other words, states matter, and transnational governance matters, in a globalised world. The restructuring or repositioning of the national state in transnational governance will be addressed later in chapter 11.

Related, it will be discussed that the increasing global inequality leaves weaker countries in need of institutional and legal capacity. It will also be argued that transnational structures of governance and deliberation are significant – and potentially powerful – especially in the areas of soft policies, such as environmental management. Thus, the potentials of the EU strategic transnational concept, including the potentials of the EEA, have implications beyond the borders of the Community. These aspects will be presented in the following chapters, arguing that the EEA already has an extraterritorial approach in the narrowly defined geographical scope of Europe. It will also be argued that the EEA has an added potential global dimension, which is attractive for transnational management everywhere. As will be described, the EEA could even, due to its impartial role, undertake transnational coordination in different parts of the world among states or regimes not being part of the EEA. Naturally, such global transnational concept is at the moment rather academic, as it would require a significant legal revision of the scope of the EEA, and a similar discussion of the TEU possibilities for such extraterritorial approach. We leave these discussions outside the Thesis and remain with the visions.

Are these aspects of a global EEA dimension too visionary? Perhaps, but one should never say never. As it will be argued below, the EU would have a strong political and commercial interest – in the competition among other global and regional powers - in seeing its EEA as the international flagship in terms of transnational stewardship. The EEA could for instance provide regional transnational water management, where regional cooperation is difficult due to lack of resources, or in political troublesome regions, such as in the Middle East, where impartial external facilitation may be welcomed.

Such global ambitions fall in general terms within the similar argumentation for the global application of the EU experimental governance approach (Sabel & Zeitlin 2010b). In general, Sabel & Zeitlin argue: “Given the global-spanning interconnectedness of economic, political, and cultural developments, it is nearly impossible to imagine conditions under which decision making could become more strategically uncertain within the bounds of the EU without changing in similar ways

elsewhere. It follows, that experimentalist governance cannot be experimentalist in the sense defined here if it remains confined to the EU. The global actors will increasingly follow the EU, as the EU is a showcase, an experiment of such governance – as such governance is a robust answer to uncertainty where the traditional principal-agency accountability is not. This could be based upon an increasingly open dialogue within the EU and between the EU and the various international interlocutors based upon the merits of experimentalist governance. The EU would pioneer new and systematic ways – therefore we shall all pay attention to the lessons to be learned in the near future from this innovative governance approach in the EU" (Sabel & Zeitlin 2010b, 25s).

Such external approach corresponds to the global ambitions of the EU. These ambitions are primarily seen in the economic, defence and security areas, now especially emphasised by the recent powers embodied by the Lisbon Treaty (Foster 2009, 24ss, and Majone 2009, 13ss, 199ss and 231ss). However, also the environmental area is emphasised, as the environmental objectives are closely linked to the economic and political interest of the EU. For instance, the EU employs an ambitious external policy objective related to its sustainable development strategy. The EU actively aims at implementing its goals by other countries, and in particular in the developing world (Adelle & Jordan 2009). Thus, it would be difficult to imagine an EU pursuing a still stronger international position in global politics, trade and security without the backing of softer powers, such as environmental management. As stated by Nye: "any global power is in need of conducting, mastering imposing a mix of hard and soft powers" (Nye 2004).

Also, the global potential position of the EEA is a natural mirror of the global ambitions of the EU. It has been argued that "the EU aspires to play a leading role in global environmental affairs, using the window of opportunity opened by the low profile maintained by countries like the United States and Japan in this area" (Majone 2005, 119).

In this regard, the EU is an appropriate candidate taking on an experimenting lead applying the strategic transnational concept. The unique development and the internal

dynamics of the EU among international regimes, make the EU suitable for enhanced transnational law and interaction based upon the experimental approach. For such transnational governance, the current EEA already has the fundamental organisational transnational structure, which would make the EEA a suitable candidate for becoming the EU lead transnational environmental institution.

And yes, once again, such an approach is visionary. But why not? As described later, the new strategic transnational concept employs and brings about further legal conceptualisation of central elements – and not least visions – of the "New World Order" and the role of the "disaggregated state" based upon enhanced transnational governmental networking (Slaughter 2004a). It is visionary as illustrated by Slaughter for the New World Order: "A world order self-consciously created out of horizontal and vertical government networks could go much further. It could create a genuine global rule of law without centralised global institutions and could engage, socialize, support, and constrain government officials of every type in every nation. In this future, we could see disaggregated government institutions – the members of government networks – as actual bearers of a measure of sovereignty, strengthening them still further, but also subject them to specific legal obligations. This would be a genuinely different world, with its own challenges and its own promise" (Slaughter 2004a, 261s)[207].

The global rationale for the strategic transnational concept will be further addressed in Chapter 11.

Presentation of Chapters

Chapter 10 analyses the rationale behind the strategic transnational concept as a third level of Community integration based upon cooperative transnational law, which addresses complexity, uncertainty, and risk management by means of deliberative transnational networking processes based upon learning and knowledge generation. Such deliberative processes set aside the traditional distinction between public and

[207] Slaughter recognises the difficulties of such a visionary project at p. 17s, as she adds "to achieve a better world order, we must believe that one can exist and be willing to describe it in sufficient detail that it could actually be build".

private governance in order to stimulate the generation of factual cognitive norms and legal norms that help address the complexity. The generation of such norms and cooperative law is part of the ongoing agencification process in the EU and also the transnational evolution of global administrative law, which provides a set of references of commonly agreed administrative norms in a transnational setting. Chapter 10 describes the development and potentials of the deliberative transnational networking processes, and outlines the significance and potential for the EEA in these processes. The Chapter examines the incentives of transnational networking and the position and formulation of the strategic transnational concept within EU law.

Chapter 11 relates to the rationale of the legitimate role of the strategic transnational concept in managing the environmental consequences and needs arising from the globalisation processes. The basic foundation of the strategic transnational concept involves the transgovernmental relations among national administrations – or sub-units thereof. Therefore, the Chapter specifically addresses the legitimate role of the state in the globalisation process; if states do not matter, then the legitimacy of the transnational concept would be of little meaning. Chapter 11 provides this analysis, including the significance and potentials for the EEA in a global transnational context. As this Chapter aims globally, the aim is not to argue for a third level of global harmonisation, as we do for the EU integration. Here, the focus is rather upon the global advantage of the dynamics of global transnational networking, which brings about a sound generation and distribution of knowledge and resources among states and actors with limited resources, and which eventually also facilitates the generation of global cooperative law.

Chapter 12 discusses legitimacy regarding the accountability of the EEA and the strategic transnational concept in general. The deliberative processes of the strategic transnational concept are challenged in the sense of preserving EEA autonomy and at the same time safeguarding balanced control and influence in deliberation. As a non-majoritarian institution, both political and public legitimacy of the EEA depend upon sound deliberation processes and clarity in legal and institutional framework. Public democratic legitimacy matters also for the non-regulatory EEA, as information

management constitutes policy. Chapter 12 addresses these aspects in the context of the strategic transnational concept and the EEA, including the current accountability structures of the Agency relating to networking and management.

Chapter 13 is the final conclusion.

10 Transnational law – New directions for EU Integration

This Chapter analyses the rationale behind the strategic transnational concept as a third level of Community integration based upon cooperative transnational law, which addresses complexity, uncertainty, and risk management by means of deliberative transnational networking processes based upon learning and knowledge generation.

Such deliberative processes set aside the traditional distinction between public and private governance in order to stimulate the generation of factual cognitive norms and legal norms that help address the complexity. The generation of such norms and cooperative law is part of the ongoing agencification process in the EU and also the transnational evolution of global administrative law, which provides a set of references of commonly agreed administrative norms in a transnational setting.

The chapter describes the development and potentials of the deliberative transnational networking processes and outlines the significance and potential for the EEA in these processes. The Chapter examines the incentives of transnational networking and the position and formulation of the strategic transnational concept within EU law.

The first part addresses the generation of norms based upon deliberative processes managing complexity and risk and involving private and public transnational governance. The part specifically addresses such cooperative law as a strategic third level of EU integration.

The second part analyses the fundamental incentives for participation in transnational networking, constituting the dynamic drive for the generation of knowledge and norms.

The third part concerns the EU conformity of the strategic transnational concept; arguing that the third level of EU integration is in conformity with the EU objectives of harmonisation, and does not necessarily depart from the rationale of both positive and negative integration. Further, it is argued that the strategic transnational concept is different in approach from other deliberative forms of governance in the EU, such as Comitology, and, as argued already in Part I, also the current approach of OMC and experimental governance.

10.1 Generation of norms – a Process of Deliberation

The transnational and deliberative generation of norms is linked to a proactive management of complexity, risk and uncertainty. In the following argumentation it is claimed that the structures of third level integration address such complexity, risk and uncertainty directly, not necessarily as a threat, but rather positively as an integrated part of a flexible learning approach based upon cooperation and transnational networking, and based upon the learning under condition of complexity. Such an approach has significant potentials due to "the immense and multipolar sources of knowledge and information stored among public and private actors, as administration and marked". The strategic transnational concept constitutes an alternative to supranational and national decision making in "shifting the stress to procedural and methodological criteria integrating knowledge generation into decision making" (Ladeur 1999, 164ss and Ladeur 2000).

As earlier indicated, the generation of transnational norms, based upon a cooperative and deliberative approach, has potentials in two interrelated directions:

First, the transgovernmental processes add to the evolution of global administrative law being generated by the transgovernmental cooperation itself between state and sub-state administration, filling in the need for common administrative law in a transnational

context, and thus, filling in the vacuum left as no such substantial common administrative law yet exists. As it will be discussed, such self-generated norms may be referred to as internal rules, cooperative law or global administrative law. Such internal norms may consolidate themselves, and thus, over time develop into a generally accepted body of substantial EU administrative law.

Second, the strategic transnational concept concerns also the deliberative generation of factual cognitive norms, and eventually perhaps even legal substantive norms. The vision applied here concerns the strategic development of such factual norms based upon the transnational cooperative approach. The generation of factual (and possible substantive) norms is in addition to the generation of global administrative norms, as described just above. In fact, the deliberative processes needed for the generation of factual norms is in need of such administrative norms in order to function effectively.

These aspects will be further discussed in the following sections, but before turning to the issue of norm generation, it would be useful to start with an understanding of the origin of the problems; an outline of the multi-faceted aspects of complexity in environmental management. As an introduction to complexity, we will first examine the meaning and potential role of information. Information is the key aspects of knowledge; information is key to the risk management, and thus, informational management is key to the strategic transnational process as visualised here.

10.1.1 The Strategic Role of information

The important role of information often seems to be forgotten or underestimated in the general debate. The ambitions concerning the EEA are an example hereof, as illustrated above in Part II. The EEA is an information-gathering agency and may in regulatory terms be perceived as only providing factual objective support to decision-makers at Community and national level.

This section provides three arguments for the central strategic role of information and of the EEA in policy formulation.

Regulation by Information

As discussed in the introduction to Part III, it could be questioned whether discussing the implications of autonomy of the EEA has any real interest? Based upon the "harmless" EEA informational tasks, such a discussion would be merely of academic interest as the EEA has no decision-making or regulatory powers.

A rather instant conclusion drawn from the present limited tasks of the EEA would be that the Agency only provides information for the other EU institutions, notably the EU Commission, and for the Member States. In itself the EEA is not an agency with regulatory powers. The Community has not delegated any executive powers to the Agency - only founded an advisory body, which legally has no influence on the decision-making processes in the Community. So, independent or not, the EEA could be regarded as just a "satellite" body of the EU Commission with no or little effect on European environmental policies and law.

Such a conclusion would be wrong for two reasons:

First, the discussion is relevant already now as an input to the ongoing reform process. In case the EEA – sooner or later - will have expanded powers, such capacities may have significant influence on the setting and implementation of European and international environmental law.

The second reason concerns the current role of the EEA, the important role of information and networking in itself. Focusing merely on "information" rather than "inspection" it would be wrong to consider the EEA as a purely neutral, inactive and information-gathering institution in relation to the European decision-making processes. It is generally recognized that the role of information in contemporary policy-making "is not only instrumental but also constitutive - information is not only a necessary input into the policy process; under some conditions, the information constitutes policy" (Majone 1996a, 1 and Shapiro 1996b, 11s). The EEA has no mandate to influence

directly the actual use of the information[208]. However, by gathering, processing, evaluating and dismissing information the EEA has *de facto* a significant impact on the end-use of environmental information and thus, on the formulation of European environmental policies and law[209].

Majone has specified the role of information as "regulation by information" specifically referring to "the regulatory significance of changing behaviours indirectly by changing the structure of incentives of the different policy actors, or by supplying the same actors with suitable information" (Majone 1997, 265). Simply having access to credible information can change the calculations and choices that different actors make (Slaughter 2004b, 140). As will be described later, especially the role of information management tends to play an increasingly important part in the processes of transnational globalisation. Such processes are "predominately based upon enhanced flow of information (the information revolution) and a complex number of transnational actors" (Nye & Welch 2011, 268ss).

Therefore, information agencies operating such transnational networks, such as the EEA and the EIONET shall not be underestimated in terms of policy-making. Regulation based "upon information and persuasion is perceived to be more flexible, responsive, and effective than traditional regulation based upon command-and-control" (Majone 1997, 267s).

The Constitutional Objective of Information

A second argument on the strategic role of information relates to the constitutional position of the EEA – and the constitutional objectives of environmental information.

[208] At the outset of the EEA, it was stated that the Agency will not interfere and defend the use of the information in order to avoid abuse. This will be a task for the public or others. Rather, the Agency will produce a "menu" for the users (House of Lords 1995a: Evidence, Beltran, Question 16).

[209] Related, see also Westbrook 1991, 268ss, on the US EPA and data gathering as more than a simple passive function. Similarly, environmental information is instrumental for the enforcement and implementation of environment protection. This follows by the Council Directive 90/313 concerning the Access to Environmental Information, OJ No L 158/1990, p. 56.

Beside the role as independent collector of information, the EEA may also be identified as an institution allocated with the task of pursuing a constitutional goal, i.e. environmental protection, and providing for available scientific and technical data, TFEU Article 191,3,(1). This in itself does not constitute any elevated position of the EEA and informational generation. However, the influence on EU constitutional objectives emerges as a combination of three elements. First, the just described regulatory impact of information on decision-making. Second, the EU constitutional objective of actively "greening" Community policies, TFEU Article 11. Third, the general need for environmental information supporting the realisation of other EU constitutional objectives, such as the functioning of the internal market.

The establishment of the EEA cannot on its own be regarded as a measure only to improve and fulfil the environmental policy of the Community. The need for environmental information and regulation as a supporting component in securing the establishment of the economic integration has from the late 1960s and onward been a driving force for Community environmental law and policies. However, it was not until the 1993 Maastricht Treaty that environmental protection and sustainable development was upgraded among the fundamental objectives of the now re-named European Community (EC). Thus, prior to 1993 the overall constitutional/fundamental objective of the European Economic Community (EEC) was to promote the economic integration as stated in the earlier Treaty of the European Economic Community, Article 2.

The need for information was further apparent by the 1987 European Single Act (SEA), which intensified the economic goals of the Community. It became clear that the intensified economic growth was in increasing need of a solid environmental regime. The period following 1987 has seen an increase in EC regulation in general, which has also led to a greater need for environmental information and thus, for better environmental monitoring, improvement of the network structure, better research regarding the environment, better assessments of the impact of projects on the environment, etc.

Thus, environmental information of today has strategic and constitutional significance for the EU policy objectives and policies, and has played an influential role in policy formulation from the very beginning of the Community.

Managing Uncertainty Strategically

A third argument concerns the need for strategic approach in managing the diffuse and polyarchic sources of information.

As we have learned above, the exercise of power of information, and the dissemination of information shall not be underestimated. As observed by Slaughter, especially the transgovernmental networks are "well positioned in generating for compilations of best practices, code of conduct, and templates for everything from Memorandum of Understanding to an environmental assessment review". Recommended rules and practises compiled by a global body of environmental officials, such as the EEA, offer "a focal point for convergence". Policy formulation depends upon "credible and authoritative information – and even more valuable is distillation and evaluation of information from different sources" (Slaughter 2004b, 137s).

Focusing upon the different sources of information, Ladeur argues that such source often in the modern complex society "consists of uneven and multipolar patterns of information, corresponds rather well to the polyarchic nature of transnational networking". Such patterns of information give rise to an uneven progress of knowledge and give rise to corresponding "professional societies" – such as epistemic communities – orienting themselves towards strategic goals, while "the earlier "knowledge communities" aimed towards the continuing progress of the general stocks of knowledge". In a European multilevel system, "a multipolar processing of knowledge is required, which can be shored up by the transnational cooperation between legal orders" (Ladeur 2009, 241).

The complex management of such uncertainties and different patterns of information based upon information networking are precisely the principle conditions of the

strategic transnational concept. Without such transnational management and strategies, specific information held is at risk of languishing, getting lost in uncertainties, or being concentrated within individuals or special interest groups serving only particular strategic goals of self- interest, not getting into play for the greater generation of knowledge.

In addition, transnational informational networking is able to provide for strategic "solutions" to such uncertainties, and thus attract the participation of actors. The same conditions as generated for the related EU experimentalist governance approach may apply: "strategic uncertainty and multipolar or polyarchic distribution of powers" (Sabel & Zeitlin 2010b, 9).

Under strategic uncertainty, actors "by definitions have to learn what their goals should be, and while learning determine how to achieve them. This learning process necessarily involves cooperation, since any actor able to fix a strategy independently would do so, and not be in a state of strategic uncertainty" (Sabel & Zeitlin 2010b, 9).

Multipolar or polyarchic distribution of powers implies that "no single actor has the capacity to impose her/his own preferred solution without taking into account the views of the others. If any actor could impose the full costs of her/his mistakes on the others, ignoring would be costless, and there would be no need to learn, or indeed to fret about strategy at all" (Sabel & Zeitlin 2010b, 9).

Such aspects are linked to the incentives of networking, which will be discussed later in this chapter.

10.1.2 Understanding Complexity

The complexity of environmental management concerns the management of information. Information is key to any approach on environmental management - whether being deliberate measures where causes and consequences are well documented, or precautionary measures where risks and uncertainties prevail. In a

highly complex world, where goals are often ill-defined and many links are possible, knowledge can greatly facilitate agreements on the development of an international regime (Krasner 1983b, 20).
The purpose of this section is to illustrate the diversity of complexity. One could say that the understanding of complexity in itself is complex. Complexity is not only a matter of *how* to manage the risks, and how to manage the huge amount of information and knowledge around. It shall also be understood in a broader context of *what* to manage, and refers to an understanding and overview of the many fundamental complex and differentiated interests, aspirations, problems and potentials, which are also part of environmental management.

Therefore, the management of complexity refers to the ability in operating within such a differentiated world, in making ends meet, and in facilitating a refined web of interaction between actors, problems, resources and incentives. Of equal importance, management of complexity also requires the ability to understand, already at the outset of engaging management, the many variables of know and unknown character. It is not until such an overview is mastered that the actual environmental management may start.
The increasing complexity and related uncertainty of modern environmental law - and the significant resources required in order to meet these challenges - cause problems for any environmental management. Modern environmental administration - at national, regional and local levels - requires significant resources in order to execute the demanding task of environmental management. These demands are increasing and constitute a real problem for the environmental administrations in general – a problem not only related to the less developed countries but also to any administration with limited resources available.

It also follows that the eventual outcome of complexity, being non-compliance, is not necessarily a matter of non-willingness. Naturally, non-compliance can be a matter of a deliberate anti-environmental attitude or arise from prevailing commercial interests in applying less environmentally friendly production processes and products. However, it must be recognised that often non-compliance and non-enforcement are results of an administration, and also a private sector, without the means, tools and even

understanding necessary for solving the problems and even in certain cases for identifying or recognising the problems. This problem can to some extent be seen as a matter of ill-equipped and under-powered environmental administrations being pressed by an over-optimistic political desire and thus, an increasing number of regulatory environmental acts without the allocation of adequate and corresponding resources[210].

For instance, this phenomenon is observed at the increasing requirements of reporting included in most environmental international instruments. Such requirements exceed the capacity of national bureaucracies to respond with adequate and meaningful reports. "Non-reporting, under-reporting, or mis-reporting are therefore prevalent" (Chayes & Chayes 1995, 159s and Louka 2006, 126). Such complexity relating to the increasing volume of international (and EU) environmental law also adds to the weakness of international environmental law itself, jeopardising its own legitimacy.

As this Thesis concerns, we need a new world order to manage such increasing complexity and increasing volume in environmental law. It must be an approach, where demands are met with adequate resources, as Koskenniemi already in 1996 observed: "the massive increase in international legislation during the last quarter of a century, particularly in the environmental field, has not created a new world order. In fact, the gap between law in books and how states act may now appear wider than at any other time in history – the more rules there are, the more occasion there is to break them. After years of active standard-setting, global and regional organizations stand somewhat baffled in front of a reality that has sometimes little in common with the objectives expressed in the inflated language of their major conventions and declarations" (Koskenniemi 1996, 236 and also DiMento 2003, 83s and 155s).

[210] As illustration, the transposition of EU environmental law in Central- and Eastern Europe in order to prepare for possible EU membership takes place over a short time-span of a few years, which is typically based upon a political desire and commitment to formally apply for EU membership in a relatively near future. This entails many laws enacted without ensuring the adequate allocation of resources and institutional capacity needed for sound implementation. This observation is based upon my own experiences as EU legal and institutional consultant in the region. Related to such observations, the Commission has earlier (with reference to the accession negotiations with Turkey) emphasised implementation strategies rather than just the transposition of legislation itself (*The Economist,* 9 October 2004, p. 45).

The following sections illustrate the plurality of complexity involved in environmental management – a plurality to be addressed strategically by the transnational approach.

Complexity – *What* to Manage

The origin of the complexity and uncertainty is based upon six general observations.
First, complexity relates to the uncertainty arising from the increasing flow of information and the dynamic and constant development in environmental science. This calls for detailed assessments of activities and policies on the environmental impact, on the financial implications and on any significant consequences for other and affected policy involving a high level of cost benefit and risk analysis. This requires a well-educated and technical environmental administration.

The information available and various degrees of scientific uncertainty emphasise the necessity of establishing sound and efficient management of risk and uncertainty. The complexity and scientific uncertainty legitimate an increasing integration of scientific expertise, typically as epistemic communities, into the regulatory process. These scientific experts have significant impact on the policy outcome itself. Consequently, scientific argumentation is often politicised and applied in promoting national interests, leading to increasing deadlock in the political and regulatory process. An example hereof is seen in the political use and scepticism evoked relating to the climate negotiations and the scientific outcome from The Inter-governmental Panel on Climate Change (IPCC) (relating to the political involvement of scientific argumentation, see Louka 2006, 19s).

Second, modern environmental law is based upon increasingly flexible standards and norms - typically based upon minimum criteria - allocating a high level of discretion and also responsibility of the individual environmental administration at all levels. In addition, modern environmental law is based upon the notion of applying/implementing the measures at local levels corresponding to the local conditions. This also puts significant pressure upon the regional and local environmental authorities. This may

easily lead to variations in norms and implementation, adding to the overall complexity of uncertainty allocated international environmental law.

Illustratively, the EU enlargement process has highlighted such diversity and differences in administrative cultures and needs[211]. As will be further discussed in Chapter 11, it is to be expected that increased globalisation will to some extent lead to increased diversity and legal pluralism because international norms will have to "respect" or rather "accept" the legal and cultural context of each recipient country. Despite the impact of globalisation, legal and cultural diversities are likely to remain, as different cultures react in different ways to imposed norms – even within closely related regulatory systems. (Wilson 1985).

Third, the relative success of integrating environmental concerns into other policy areas also implies that the challenges related to uncertainty and complexity do not only apply to the traditional environmental administration. Rather, these concerns apply to all regulators involved with environmental management. For regimes not predominately involved with environmental management - and thus, with little own capacity in the environmental area - these challenges may be difficult to manage on their own.

Fourth, the integration of environmental concerns into other policy areas and the increased integration of NGOs and private parties have multiplied the number of environmental actors worldwide. The diversity and multitude of actors in environmental management make coordination, management, sound balancing of interests and even understanding of the total inputs and individual interests difficult for the environmental administration and the participants themselves.

Fifth, complexity is also based upon the general expansion of environmental regimes and regulations on all levels globally, regionally and locally. Such increase in the diversity and numbers of legal acts and actors demands in itself increased administration

[211] For instance, the EU and European environmental law allocate significant discretion to local environmental authorities, which has imposed a radical change to the administrative culture in most of the recent EU Member States coming from socialistic regimes characterised by centralised governance, little room for flexibility and few resources at local levels. The true change of such administrative reforms will probably take a professional generation.

and coordination as the number and volume of environmental regimes and regulation go up (Weiss et al 2007, 190s). It follows that international environmental law is characterised by a fragmentised legal and institutional framework. The geographic fragmentation emphasises the regional cooperation and the regulatory fragmentation concerns the increasing number of environmental legislative acts and of environmental regimes[212]. Although reforms both at EU and international levels encourage greater coordination, environmental management is taking form in an increasing number of regimes and settings. Such development is not necessarily a negative development; it does to a large degree reflect the success of international environmental law.

Environmental management is expanding the traditional frame of environmental law, partly due to the relatively successful integration of environmental concerns into other policies, such as the WTO and the World Bank (Birnie, Boyle & Redgwell 2009, 78ss and Sands 2003, xxi))[213]. In principle, this is a positive development, but it raises some complexity and concerns regarding the status and application of environmental law in the context of a wider regulatory agenda. There is a risk for regulatory and institutional inflation and also a risk for some distortion (dilution/loosing sight) of the environmental focus when connecting environmental objectives to other - often "harder" - policy areas. This expansion of international environmental law is a positive development, but the successful future development presumes a good and interdisciplinary coordination.

In general, the fragmentised environmental management demands strong institutional coordination among the various environmental regimes. This concerns the full regulatory process from norm setting to implementation.

This puts increasing restraint on resources in general, which especially is an increasing problem for countries without the needed resources for meeting the increasing demands for following the environmental agenda, and as the demand for resources are not adequately met. As already observed in the beginning of these sections, the lacking

[212] Such development even creates some “redundancy among existing international organizations”. See related discussions in Louka 2006, at p. 15s and 63.
[213] For instance, the World Bank applies its own schemes of Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA), see Louka 2006, at 117ss.

enforcement of and compliance with environmental law are often the direct result of inadequate resources needed or complex management. Adequate resources in terms of money, education/training and capacity building are limited. International financial schemes are typically not able to satisfy the need for sustained institutional support in the longer perspective. Far too often the support falls short of supporting and sustaining the daily ongoing operation. Training takes place, however, often as a "one-stop shop" rarely effectively addressing the needs and education of the next generation administrators. Often, in developing countries, job rotation among the educated elite occurs rapidly, as they are in high demand, and as they may find new and more lucrative job opportunities elsewhere – or as they are required to take other government positions due to government rotation schemes. These factors jeopardise the needed consolidation of the knowledge generation within the particular institution – and is a threat to the sustained ability in meeting complex environmental management[214].

Sixth, complexity concerns the regulating of a strong private sector. The managing of an environmental agenda may risk being captured by private or commercial interests. It may be increasingly difficult for underpowered environmental administrations to stand against such interests, and even to advance a public agenda among private actors often powered with global influence and significant resources. However, the aim is not to discourage such private interests. Rather, the challenge is to encourage such private actors to participate in public environmental governance, as they often possess significant resources and knowledge, which would be of value for the generation and distribution of knowledge. This has two aspects:

First, access to such privately held technology and knowledge is inadequate and unsystematically distributed (Sands 2003, 1037ss). The problem often originates in national and private protective self-interest. Many innovations are developed by the private sector and are protected as intellectual property of the inventor and have significant commercial and monetary value. Thus, the transfer of such technologies must be addressed (Sands 2003, 1043ss and DiMento 2003, 179s). However, attempts at such transfer based on a regulatory approach would likely fail because of the vested

[214] Based upon my own experiences as legal and institutional consultant.

economic interests of the global powerful private sectors (such as pharmaceuticals, chemicals, and information technology (IT) businesses) and because of the profound unwillingness of any national state to jeopardise the competitiveness of its own domestic private sector[215]. Instead, incentives should be set up to encourage the private sector to enter into private-public deliberative processes. Such incentives are discussed later in the chapter.

Second, the many private interests, participants and private economic agendas involved may lead to a distorted agenda. It could be argued that the environmental agenda has already to a large extent been hijacked by other policy and economical interests frequently (mis)using the environmental rhetoric in order to promote short-termed self-interest. The environmental agenda has become commercialised utilising the positive message of being "green"[216]. As part of Corporate Social Responsibility (CSR); companies are increasingly using public imagining as direct marketing – and are equally being measured by the public opinion (on CSR, see Birnie, Boyle & Redgwell 2009, 327s and Bhagwati 2007, 190ss).

The unfortunate consequence of this development may be that the objective of sustainable development has become blurred, which also adds to the complexity and difficulties for an underpowered administration in meeting sound environmental policy objectives.

[215] This debate is similar to the ongoing debate on the uneven access to and sharing of medicine and vaccines against AIDS, malaria and other deceases tormenting the populations of the third world.

[216] The environmental agenda is often directed towards how to integrate environmental concerns into the current and increasing consumer patterns. Such concept of "sustainably developed" has little to do with the needed actions of, for instance, changed consumption habits in order to ensure the much wider scope of sustainable development.
For instance, the computer industry, car manufacturers and oil companies are increasingly taking commercial advantage of the popular environmental agenda. By enphasising their “green” standing and contribution to more environmentally friendly products, such companies promote increased sales and consumption disregarding the global environmental and social consequences and needs. Such commercial messages are repeatedly being presented to the public, e.g. by means of massive advertising that eventually brings about a general acceptance of an unchanged and even increasing consumer behaviour – even added a general, however mistaken belief that such consumption is actually for the benefit of the environment. And such commercial campaigning risks shifting the focus away from the issue of changed consumer behaviour, which would eventually be far more productive for sustainable development.

Naturally, a positive consequence of this development is simply that the environmental awareness is being promoted. Although in a commercial context, the environmental message reaches many consumers around the world and there is reason to believe that such advertising effectively reaches far more people on a global scale than achieved by traditional awareness campaigning. Thus, the commercial promotion must be seen as an important supplement in the general awareness-raising and a structured approach together with more traditional means could prove very successful. Also for these reasons, a private-public cooperative approach is needed.

Complexity and the Strategic Transnational Concept – *How* to Manage

The areas of complexity presented above all relate to the fundamental issue of adequate resources of the individual administration. It may even be argued that such complexity is increasing based upon the global economic development, which puts significant pressure upon legal and institutional capacities. This will be further discussed in Chapter 11, arguing that the globalisation processes even add to such peril and contribute to even greater inequality worldwide.

It is increasingly difficult for national administrations to find their stand in the ever-increasing complexity of environmental management. Thus, such complexity generates a strong demand for transnational resources in most stages of the policy process, especially ideas and expertise (Jönsson & Tallberg 2010, 241). This emphasises the need for a collaborative transnational concept allowing for understanding and learning, allowing for distribution of and getting access to knowledge and resources, allowing for experimental management approach, and allowing for norms to be developed.

But are all administrations in need of a cooperative approach in order to manage complexity? In case the individual administration possesses sufficient information, knowledge and resources to manage entirely on its own, one could argue that there would be little incentive or need for cooperation. However, in complex environmental management such is not the case. Later in this chapter, we will discuss the incentives for transnational cooperation, primarily based upon the comparative advantages of

following transnational networking; advantages even for the most resource-strong administrations.

Now, we can return to the main subject of this chapter concerning *how* to address complexity by means of transnational deliberative processes for the generation of norms.

10.1.3 Managing Risk and Uncertainty by Deliberation - a Precautionary Approach

An essential part of the strategic transnational concept concerns the management of complexity based upon deliberative processes. It follows that the autonomous position of the EEA relates to its involvement in managing complexity, uncertainty and risk.

The failures of the EU regulators in such risk management, as illustrated by the recent BSE ("Mad Cow Disease") crises, have brought about "an EU institutionalised attempt in order to combat the "organised irresponsibility" in order to regain public trust in the creditability in risk management, based upon clear definition of risk management; clearer separation between risk assessments and risk management, making clear which proportions of risk policy would be attributed to scientists and bureaucracies, and also based upon an increase in procedural standards of risk oversight strengthening of the principles of openness and participation, as well as the introduction of the precautionary principle" (Everson & Vos 2009b, 2).

In such EU attempts for clarity, the strategic position of the EEA would concern the assessment of risk, leaving the actual management of risk to the Commission and the Member States, as risk management is typically considered as policy formulation. In strict terms, risk assessment is a scientific task, whereas risk management is a political task involving the inclusion of other economic and political considerations (Everson & Vos 2009b, 2 and Commission 2000b, 3). In addition, the Commission adds a third

element: risk communication as part of the precautionary principle and the structured approach to the analysis of risk[217].

In this sense, the scientific expertise at the EEA undertakes risk assessment, and the bureaucrats of the Commission risk management. Risk communication would be split between them. However, in reality the distinction between assessment and management is blurred; like the evaluation and management of information, the scientific risk assessment constitutes policy.[218] Risk management is in reality also taking place in the prioritisation and handling of the risk assessment. The result of the risk assessment – that is presented and feeds into the European decision-making – is already in itself the outcome of scientific and political evaluation encouraged by the uncertainty involved and influenced by the various stakeholders and individual actors involved in the risk assessment[219].

As argued by Ladeur, the mix of political/scientific risk assessments and risk management differs from the past, where "the administration asked experts for explanations of phenomena which it did not understand well enough. Nowadays, in processes of decision-making on risk, scientists, engineers and other experts are themselves confronted with problems which they do not completely understand, which results in a process of interrelationship between science and administration integrating

[217] "The precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management, risk communication" (Commission 2000b, 3).

[218] Adding to the blurriness, it has been found that the risk producers (i.e. the marked actor that pursue potentially hazardous technologies or activities) are also *de facto* risk assessors (van Asselt et al 2009, 375 and 381)

[219] Political bias also influences the risk management; governments, for opportunistic political reasons, tend to focus upon even independent scientific expertise, the conclusions and recommendations of which are politically favourable. For instance, the right-wing Danish Government Fogh-Rasmussen 2001-2009 provided public funding of environmental economist Bjørn Lomborg and the Institute of Environmental Evaluation, as an independent research institution aligned with the Ministry of Environment and dedicated to environmental cost-benefit analysis for the political decision-making process (now integrated into the Environmental Economic Council). This was seen by the political centre-left opposition as politically opportunistic, and as an instrumental tool by the government due to the controversial stand of Mr. Lomborg on the causes and recommendations of climate changes. The issue was not the integrity of Mr Lomborg, which is well respected, but rather the stand of the government, which in the early stage distanced itself from recognising the need for action in the environmental field – and also distanced itself from the earlier centre-left government of Nyrup Rasmussen 1993-2001, which had a significant environmental profile. See also the related discussions on the political – and public – change in environmental attitude from the 1990s to the 2000s in Chapter 3.2.

science into administrative decision making. There is no more a shared experience that decisionmakers can draw on" (Ladeur 2003, 1462ss).

Therefore, decisions must now be taken in the face of uncertainty. The management – or regulation of risk – is based upon using fact-finding as a core instrument of learning for risk regulation (Everson & Vos 2009a, ix). However, the "fact-finding" must be applied in a new light. Ladeur, based upon his critical analysis of the outcome of the 2002 *Pfizer case* for the then Court of First Instance (CFI)[220], points out that administrative discretion under conditions of complexity has to be used for the design and modelling of complex strategies. This is why the focus on fact-finding and scientific expertise would be misleading, as it is only one of the major elements in the decision-making process. The "decisional management itself needs an adequate procedural and methodological structure as well. At this stage, administration (and court control) cannot just rely on the traditional legal requirements for discretionary decision-making because a spontaneous trial and error process can no longer be expected to generate a consistent rule of practice as the CFI seems to presuppose" (Ladeur 2003, 1479).

Also, "fact-finding" in a new light does not mean an arbitrate definition and application of the precautionary principle. The Commission has argued for uniform definitions, but has also argued that the principle is open for interpretations, as, in light of the scientific uncertainty, other aspects than science should be taken into account, such as social and ethical concerns (Commission 2000b)[221]. Despite the Commission's desire for uniform interpretation, this use of the precautionary principle gives way – a carte blanche - for arbitrary decision-making (Everson & Vos 2009b, 4), and also has the consequence that no single definition of the principle exists, since the principle depends largely upon its

[220] As referred by Ladeur; "On 11 September 2002, the CFI delivered two important judgments on the role of the precautionary principle **(Pfizer** and **Alpharma).** They confirm the legality of EU Regulation (2821/98) by which the authorization to use certain antibiotics, which include Virginiamycin and Bacitracin zinc as growth promoters, in animal feeding stuff is withdrawn". Cases T-13/99, Pfizer, and T-70/99, Alpharma; cf. also EFTA Court, E-3/00, EFTA. Surveillance Authority v. Norway, [2001] 2 CMLR, 1184 (Ladeur 2003, 1455).

[221] "The precautionary principle is particularly relevant to the management of risk. Decision-makers need to be aware of the degree of uncertainty attached to the results of the evaluation of the available scientific information. Judging what is an "acceptable" level of risk for society is an eminently political responsibility. Decision-makers faced with an unacceptable risk, scientific uncertainty and public concerns have a duty to find answers. Therefore, all these factors have to be taken into consideration", (Commission 2000b, 4)

context of application and the legal culture within which it is embedded (Everson & Vos 2009b, 4s and Fisher 2009, 38ss). Pursuing "a monolithic definition and application of the precautionary principle, and yet acknowledging the socio-economic values impact upon precautionary decision making, the Commission risks failing taking account either of science or of the very series of diverse social and cultural interest it was designed to protect" (Fisher 2009, 38ss and Everson & Vos 2009b, 5).

The strategic transnational concept, based upon deliberative processes of experimental learning brings the precautionary principle further than traditionally applied by the Commission. Precaution is not necessarily only met with scientific facts and assessment; it also involves a deliberative process of risk management ensuring that knowledge is generated, and that all relevant stakeholders are well-informed, involved and encouraged to deliberate on any uncertainty. It is a process that enhances optimal deliberation on knowledge, uncertainty and concerns, and at the same time enhances optimal legitimacy and accountability based upon the broader participatory framework.

Law in traditional sense cannot any longer promote science, or complexity of environmental management (Everson & Vos 2009b, 11). Therefore, in order to get these plural interests into deliberative play, the law and institutions should promote and further strengthen "discursively established legitimacy through procedural values and transparency, participation, independence and excellence" – and based upon "administrative constitutionalism", as will be further discussed in Chapter 12.3 (Everson 1999, Fisher 2009, 21, 25s and 38s, and Everson & Vos 2009b, 10s). The deliberation should encourage participation and openness; this also indicates that "expert bodies should be prepared to talk openly about scientific uncertainty in an approach accessible towards the public", and for the input of comparative evaluations and points, the administration (and the EEA) should stimulate more independent research (van Asselt et al 2009, 383).

Studying the precautionary principle requires an engagement with diversity of context, legal cultures, institutions and ideas of administrative constitutionalism. This leads us to the focus upon the administrative power "as an overlooked aspect of European

integration and the multipolar character of the European administrative system might even turn out to enabling learning processes, mutual comparison, and experimentation with different types of relationships and coordination. Risk decisions have to be situated in a network of inter-relationships with strategies concerning different types of risks and different approaches to the same type of risk formulated within a network of administrators" (Ladeur 2003, 1479 and Fisher 2009, 38s). It follows that the management of risk and decisions on risk itself are part of diversity management, as argued in the introduction. Priorities and goals are "moving targets" and cannot be based upon previously fixed rules. Instead, risk decisions must be managed upon a concept, a structured framework for diversity.

This gives cause for learning processes based upon the merits of networking, which will widen and balance the knowledge base upon which precaution is established (Everson & Vos 2009b, 16).

Therefore, we may conclude that the strategic transnational concept applies to such management of risk and uncertainty by deliberative networking among European administrations. It allows the EEA to stimulate the coordination of different types of decision-making and risk management, and at the same time to undertake its own strategic transnational approach in risk management.

Now, let us turn to the dynamics of the deliberative processes in addressing risk and precaution.

Deliberation is another word for horizontal integration and learning process of public and private interests. It may apply in most regulatory contexts, but is especially relevant in the sense of the recent EU experimental governance in areas involving strategic uncertainty, as a "proactive reaction to the unworkability of the conventional vertical principal-agent relations" (Sabel & Zeitlin 2010b, 25).

Sabel & Zeitlin link experimental governance to deliberative decision-making, as experimental governance takes in "the functional novelty of a regulatory approach

based upon deliberative decision making: actors' initial preferences are transformed through discussion by the force of the better argument. Deliberation in the EU is driven by the discussions and elaboration of persistent difference. Practise and institutions are expected to become more mutually responsive, but not to converge to a single and definitive best practise. So, consensus is correspondingly regarded as provisional as a necessary condition for taking decisions that have to be confronted now, but certainly not the final word of discussion or a reflective equilibrium. The system is directly deliberative because it uses the concrete experiences of the actors' different reactions to current problems to generate novel possibilities for consideration. It is polyarchic because it is a system in which the local units learn from, discipline, and set goals for each other. Therefore, it is especially well-suited to heterogeneous settings, such as the EU, where local units face similar problems, and can learn much from their separate efforts to solve them. In this sense, such deliberative polyarchy is a machine for learning from diversity, thereby transforming an obstacle to closer integration into an asset for achieving it" (Sabel & Zeitlin 2010b, 4ss).

The system of deliberation is "multilevel" as it connects the national administrations and the EU without creating a hierarchy between them, based upon networking combining the advantages of decentralised local experimentation with those of centralised coordination, and so blurring the distinction between centralised and decentralised decisions and administration (Sabel & Zeitlin 2010b, 2, Dehousee 1997 and Chiti 2004).

So, the deliberative process may provide for learning and knowledge generation in complex policy areas, such as environmental law. As we have argued, it also generates norms, which due to their cognitive character eventually may constitute rules or law. Such generation of norms, based upon enhanced private and public deliberation, even goes beyond the framework structure applied by experimental governance. In the "classic" EU experimental governance, such deliberation takes place within a more structured framework - a fundamental design for decision and rule-making, seen for

instance in the Water Framework Directive, which not necessarily calls for broad transnational deliberation of private and public deliberation[222].

Now, in the next part we will turn the focus to the generation of norms as an outcome of the deliberative process constituting cooperative law. However, first it could be asked, why it would be necessary to stimulate such norms to be developed? Why not just leave it for the public administrator and public decision-maker exclusively to formulate for instance environmental law based upon the information obtained by the deliberative processes?

The answer may be found in the mixture of uncertainty and inability of the traditional international or supranational legislators in meeting such demands for complex legislation. Such inability encourages the private actors and markets themselves to develop needed norms (for instance as private cooperative law, as described in the next sections).

Searching for a reason for such inability among legislators, the cause could simply refer to the lack of political will or consensus.

The inability of the traditional government may also be a result of a recent shift in "political sociology from government to governance, as social steering is becoming more a matter of interaction of organizations, networks and associations involving both public and private actors, rather than a product of government control of and intervention in society. As a result from the process of globalisation and differentiation, the state loses its centrality in the activities of traditional government" (Schepel 2005, 11 and 19s). Such globalised processes, and most significantly within the EU, have increasingly led to links and cooperation between administrations, which brings about "a *deterritorialization* or territorial extension of administrative competencies" (Warning

[222] As already described in Part I, the WFD is rather based upon "classic" EU experimental governance, not necessarily transnational in nature. The WFD concerns the following elements (Sabel & Zeitlin 2010b 2s, and Homeyer 2010, 122):

- Establishment of framework goals and metrics
- Elaboration of plans by "low-level" units for achieving them
- Reporting, monitoring, and peer review of results
- Recursive revision of goals, metrics, and procedures in light of implementation experience.

2009, 24). Such implication of the globalised – or transnational – process for national law and institutions will be further discussed in the following Chapter 11.

However, "inability" may be a result of the domestic, international or supranational regulator recognising that the complexity of the market, uncertainty and the management of risk require – or in some cases necessitate – the involvement of the market and its actors in order to provide for knowledge generation, innovative approaches and shared responsibilities.

So, once again, in this way, the involvement of the market and the development of transnational norms constitute a realisation of the precautionary principle as part of risk management and based upon deliberative processes. The traditional legislation takes caution in areas of uncertainty, and postpones the introduction of new rules observing the market reaction in handling such risks and uncertainties. Based upon a deliberated learning phase, the regulator, the administrator and the private market alow knowledge to emerge for their mutual benefits.

Now, let us focus upon the deliberative process in the generation of norms – based upon the transnational dynamics of private and public cooperative law and based upon deliberative transnational processes.

10.1.4 Deliberative process – Generation of Transnational Cooperative law

As earlier argued, cooperative law shall be understood in broad terms referring to cognitive norms evolved upon self-generated transnational deliberation - or a cognitive discursive function (Pattberg 2009, 228). The outcome of such deliberation is accepted cognitive norms, which may apply in a more or less binding form among the transnational actors. Eventually over time, these norms will develop into generally accepted norms for specific private markets or public sectors at domestic and international level. Such norms "stabilise and generalise normative expectations, which constitutes "law"" (Schepel 2005, 404).

For the vision of the strategic transnational concept, the EEA shall coordinate and facilitate the dynamics of transgovernmental deliberation between European administrations, and shall include, facilitate and take advantage of the similar dynamics of relevant private transnational deliberation. As argued later, such combination of public and private transnational governance illustrates that in view of increasing complexity, the distinction between private and public of yesterday is changing. Following the traditional regulatory approach, public governance continues to matters, however, in complex areas often based upon new deliberative partnerships with private governance.

Such interaction between deliberative processes generates knowledge, and generates cognitive norms. In this context, the strategic element of the transnational concept concerns two aspects. First, it allows the EEA, together with the Commission and the Member States, to set goals, plans and strategies for developing new norms within a specific complex policy area. Thus, the strategic transnational concept becomes a deliberate, yet open-ended and flexible instrument in achieving such goals, where the public regulatory can no longer meet these goals on its own. The joint deliberative private and public processes may provide for such norm. Second, the generation of knowledge allows the individual participants – at public and private level – to make strategic decisions of their own in accordance with their own agendas and policy objectives.

These two strategic aspects also relate to the two-fold aim of the transnational strategic concept applied here; the strategic transnational concept stimulates transnational relations, knowledge and norms and may, at the same time, also be used directly by the Community as a deliberate transnational policy instrument. The latter is a direct transnational addition to the current EU experimental approach based upon framework directives and build-in learning processes without set end-goals.

Now, in order to understand the potentials of the vision employed for the generation of cooperative law, we shall learn from the dynamics of private transnational law, and from the dynamics of the Europeanisation process of generating for administrative

norms. This also provides an understanding of the mentioned break-down of the traditional distinction between public and private governance, and the similar diffusion of our understanding of law, as seen with the concept of cooperative law. The purpose is not to provide for a comprehensive analysis of these aspects. Rather, the point is simply to illustrate the universe of private-public interrelation and transnational possibility; a universe that is likely to evolve further in the years to come based upon experimentation and open-minded attitude among public and private actors.

This also concerns the EEA and the strategic transgovernmental concept being applied in the traditional sphere of transnational public governance but redefined understood as integrating private governance. However, the traditional sense of public transnational governance is maintained here, as the organisation and institutionalisation of the EEA and the setting and determination of agenda, goals, planning and strategic determination are solely matters of public governance and public management; i.e. a matter for the EEA, the Commission, and the administrations of the Member States. Such a "classic" public governance approach is justified as the objective of the EEA and the Member States is to pursue public environmental policy. However, such a "classic" public governance approach may involve significant interaction and strategic utilisation of private transitional governance for mutual benefit, and for advancing both public environmental policies and private environmental objectives (see also Ladeur 2003, 1476s).

Now, we will focus upon an understanding of cooperative law as development of cognitive norms.

Private Cooperative Law

> "*As long as we keep out constitutional aspirations and our legal imagination locked in the unity of law and state, we will not only fail to understand the phenomenon of global law conceptually but also fail normatively to grasp the opportunities to enhance its legitimacy*", (Schepel 2005, 413s).

It has been argued "that law, as an instrument of normative ordering, has become more diffuse and is now derived from multiple sources not necessarily limited to the machinery of constitutional lawmaking and exerts validity far beyond the territorial borders of political systems" (Schepel 2005, 11). It has been observed that "clear, corporate governance norms offer themselves as a telling example of legal pluralism, of the transformation of traditional state-originating, official norm-setting in favour of increasingly decentralized, multi-level processes of norm production. At the same time, not only are norms produced on more levels; the nature of these norms themselves changes dramatically" (Zumbansen 2009, 275s)[223].

The appearance of transnational legal patterns is a consequence of the increasingly globalised markets and, as already described, the likewise increasing need for capacity and common understanding in terms of administration and in terms of managing the complexity, uncertainty and risks involved in several of these markets. As the traditional state – or international – regulator has difficulties in meeting the needs for spontaneous new rules or standards following the dynamic private networks of inter-relationship, private exchange relationships have to integrate an element of institution-building, which opens the way for new transnational private governance based upon contractual interrelationship allowing for firms to coordinate in complex risk management (Ladeur 2004b, 5ss and Keohane & Nye 2000, 22, 24ss, and 37). This also leads to the argument that the new phenomena of globalisation do not lead to the generation of "a further "legal plan" beyond the state, as it is the expression of a fundamental change in law, which grasps all its forms and sets out a differential logic of hybridisation, which permits the transcending of competences and perceived boundaries (public/private), the linkage of irreconcilable rationalities and the coordination of hithertofore separated functions. This does not entail the dissolution of a legal order based upon unity and

[223] Applying such corporate governance approach, Calliess defines transnational law as a third category of autonomous legal systems "beyond the traditional dichotomy of domestic law and (public) international law". Transnational law is created and developed by "the law making forces of a global civil society: (1) It is based on (a) general principles of law, derived from a functional comparative analysis of the "common core" of domestic legal systems, and (b) on the usages and customs of the international business community as expressed in standard contract forms and general business conditions, (2) it is administered and developed by private providers of alternative dispute resolution, and (3) it is enforced predominantly by virtue of social sanctions such as reputation and exclusion. Finally, (4) its rules are codified – if at all – in the form of lists of principles, standard contract forms, or codes of conduct proposed by private norm entrepreneurs" (Calliess 2010, 6).

hierarchy, but the emergence of another, which operates with collisions laws in setting plural law" (Ladeur 2011b, 418).

Is has been observed that the EU has been a major driving force behind the spread of transnational private governance, as the existence of highly specialised technical or professional knowledge within the private sector is one major precondition of transnational private governance. (Graz & Nölke 2008, 234s).

In this regard, especially standardisation is being privatised to facilitate the harmonisation of technical standards, also within the EU as addressed earlier in Chapter 4.2. Schepel finds: "The emerging system of private "supranationalism" has both institutional and legal implications. Institutionally, it has caused diminishing powers of the national standardisation bodies – with the exception of the major US standardisation bodies. The redefined role of the national standardisation body is now focused upon the participation in the international process of standardisation, and the adoption and implementation of the results at the national level" (Schepel 2005, 221s and 405). Legally, the process of privatisation and globalisation of standard setting results in "a relatively autonomous system of global lawmaking beyond the state. Even if adopted as national law, a large proportion finds its origin in the global process of standardisation" (Schepel 2005, 405).

As we will further discuss in Chapter 11, it is commonly accepted that these private governance structures and lawmaking bring about a redefinition of the role of the traditional state. Schepel continues: "A tendency of diffusion of governance structures, and of intensified privatisation has been observed, as the market and private actors can approach problems without limits of arbitrary, territorial boundaries imposed on them. This transforms the state into a complex mix of civil and enterprise associations operating on transnational levels. Governance on a global scale is not so much a matter of states but of depoliticised regulatory networks – meaning that the distinction between state and market is becoming less relevant" (Schepel 2005, 21s and 143s).

Focusing upon these changing patterns, Teubner has shown the interaction between the *Lex Mercatoria* and private regimes as a result of an overburdening of the state in the realm of globalisation and global law. Globalisation of law creates "a multitude of decentred lawmaking processes in various sectors of civil society independent of national states" (Teubner 1997a, xiii). Hereupon, a shift in lawmaking from state to civil society actors has been observed (Teubner 1997b, 7ss). Teubner argues that the politics of sovereign states has lost its controlling potential, which makes the process of globalisation highly fragmented. "The fragmentation of world society creates a very peculiar form of global law, which could not be measured against standards of unified national legal systems. Its peculiar characteristics can be explained by the relative absence of political and institutional support on the global level and by its dependency on other globalised social processes" (Teubner 1997a, xiv). In later studies, Teubner has together with Fisher-Lescano further argued that such emerging norms, instead of establishing a unity of global law, are leading to fragmentised global law reflecting the fragmentised global society. In order to resolve and avoid collision of norms and in order for establishing a certain hierarchy of norms, legal orders must engage in decentralised networking, (Fisher-Lescano & Teubner 2004, 1003 and 1117ss). Such fragmentation indicates an increasing legal pluralism, which also presents a break-down of the former distinction between public and private law (Schepel 2005, 31ss).

Need for Public Governance – Need for Public-Private Partnership

It follows that the private governance is useful for its contribution to developing norms. However, the fragmentation and pluralism following private governance also call for strategic coordination, where public policy objectives are involved. Within the environmental field, such coordination may be provided by the strategic transnational concept argued in this Thesis, which eloquently will link the private governance approach to the public governance of the EEA and the transnational networking.

A public governance approach is in general needed, as the private transnational governance has limited ability in addressing major socioeconomic concerns. Private transnational governance typically focuses upon specific sectors, leaving the public

sector the task of "meta-governance"; providing an overarching inter-sectoral framework. Transnational private governance still requires the support of public administration and courts to be implemented (Graz & Nölke 2008, 238, Smismans 2008, 194 and Conzelmann & Wolf 2008, 112s)[224].

Therefore, there is a need for partnership between private and public governance. Again, with the example of standardisation, "an exclusively public law approach to standardisation assumes that the process is political. An exclusive private law approach assumes that the process is economic. But standard setting is inherently both and either; it is a political process that relies on market mechanisms. Standards setters come together; not for civic duties but because they hope to use these standards as marketing tools and hence sell more products" (Schepel 2005, 414).

It follows that actors and addressees differ for both regulatory regimes. Warning presents the differences as "transnational private law concerns civil society actors: the "creators" of transnational private law are societal actors emerging and interacting with economic law, like the *lex mercatoria*. The "creators" in the sphere of transnational public law are public actors referring to transnational administrative networks and international organizations. And the addressees are similar societal actors for transnational private law and states and international organisations for transnational public law" (Warning 2009, 59ss)[225]. The private actors may influence the creation of transnational public law, but ultimately the creation of law is a public effort signalising

[224] Conzelmann & Wolf present five functions of the "meta-governance" to be provided only by the public sector – an analogy may be drawn to the functions of the EEA in its function, support and facilitation of transnational networks involving public and private actors (Conzelmann & Wolf 2008, 113):
"1) The provision and guarantee of the constitutional legal framework for private self-regulation, the functioning of markets, and an open access to the public arena;
2) The shaping of the normative environment of private self-regulation, which can lend legitimacy to the goals of private actors and keep self-regulation geared towards the general good;
3) The facilitation and encouragement of voluntary self-regulation through the maintenance of a credible "shadow of hierarchy";
4) To support the monitoring of self-regulation; and
5) To avoid negative externalities by linking the different sectoral self-regulation efforts between them."

[225] For a distinction between transnational private law and transnational public law, see Warning 2009, 57ss and 176.

that the role of the states is not diminishing, especially within the core areas regulated by the state, such as environmental protection and health (Warning 2009, 171)[226].

Thus, the partnership does not lead to the delegation of public power to private actors. The element of "public" responsibilities and accountability is not given up. Public governance is "to be distinguished from private governance in as much as it focuses, above all systematically on external effects produced as the unintended consequences of private actions. Instead, it tries to stimulate more responsive strategies by private networks of interaction bringing in incentives to develop long-term horizons of decision-making. In this respect, it exercises indirect influence although is does not directly intend to change societal networks" (Ladeur 2004b, 19).

Now, the strategic transnational concept becomes important in combining and utilising private and public knowledge. As formulated by Ladeur: "both private and public organisations now produce knowledge rather than merely using spontaneously generated experience. Not only do "public powers" emerge because state sovereignty has decayed, but the state can no longer claim to regulate the "universal" and undertake lasting graduations in the super- and subordinations of interests. The aspect of creation, of experimenting with new forms of law, of producing new knowledge which does not just fit into the continuity of experience, and the importance of information as a decisive resource, are the most important features of a de-territorialised economy that admits of legal norms only with the close participation of private persons, or supports their self-organisation, merely observed publicly" (Ladeur 2004c, 110s).

Pairing the private governance with public governance is useful, as just described. Also, the involvement of private governance is to be approached strategically by the EEA in the transnational approach. Such strategic involvement adds to the autonomous position of the EEA, as the EEA provides inter-linkages with private transnational governance networks; links that would not easily be obtained by the 27+ Member States administrations alone, or by the Commission on its own.

[226] Warning refers to international chemical management and the development of standards, such as the development of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) and the OECD Test Guidelines.

However, when pairing the private and the public, one must also avoid subjecting the private transnational process to the political and administrative rulemaking that "prevented the political administrative process from producing the social consensus in the first place" – a consensus attributed standardisation as a mechanism on complicated regulatory issues in pairing the "technical" and the "political" in the New Approach. Such approach has according to Schepel favourably prevented legislative bodies from being paralysed by the technical detail and technical bodies from being exposed to political questions. The point has been "that the "political" and the "technical" are not separated by epistemological boundaries but by the social structure of communication in different institutions" (Schepel 2005, 256).

The discussion continues in Chapter 11, on the specific redefined role of public governance and state administration in a globalised economy.

Legal Legitimacy Based on Deliberative Processes

Private and public transnational management is oriented towards an institutional reduction of uncertainty and the creation of cooperation on the basis of common interests. The rise of knowledge is an important resource in particularly enabling complex ties among contracting parties. Whether "the self-organising production of binding effects is to be seen as "law" in the traditional sense, or as mere de facto coercion, is a question of mainly theoretical importance" (Ladeur 2004c, 92s) [227].

Therefore, private transnational governance and the generation of norms may be considered legitimate "law", despite being norms "generated in private associations outside the central political institutions of the constitution and beyond the national state. However, such legitimacy is based upon the same procedural guarantees and requirements as we expect of public regulatory decision-making in order to structure for meaningful social deliberation: transparency, openness, due process, wide and

[227] See the Introduction of the Thesis, on the similar broad concept of norms applied, supra note 11.

meaningful consultation, and institutionalised debate balancing the interest representation" (Schepel 2005, 223 and 413).

Similar, public transnational networking fosters harmonisation of rules and standards, as "the networking among governments (especially agencies) within specific regulatory areas is based upon consensus generating codes, principles or recommendations on this basis. Based upon their advocative character, and bolstered by the authority of the participating actors, these instruments constitute a specific type of "law"" (Slaughter 2004a, 178ss, and Warning 2009, 40). We will describe this further in the following section on *Public Cooperative Law.*

The sheer complexity of technical developments forces government officials to leave important government functions to an expert-driven self-regulation – and at the same time, this delegation of powers favours those private actors that have already accumulated a substantial amount of knowledge resources (Graz & Nölke 2008, 235). As also discussed in the introduction to this Part III, this constitutes somehow a restriction on the democratically legitimated public control over private actors, as transnational private governance in many cases "effectively undermines the free and unrestricted choice of policy options and instruments of individual governments, in spite of the fact that most of these private institutions are somehow supported by intergovernmental or supranational institutions" (Graz & Nölke 2008, 240).

Nevertheless, such scientific expertise is necessary for the enhancement of the deliberation process. Once it is accepted that non-democratic private governance is useful and legitimate *loci* for deliberation of complicated regulatory issues, it must be required that sound deliberation take place. This requires internal norms and procedures of such private governance organisations providing a useful and meaningful framework for deliberative decision-making.

Such conclusion may in similar sense also apply to the non-majoritarian EEA and the transnational deliberative processes involved. Also here internal norms and procedures shall safeguard deliberation. Similarly, the work undertaken by the EEA and the

Scientific Committee resembles the scientific expertise involved in private governance. The same issues of ensuring public legitimacy exist; truly democratic institutions find their public interest embodied within the public institution itself, whereas private bodies – or the non-majoritarian EEA – derive legitimacy safeguarding the public interest by procedural criteria of good governance. As in the case of private governance, the basis of the organisational authority of the EEA is not really democratic, but rather grounded in expertise and experiences and its ability to generate deliberation based upon representation of "diffuse" interests.

Safeguarding deliberation by internal procedures may prove difficult in a truly transnational networking, where deliberation may take place in different public and private fora. Deliberation may take place at the EEA, it may take place within the transgovernmental networking, it may take place at the level of the individual national state, and it may take place within the organisation of the individual participating private and public actors. Due to the horizontal and extraterritorial nature of transnational networking, combined with the integrity of the individual organisation, it appears unlikely to impose a unified procedural framework upon the participants. In the "grey area" and mixed field of public and private governance, such common, imposed procedures would be bound to fail.

This means that the procedural safeguarding of deliberation may be based upon the integrity and quality of the internal framework of the individual participating organisation. Such a coordinated framework of several individual procedural regimes would in principle be workable for the strategic transnational concept advocated here. However, naturally, the overview of the procedural guarantees would most likely be non-transparent and thus jeopardise the overall accountability and legitimacy of the transnational regime causing a major risk to the realisation of the ambitious vision presented in this Thesis.

Also, the transparency is lost in the shift from "government" to "governance", as the very distinction between "governmental and nongovernmental has become blurred, since the real decision-making process now continually involves, and combines, public

and private actors" (Shapiro 2001, 370). There is even a risk that private interests are capturing public administration. As public policy decision-making is diffused among various government and nongovernment actors "in an amorphous, non-rule-defined manner, democratic accountability is in risk of being destroyed and replaced by technocratic regimes in the shadow" (Shapiro 2001, 372s). In this manner, we need to secure the democratic process by other forms of accountable mechanisms.
This need calls for commonly accepted administrative norms safeguarding both the deliberative process and the operation of the non-majoritarian transnational agencies, such as the EEA. As argued in the introduction to this Part III, the EEA and the strategic transnational concept are in need of a structured procedural framework in order to legitimise an accountable deliberative process safeguarding the essential processes of recursive deliberation, being the fundamental element of the strategic transnational concept.

To some extent, such commonly accepted norms are emerging as public cooperative law, or global administrative law generated by transnational relations among administrations, and generated by need. The generation of norms has for long been needed. Initially, the need concerned the implementation of the increasing number of Community substantive rules. However, the need and processes have intensified as a consequence of the European agencification process, which has led to an intensive rise in different administrative cultures of the now 35+ EU agencies, and the increase in transnational networking among European administrations and private and public actors.

Public Cooperative Law

Now, let us in general terms focus upon the specific dynamics of the European agencification, and of the processes of global administrative law relevant for such generation of administrative norms relating to structures for deliberation processes.

The rise in the number of agencies and public administrative networks has for a long time given cause for internal law, for we have learned that modern complex legislation

is often “endorsed by parliaments with such normative gaps that significant discretion is left for agencies to “fill-in” legislators' role in making policy and norms by discretion and administrative decision making” (Shapiro 1999). Shapiro also points out that such internal law does not just concern the internal process norms but also indirectly the substantive outcome constituting law: The factual analysis leads to legal factual cognitive norms. This is apparent for decision-making and regulatory agencies. However, it is also apparent for the “simpler” EU informational agency, such as the EEA, as the outcome of the deliberative process and also of the assessment of information may constitute norms. However, in this section on public cooperative law the focus is upon the first understanding of internal administrative law, which is related to the internal self-generated administrative procedural norms. In the US context, such norms are referred to as law within administration, internal administrative law or “bureaucratic justice” (Mashaw 1983, 1); an internal law for the structuring of the administration itself, but likewise an “external” set of doctrines concerning the rights of citizens to hold administrations accountable in court (Mashaw 1983, 9).

That the law is internal is true in “the superficial sense that it consists primarily of unpublished written instructions and interpretations combined with standard bureaucratic routines and with developmental and decisional practices. Here employed, this law is internal in the more significant sense that it has remained largely unaffected by traditional external legal control through judicial review and by the forms of external legal process” (Mashaw 1983, 213).

Mashaw explains that considering these documents and practices as law is only problematic “from a legal perspective that takes as its rule of recognition the existence of rights enforceable in court. But that internal law exists in the form of norms backed by sanctions and that these norms are recognised and acted upon by the relevant officials seems relatively non-problematic” (Mashaw 1983, 213). Rather, internal law is based upon its cognitive character, and thus not necessarily as enforced by courts. Further, the “quality of administrative justice will not be improved significantly by the substantive or procedural interventions of courts” (Mashaw 1983, 226) –it is rather the repeated, cognitive process that provides the quality; a process that resembles the

outcome of the "competition with cooperation" and the "convincing by the better argument" in the networking process, as we will describe later in this chapter, section 10.2.

"Quality in administrative justice" requires fair and sound deliberation processes. Mashaw points out that the quality depends primarily on how good the management system is at dealing with the set of conflicting demands "that define rational, fair, and efficient adjudication. It must translate vague and conflicting statutory goals into administrable rules, without loosing the true and sometime subtle thrust of the program. It must attempt to ensure that decisions are consistent and that development is adequate, without impairing the discretion necessary individualisation. It must simplify and objectify the data relevant to adjudication in order to direct action and monitor outputs, but without so distorting perception that decision making is in fact divorced from a reality that is also complex and subjective. It must deploy appropriate expertise while screening out inappropriate professional bias. It must balance perceptible administrative costs against the less perceptible costs of error, delay, and demoralization" (Mashaw 1983, 172)[228].

These dynamics of internal law described by Mashaw may also apply to the transgovernmental level among administrations in a transnational context. The European agencification process has also left the EU agencies with normative gaps allowing significant administrative discretion for the European agencies. The same agencification processes are generating for "internal law", understood as a

[228] In the same connection, Schepel provides a comprehensive reference to US administrative law; to the informal and negotiated rulemaking in the view of the Administrative Procedure Act (APA), Schepel 2005, 77ss. Further, Schepel states at 145ss and 176 that a variant of such internal administrative law even concerns the specific set of procedural administrative rules for private standardisation bodies. Judicial review "demands of the public agency to keep the standardisation process under review and holds the agency accountable for that review of the fairness and the scientific validity of that process." Schepel finds that "The review falls short of demanding that the agency subject the standard body to the same standard for review as courts impose on agencies; rather, standard bodies should be expected to discipline themselves according to a set of procedural rules, an "internal administrative law" of sorts geared specifically to the exigencies of standardisation. Standard bodies have an enormous incentive to co-operate and adjust their procedures according to such a conception of induced "public-regardingness"; standards that are incorporated into regulatory frameworks are far more economically useful than standards that are not, and incomparably preferable to public standards. Agencies are to limit themselves to procedural review and satisfy themselves that the standards body has adopted the standard in accordance with its own internal rules" (Schepel 2005, 284).

Europeanisation of administrative norms generated as a result of the interrelations, or cooperation among administrations. This constitutes cooperative law and is part of the related process of a progressing global administrative law.

As described in the introduction to Part III, the process of global administrative law has emerged as a reaction to the needs of administrations in transnational context providing common administrative references for transnational administrative networking (Ladeur 2009, 2010, 2011a and 2011b, 410ss, Caranta 2009, Hofmann 2009, Schout & Jordan 2008, Harlow 2006, Esty 2006, and Kingsbury et al 2005). Such rules typically emerge from "the bottom" encouraged by administrative need and internal processes[229].

The foremost dynamics of the development of global administrative law, as seen in the Europeanisation of administrative law, are based upon the incentives made by the agencies themselves. Cooperation, interrelationship and interdependency among national European agencies and administrations have risen in the last decades as a consequence of the implementation and complexity of the increasing number of Community and international substantive law. This also indicates that the national agencies and EU agencies alike face the same problems and administrative needs in the implementation and harmonisation of Community law. In addition to the transgovernmental relations among national agencies, the EU agencification process has added an extra layer of 35+ EU agencies, all with prescribed transnational networking of their own involving the Community, the particular agency itself, and the Member State administrations[230].

This has created a web of transnational relations, links and constellations of formal and informal character. These transnational networks have dynamically empowered national agencies and administrations with innovative roles to play in the development of knowledge and norms at national, transnational and supranational level (Egeberg & Trondal 2009). Such dynamic transnational performance may lead to relative, domestic

[229] The earlier focus upon the development of EU administrative norms addressed primarily the "judge-made law" of the ECJ, and not the transnational networking, see Chiti 1995.
[230] On the transformation and the pluralistic of European administrative norms and the related development of EU agencies, see Harlow 2011, Shapiro 1999, 30, Chiti 2004, 438 and Saurer 2009.

independency of national regulatory agencies. As Martens observes; "An informal penetration, fuelled by faster electronic technology, is taking place between the European Commission and the regulatory agencies, and as a consequence of the agencification processes largely outside the control of the domestic politico-administrative leadership. Due to their relative autonomy, the national regulatory agencies are well placed to work 'double-hatted' in the sense that they interact directly with the European Commission at the same time as they perform traditional tasks as agents of national ministries" (Martens 2008).

These processes may appear rather confusing, and may give cause for concerns about transparency and accountability in the different administrative cultures of the 35+ EU agencies, and of the agencies in the 27 Member States[231]. Also, perhaps the harmonisation of Member States' administrative procedural laws is a particularly troublesome area due to the unique legal administrative context of each individual state? Ladeur has earlier observed such basic problems analysing the harmonisation of Member States' administrative procedural laws with the requirements of specific European administrative law "as the problems arising in national law and the requirements of adapting the two legal spheres to each other" (Ladeur 2002b, 2).

However, we also observe that the dynamics of the many constellations constitute a breading ground for innovation, learning processes, experimental approaches, and development of cooperative law. Hereby, the EU agencification process becomes directly instrumental in the generation of innovative cooperative administrative norms, and also instrumental in bringing about new directions in Community law and governance. Such processes recognise diversity and pluralism as strength rather than weakness in EU law. The objective would be "a gradual convergence inside a common "European administrative space" achieved through the methodology of soft governance" (Harlow 2011, 455ss and 464). The development of a Europeanised general administrative law is a learning process at the national levels (Ladeur 2002b, 2s

[231] Saurer argues that as a result of the lack of unifying provisions in the EU treaty framework, the accountability regimes of the agencies are remarkably diverse. Unifying provisions have now been established by the new Treaty of Lisbon granting access to agency documents and judicial review against agency action. To that extent, it represents a remarkable unification of the currently very diverse accountability regimes for EU agencies (Saurer 2009, 487s.).

and Ladeur 2009, 215ss). Such Europeanised administrative norms or law is effecting the individual national administrative legal orders, addressing "the legitimate expectations of coordinated specific European administrative law for the implementation of EC law - not be confused with the other categories of general administrative law in the European system; the general administrative law of the EEC, and the national general administrative law of the Member States" (Ladeur 2009, 222ss).

These dynamics of cooperative law constitute the rationale of the EEA strategic transnational concept as presented by this Thesis. Also, cooperative law is not just instrumental in generating for a Europeanised administrative law; it also provides for a third level of Community integration based upon transnational cooperative law, neither national law nor community law - a third level of EU integration based upon the same dynamics of the agencification process as described above. This will be further presented in the following section.

10.1.5 A Third Level of EU Integration

As already argued in the introduction to Part III, the rationale of the third level of EU integration is found "in between" the traditional harmonisation based upon supranational law and national law.

The three levels of EU integration are not mutually exclusive and easily refer to each other. The transnational concept may be utilised explicitly by the supranational Community in order to generate for Community harmonisation. Likewise, national levels may apply the concept in order to gain knowledge for the development of national law and harmonisation. Thus, the attractive rationale of the strategic transnational concept is found in its ability to manage sovereignty of national states and of supranational institutions, i.e. the institutional prerogatives of the Commission. Such an approach makes it easier for states to operate and cooperate, as national sovereignty is less threatened, and it likewise makes it easier for the Commission to operate and cooperate, as the TEU institutional balance is respected. Therefore, the strategic

transnational concept is attractive for the supranational level, and also for the national level.

Applying such approach, the EEA will gain legitimacy escaping the risk of instrumental use by the Commission. Also, by allowing a truly strategic autonomous EEA, the Commission will gain legitimacy, as the Commission will emphasise its use of truly independent information.

The strategic transnational concept differs from other "third way" deliberative models and brings about a rationality, or autonomy, of the strategic transnational concept unique among such other deliberative approaches.
Let us have a look at the positioning of these "false friends" of deliberative transnational character, first at supranational and then at national levels. Again, the positioning is related to the decision-making powers at supranational and national levels within the Community.

First, at the supranational level deliberative transnational models are applied for generating decision-making at Community level. This implies an instrumental use of such deliberative processes orchestrated by the Commission. An example hereof includes the instrumental use of the EEA as described in Part II, and it also includes the instrumental use of the more regulatory EU agencies, such as the Medical Agency and its direct role in EU decision-making processes. And finally, it includes the instrumental use of Comitology. As will be analysed later in this chapter, Comitology may apply transnational relations integrating Member State administrations. However, Comitology is focused upon supranational settings and decision-making rather than knowledge generation and deliberation geared for a multi-polar European administration. In the words of Ladeur: "The transnational processes and cognitive norms do not derive legitimacy through the force of "arguments" in reaching Community decisions, but rather from their "preservation" in practice, which can only be understood partially as "discursively" based upon comparison of the different logics of the generation and operation of knowledge and uncertainty allowing for the organisation of productive competition between institutions" (Ladeur 2009, 230). Also, the transnational processes

are, like EU experimental governance and the OMC, characterised by "the absence of a formalised legal framework, which instead creates a structural basis for the de-differentiation processes". This is in contrast to the operational mode of Comitology relying upon a detailed procedural framework (Kjaer 2011, 103).

Second, at the national level states are formulating a model of deliberative transnational process that attempts to escape the increasing instrumental use of the Commission and at the same time embody the Subsidiarity principle, TEU Article 5[232]. Such development is addressed in Part I referring to the examples of the Common Implementation Strategy (CIS) established by Member States administrations in support of the implementation of the WFD, and to the Europeanised telecommunication law, and the recent Body of European Regulators of Electronic Communications (BEREC). The transnational approach of the Europeanised telecommunication introduces "new variants of *ex ante* participation of authorities of other Member States in state administrative law processes. The national telecommunication regulator or administrator (NRA) is obliged to consider, as far as possible, the stances of other regulating bodies. This is an intensive form of mutual binding, which is strongly influenced by the position of the Commission. However, this variant of a European administration is geared towards a relatively unified decision-making practice, and can, therefore, not be informative for a multipolar European administration" (Ladeur 2009, 234). Also, BEREC's opinions, advice, recommendations, guidelines and best practices are not binding for the NRAs and the Commission; they simply "shall take them into consideration ("utmost account"), but they do not need to explain how they have done this (Art. 3 para. 2 BEREC Regulation). Nothing is said about how other European institutions take account of BEREC's opinions" (Falke & Batura 2011).

In such a system, most regulatory responsibilities would be left with the Member States and the actors directly affected by a given problem. The role of the EU would be to

[232] Such new directions for the Subsidiarity principle are needed. As Ladeur points out, the Subsidiarity principle of today "is prescribed in a one-dimensional manner, which is exclusively orientated towards the unified implementation of EC law, and disregards the practical possibilities of the variety and the learning in a legal order, which is understood as being decentralised. The Subsidiarity principle has, in the practice of the supranational institutions of the EC, practically reversed itself; it has been transformed into a presumptive rule for the effect utile of a uniformity of EC law "(Ladeur 2009, 237).

monitor the national regulators. Eventually, the Member States could rely on information exchange and rely on international standards or self-regulation "where the functional requirements of the common market require some type of *ex ante* harmonisation". Ultimately, a "centralised top-down approach would be an option of last resort" (Majone 2009, 191).

Now, the strategic transnational concept differs from these two models of deliberation based upon supranationalism and Subsidiarity. The third level of integration and the strategic transnational concept are an attempt to escape both supranationalism and Subsidiarity in their meaning of getting in the way of the dynamic processes of the multipolar European administration. The development of cooperative law presents an innovative way to activate and utilise national influences. This represents a bottom-up integration based upon "a European-wide administrative network, which escapes the debate of Community competences versus Member States' sovereignty, and related, alters the related distinction between negative and positive integration", as it will be described in the following Chapter 10.3 on EU conformity (Schepel 2005, 72s).

Also, such third level of integration brings new legitimacy for the EU as "an association of states, which is in need of a new type of law of collisions; a law that addresses the collisions between national and supranational laws, as well as the absence of a general legal order, or the integration function of a constitution as in a federation of states" (Ladeur 2011b, 400). In the realm of "the European multilevel system, or rather, the European network of overlapping legal orders, this new type of collisions law differs from the traditional hierarchical legal order within the supranational EU, as it actively concerns heterarchical legal relationships in a European multipolar legal system. It is cooperative law also developed for the interests of the supranational level directed toward the porosity of national law. It is an approach towards the permeability of other legal orders and also towards cooperation with those legal orders" (Ladeur 2011b, 403ss).

Based upon the dynamics of the European agencification process, the third level of EU integration based upon cooperative law comes close to the related concept of

“decentralised integration” being the process of administrative integration between supranational and national public authorities, through which a Community function can be carried out by two different authorities acting (Chiti 2004, 437s). Also relevant for the strategic transnational concept, is has been suggested that it is “precisely because of administrative pluralisation and the creation of "European agencies" in an institutional context that such models provide numerous opportunities for the development of a sophisticated model for administrative action. This model, in particular, could be capable of providing a positive response to the challenges posed by the various problems connected with the current state of development of the Community order, as well as the many questions connected with the exercise of modern administrative activities” (Chiti 2004, 438).

The EEA plays a significant role in such integration based upon dynamic agencification. The third level of EU integration provides the EEA with strategic autonomy, as the transnational interaction is in need of “transnational moderation, oversight and order for practical use. Such facilitating role requires an institution that brings about the particularities of the pluralisation of the public interest in a heteronomous association of states; a function not to be undertaken by the Commission due to its supranational own interests” (Ladeur 2009, 232ss). As argued earlier, the EEA would perform such role as the lead transnational environmental institution, as it already reflects the transnational and pluralistic approach. Also, as we will analyse later, the current framework of the Agency, with some adjustments, may be able to provide such support.

Also, the third level allows for strategic information on all levels. It allows the Member States to target information for own needs. It allows the EEA to target information to specific needs. It allows the Commission to utilise such transnational processes for the development of Community law. In addition, it allows the EEA to take strategic advantage of the institutional competitive nature of the transnational network in order to generate knowledge, and to combine this with an even greater global context; a “network of the networks”.

In this context, elements of the decision-making processes of the three models of supranational, national and transnational harmonisation may be combined, as the deliberative processes of the three models are not mutually exclusive.

The autonomous position of the strategic transnational concept even distances itself from its closest relatives, the OMC and the EU experimental governance. As already discussed in Part I, the strategic transnational concept is part of the experimental approach, but adds a truly transnational dimension to the current approach. It appears that such deliberate transnational processes are rather absent in the actual realisation of the environmental OMC. The strategic transnational concept also allows for knowledge and learning in a broader structural manner involving private and public deliberations. The strategic transnational concept also applies framework directives in broader manners compared to OMC-inspired framework directives, such as the WFD. The relative stringent structure of the EU framework directives, the WFD included, does little in generating for cognitive norms in a "lower-level" transnational manner among administrations of different Member States. Instead, the process focuses primarily upon the Community level. Hereby, the OMC is at risk of falling into the instrumental use of the Community. The strategic transnational concept is an attempt to redirect the orientation of the experimental governance approach, and of the OMC, in becoming experimental beyond the narrowly defined objectives of the Community. The virtue of the strategic transnational concept is that it aims broader allowing for true European processes in addition to Community processes.

10.2 Incentives – Transnational Networking

So far we have learned that the incentives of the strategic transnational concept concern the management of complexity, risk and uncertainty, and the related generation of knowledge. We have also learned that deliberation of knowledge in horizontal networking brings about needed learning processes. Further, Part I described that horizontal environmental law and transnational networking is a response to the failures of the traditional vertical command and control regulation of the past.

Now, we will have a look at the more specific incentives for the participation in transnational networking. Why and how is transnational networking attractive for weak and strong actors alike; weak and strong in terms of resources and influence? Also, why is the "soft" transnational networking among states (and their sub-units) in international environmental law a promising governing tool?

Such questions relate to the rationale of transnational networking of it own. It is a mix of rather "classic" arguments for networking in the context of the strategic transnational concept.

As presented so far, the transnational concept could be criticised for being rather optimistic presupposing a world of regional equality and a willingness to interact at the international level sharing exiting resources. Naturally, such a world order does not always exist.

Successful transnational interaction requires, like optimal networking, a certain degree of incentive or actors to participate actively and voluntarily.

The following discussions address such incentives for participation.

10.2.1 A supplementary Regulatory Model

As already stated, the strategic transnational concept presents a supplement to other regulatory models available. This means that the incentives involved the transnational models take part of the variety of incentives and regulatory possibilities available. Of course, it is a matter of individual choice, which model to choose depending upon the needs of the particular regime and the individual actor. As it will be illustrated below, even resource-strong nations may find the transnational model favourable.

The added value of the transnational vision is to link innovative new forms of networking to the productive management and development of environmental law. Again, it is not supposed to challenge existing regulatory models following

environmental law of today but rather present itself as a supplement to the existing regulatory models.

Likewise, the strategic transnational concept will not displace the traditional supranational or international organisations. Instead, the transnational concept will appeal to such organisations as part of the ongoing institutional reforms they undertake, answering to the changing demands related to globalisation. These organisations may encourage and arrange for the inclusion of transnational interaction in order to obtain useful information and to generate new rules and standards, which may eventually be endorsed and incorporated by the same organisations. It will appear that both the international organisations and the transnational networks depend upon each other[233].

10.2.2 Environmental Management – a Soft Policy Area

In principle, the problems relating to the complexity and compliance of environmental law should provide enough incentive for states to encourage the vision of global regulatory regimes and organisations. A fully competent regulatory environmental organisation should undertake supervision and reporting on non-compliance, be able to conduct on-site inspection without any warning, direct (enforce) transfer of necessary technologies and know-how to less developed countries and should be able to impose enforcement and sanctions in case of non-compliance.

However, such legal autonomy collides with the political reality. As already argued earlier in Part II, such executive powers conflict with the sovereignty of the states and also, in terms of the EEA, conflict with the TEU institutional balance. Such attempts in the environmental field may lead to dead-locked situations and therefore constitute an obstacle to the creation of a fully regulatory international environmental institution, such as an EU equivalent to the US EPA, or a new and powerful Global Environmental Organisation (GEO) (see Birnie, Boyle & Redgwell 2009, 69ss, Palmer 1992, Esty 1994, Ayling 1997, Esty & Ivanova 2001 and DiMento 2003, 164).

[233] Warning presents the example from the international management of chemicals. Standardisation is left for transnational networks to emerge and subsequently, the standards are being adopted by the international regimes, Warning 2009, 173ss.

Naturally, this does not mean that the visions on a regulatory EEA or GEO are without meaning. The debate is necessary in order to maintain the political observance on possible future models. Also, as the environmental problems increase, there are good reasons for "pushing" for the establishment of such organisations. However, such discussions are outside the scope of this Thesis.

Certain policy areas allow for strong autonomous global institutions with significant executive powers. However, so far, such regulatory powers are only seen in "hard" policy areas of high political interest and intensity, which overrule even domestic interest. The best-known areas are perhaps anti-trust law, which is even allocated extraterritorial jurisdiction in the US and the EU, nuclear safety and the common EU agriculture and fishery policies. In contrast, the international environmental law is a "soft" regime, which has so far experienced national hesitation in establishing any global or supranational environmental authority. Perhaps the Commission's environmental directorate, the DGXI, is the closest we get to a global (or rather, a regional) environmental regulatory body – but it is also the inabilities and difficulties of the same DG that have sparked the starting point of this Thesis, in arguing for alternative transnational models in addition to the supranational approach.

So, the misfortune of international environmental law is its "soft" political position. This has two implications: first, that the environmental agenda is at risk of losing out in political prioritisation when confronted with harder policy areas; second, that a "soft" policy area shall take advantage of soft policy power incentives[234].

[234] For the definition of "soft" power, see Nye 2004, 5-32. Within international relations, Nye argues that soft powers rest on three resources of the state; its culture, its political values, and its foreign policy, Nye 2004, 11 and 44ss. Nye continues that soft powers are becoming more important in the information age, being in part a social and economic by-product rather than solely a result of official government action, Nye at 32. The analyses made by Nye address foremost the use of soft powers in international relations in addition to the traditional hard powers, typically based upon economic and military powers, in order to legitimate international activities and influence.
This Thesis applies such understanding of soft power – or soft regimes - in a broad context as a deliberate, applied mechanism by "official government" in the following four ways: First, soft powers are applied in the transnational networking as part of the horizontal bargaining or "persuasion" among the participants. Second, the process of transnational law may be based upon soft power, which includes instruments of soft law. Third, soft power means and goals are interrelated; soft powers concern not only the resources available; it also refers to any specific soft policy area, which is in need of soft regulatory mechanisms. Fourth, hard and soft powers interplay as states apply both avenues achieving their policy

When prioritising the resources available at the national level, environmental law is in constant danger of being "out manoeuvred" by "harder" policy areas, which may enjoy more public support and/or direct and short-termed benefits in measurable terms. Such prioritisation is illustrated by the different international reactions to two major global challenges: the climate challenge and the current financial crisis. The recent tumult following the 2009 COP 15 in Copenhagen[235], and the modest progress at the succeeding 2010 COP 16 in Cancun [236] and 2011 COP 17 in Durban[237] illustrates that the international community has yet to agree on an international agreement in order to meet the climate challenge. In contrast, the EU and world leaders have met several times, successfully agreeing on EU and international regulatory and financial mechanisms addressing the turmoil of the Euro and the global economy[238]. This is of course not to say whether these financial mechanisms will work, but it illustrates that the political willingness and determination relating to the "hard" policy area of the global economy make solutions possible. Such willingness and determination do not yet exist with regard to the "softer" policies of the environment and the climate.

Transnational networking is a soft policy instrument in global environmental law. As described in the earlier sections, the transnational model offers a productive solution by allowing an international system to improve compliance and enforcement and at the same time manage the controversial issues of sovereignty and national self-interest (see also Ladeur 2000, 282). The transnational model is specifically well-suited for

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objectives, Nye 2004 at 25ss. Such interplay, or "hybrid", between hard and soft powers is also a central element of the strategic transnational concept; the soft transnational regime shall link to the hard regulatory regime as a "hybrid", see further in Chapter 12.2.2

[235] On COP 15, see http://www.iisd.ca/recent/recentmeetings.aspx?id=5&year=2009.

[236] On the COP 16, see http://www.iisd.ca/recent/recentmeetings.aspx?id=5&year=2010.

[237] On the COP 17, see http://www.cop17-cmp7durban.com/ and http://www.iisd.ca/recent/recentmeetings.aspx?id=5&year=2011.

[238] The successive financial assistance as provided by the EU and the IMF to Greece in 2011 and 2012 illustrates the point.
In addition, the EU's finance ministers adopted 9 May 2010 a regulation establishing a European financial stabilisation mechanism with a total volume of up to 500 billion Euros. The mechanism is part of a comprehensive package of measures to redress the financial situation in Europe, see http://www.consilium.europa.eu/homepage/showfocus.aspx?lang=en&focusID=66189
Also, the EU leaders agreed on 16 December 2010 on EU agrees to create a permanent financial "safety net" of a permanent financial fund for stabilising the Euro, European Council, 16-17 December 2010, Conclusions, EUCO 30/1/10 REV 1, CO EUR 21, CONCL 5, Brussels, 25 January 2011. See http://www.telegraph.co.uk/finance/financialcrisis/8208312/EU-agrees-to-create-permanent-financial-saftety-net.html

regulating such "soft" regimes where little political willingness exists for establishing institutions with regulatory powers. Therefore, international environmental law should, especially where the national self-interest is high, apply a horizontal and transnational approach in organised and systematised legal and institutional frames. In other words, a vertical supranational regime operates efficiently in policy areas of low national sensitivity, whereas policy areas of higher national sensitivity require a horizontal transnational regime.

That transnational management is best suited for the soft policy areas, and that soft policy areas depend upon open deliberation processes, is illustrated by the numbers of the participating transnational actors, understood as civil society. It has been observed that the number of participants in environmental policy is high. Also human right protection depends upon a high number of participants. Security policy is characterised by medium/low participation, whereas financial management attracts or allows for a low number of transnational actors (Steffek 2010, 72s and 75s, and Jönsson & Tallberg 2010, 13 and 239). These trends are sustained by the lack of openness and access to decision-making for NGOs within the WTO, and problems of accessibility at the IMF. These problems are in contrast to the relative openness at the UNEP and the World Bank (Vifell 2010, 114ss, 124s, and 126ss and Jönsson & Tallberg 2010, 14, 238, 240 and 243).

Also, as multilateral environmental treaties have become more complex, an increasing interest in engaging transnational actors may be observed because of the expertise they can offer. Such inclusion is typically seen in the phases of policy formulation and implementation and not in decision-making and enforcement, which involve high sovereignty costs and fewer functional benefits from private actor participation (Green 2010, 170 and Jönsson & Tallberg 2010, 241).

It may be concluded that states and other sovereign actors feel greater incentive to engage in soft policy areas, such as international environmental law, based upon transnational governance.

The aspects of the soft approach are further discussed under the authority of the EEA in Chapter 12.

10.2.3 Incentives Based on Network Dynamics

Now, we will have a look at the more specific functional dynamics, which are attributed incentives for the participation in transnational networking. This relates to the rationale of transnational networking of it own. It is a mix of rather "classic" arguments for networking in the context of the strategic transnational concept.

As Louka describes, networking in international relations may have found its way based upon "the rather anarchistic setting of the international arena; the reluctance to use force, the absence of a centralised enforcement authority, reciprocity, and cooperative patterns of behaviour make the international arena look like alternating from hierarchy to coarchy. Therefore, states find themselves involved in dynamic networking, and in the parlance of game theory, states find themselves captured in repeated games in which the number of players is limited. Such players usually possess quite substantial information about the past performance of other players, especially that of players affecting their interests" (Louka 2006, 10).

The Rationale of Transnational Networking

The overall legitimacy of transnational networking concerns the excepted successful outcome, achieved by stimulating an integrated, horizontal and open management culture. The used of networking allows for a valuable integration of the stakeholders, and also for the delegating of functions, competencies and responsibilities, if possible and useful for the process. Besides information obtained, the individual participants may also experience a consolidation, even a strengthening of his/her general position in the market, such as a strengthened economic market position, or a stronger political influence and recognition.

In overall terms, the network is an organisation of "persistent, high density and informal system of exchange between embedded social agents. As an organizational form, three

main features may characterize networks. First, in a network roles and functions are performed voluntarily, thus they are more flexible than those established by hierarchies. Second, as tools of social coordination, networks assure coordination through dialogical social practices wherein people and groups have opportunity to express their opinions, revise their preference and beliefs and reach collectively binding deliberations regarding the course of action to undertake. Finally, networks supply a system of individual incentives other than those employed by hierarchies and market" (Bellamy & Palumbo 2010, xvii).

The overall motivation for networking is, as mentioned, the expected outcome. Network interactions between actors are supposed to increase common knowledge and to reduce uncertainty. Also, in contrast to formal and hierarchical "command-and-control" regulation, networks are typically based on informality and horizontal cooperation without any predominant structure or supranational authoritarian body, and are driven by the voluntary cooperation and mutual interest of participating actors (Ladeur 1996a, 12; Majone 1995, 13 and 22). It follows that networking has a synergy of its own based on a mutual interest of each participant to obtain valuable information. The participant's reputation is directly linked to credible, continuous and reliable interactions within the network, especially among equal and likeminded partners. In principle, a network among equal partners puts "competitive" pressure on the individual state to comply with internal norms as falling behind is less desirable. Also, based upon game theory it is to be expected that the individual participating actor at the same time will optimise compliance rate and active participation in order to maintain a positive reputation in the networking.

Thus, networking not only allows for a more efficient division of labour and exchange of information and other resources, but can also stimulate and promote the quality of the outcome and the networking itself due to the parties' credibility and reputation in the repeated transactions (Bailey 1997; Ladeur 1996a, Ladeur 1996b, Ladeur 1998; Majone 1995, 22 and Majone 1997, 272). Reputation arises in the context of repeated successful interactions. Reputation seems to be quite important under the lower levels of government, because of the frequent interactions that take place (Majone 2005, 175).

Similarly, teamwork enhances reputation and creditability. As Majone describes, a single actor may be weak on his own but stronger in a group. "Any member of the group is open to peer pressure in a setting and thus places him or herself in a situation where pride and self-respect are lost when commitments are broken." A European regulatory agency that sees itself as part of a transnational network of institutions pursuing similar objectives and facing similar problems, rather than as part of a general bureaucracy pursuing a variety of objectives, is more motivated than an isolated agency to defend its policy commitments and/or professional standards against external influences, and to cooperate in good faith with the other members of the network. "This is because the agency executives have an incentive to maintain their reputation in the eyes of their colleagues from the other Member States. Unprofessional, selfish, or politically motivated behaviour would compromise its international reputation and make cooperation more difficult to achieve in the future. Thus, the function of a network is not only to diffuse information and to permit an efficient division of labour and exchange of information but also to act as an extended peer group, and to facilitate the development of behavioural standards and working practices that create shared expectations enhancing the effectiveness of the social mechanisms of reputation enforcement. This is one reason why networks are such pervasive features of intensive transgovernmentalism" (Majone 2005, 101 and 176).

Strength through teamwork is sustained by the "economic theory of clubs". The theory suggests that "innovation, regulatory competition and policy learning is more likely to take place in a decentralised system between local communities, or transnational networks, than between monolithic national governments" (Majone 2009, 222 and 224)[239]. The economic theory of clubs "emphasises the advantages of institutional pluralism, and implies that an efficient assignment of tasks between different levels of government need not coincide with existing national boundaries: There may be significant externalities and a need for coordination between regions within a country or groups of countries" (Majone 2009, 229s).

[239] For further definition of the economic *Theory of Clubs*, see Majone 2009, 219 with reference to literature.

Such a decentralised teamwork approach would be advantageous for networking based upon a small number of participants, among like-minded and equal participants and within a limited geographic and/or cultural scope. As within any other confined and intimate community, such as work places and within families, these "inner" networks encourage repeated, reliable and high performance based upon competitiveness and a desire to improve the community. However, the "*proof of the pudding is in the eating*". Networking also takes place between actors with significantly different backgrounds and little common interests besides the interest in solving a common specific problem. As long as the networking is being perceived beneficial from the point of self-interest by each participating actor, such wider networking may occur among actors facing similar problems.

EU Transnational Networking

Following the idea of decentralised teamwork, transnational networking has become valuable in the confined setting of the EU. As described in Part I, "regulation by networking", based upon looser and more informal interactions between national government officials, is increasingly necessary to implement EC policies (Dehousse 1997).

Networking is part of the EU experimental governance approach. Networking may be considered as an extension of the formal EU hierarchical decision-making processes. Sabel & Zeitlin describe networking as "bargaining in the shadow of the state" aiming at reaching solutions not directly available to the authorities themselves. Participation is motivated in decision-making because the actors can calculate what they will gain by bargaining in the shadow of hierarchy over the alternative outcome that would be imposed by the authorities themselves (Sabel & Zeitlin 2010b, 14s).

Confined networking within the EU may increase credibility as well. Majone observes that policies that might be politically unfeasible in the EU at large might be acceptable to the members of a smaller, more homogeneous subset. Instead of compromise solutions that do not really satisfy anyone, genuine policy innovations would thus

become viable and other members of the Union could later draw lessons from the practical experiences of the pioneering states. "In this way based upon "competition with cooperation", the clubs forming within the Union could effectively become policy laboratories, without the bureaucratic complications and background noise that necessarily arise when all Member States participate in the experiment, as in the case of the OMC" (Majone 2005, 176s and Majone 2009, 222)[240].

Majone goes even further suggesting that the information networking and adaptive behaviour by the "club members" can, under certain conditions, replace central coordination by "*coordination by mutual adjustment*". A group can perform a collective task without a central coordinator, provided that each individual adjusts himself or herself to the state of affairs resulting from the actions of the other members of the group. This requires that the information about the state of affairs in question is available to each member of the club. Majone further explains that; "the balancing or coordination of each autonomous decision centre would become a polycentric task adjusting each action to the results achieved by all other centres in the set. This is achieved, not by centralised coordination, but rather by each individual centre reacting to the whole range of signals that reach it from all the parts of the system, which it takes into account. Each centre evaluates the joint significance of the signals, and thus guided all centres collectively produce a solution to the polycentric task, or achieve, at any rate, a measure of success in this direction". By *coordination by mutual adjustment,* European integration based upon information exchange can facilitate a decentralised and yet coordinated approach to collective problem-solving by the EU Member States, which is "an essential for the learning process of the OMC and related "New Governance" approach, which by means of information exchange, benchmarking, evolution, and peer review of the result, should lead to policy coordination through mutual adjustment" (Majone 2005, 172s)[241].

[240] In some manners, the "competition with cooperation" is a return to the trans-regional networks' application of medieval European urban law, especially of the competing German cities, where urban communities in different countries had more in common with one another than they had with the respective countries in which they were situated (Majone 2009, 227).
[241] For further definition of the model of *coordination by mutual adjustment*, developed by Michael Polanyi, see Majone 2005, 172s.

However, in terms of the strategic transnational concept such "coordination by mutual adjustment" may not work effectively without a central coordinator. Without such coordination of the transnational networking, the European integration process will be at risk. It is true that "coordination by mutual adjustment" already takes place today in many network relations in both the private and the public sphere. Also, it is true that the Community can learn by observing, or perhaps joining such "un-coordinated" networking. However, let us not forget that the EU experimental governance approach, the OMC, and the strategic transnational concept addressed in this Thesis are also instruments for enhancing *EU* integrations and harmonisation. The strategic transnational concept also addresses the individual actors in enhancing their own agenda, but when focusing upon further EU harmonisation and integration, coordination is needed. As stated just above, the OMC is not an alternative but rather an extension of the decision-making processes of the EU. The same is the case for the strategic transnational concept.

Therefore, coordination is a central element of the strategic transnational concept, and a central coordinator is called for in order to provide for the overall strategic framework in transnational networking. Without such a coordinated strategic framework the underlying strategies are at risk of getting lost in the myriads of interests involved in networking, even with a small group of homogeneous members. In order to escape the risk of being captured by special interests, such coordinator must operate independently and separately from the influences of EU institutions as well as participating actors. Such need for an independent coordinator justifies the autonomous strategic position of the coordinator, such as the EEA.

Also, central coordination is called for as networking can be a rough, competitive setting. Participation in EU networks may not be free and voluntary as EU networks set out in binding EU legislation typically require the participation of states and also, more or less directly, of other actors. Thus, the EU networks, such as the environmental networks EIONET, INSPIRE and SEIS, cannot boost incentives based upon a truly voluntary approach. Often, states have no choice other than to participate and to obey the behaviour patterns of networking set by more or less formal structures and by the

influence actually imposed by stronger participants. Therefore, in order to ensure a fair playing field, especially in the EU context, a central network coordinator is needed, as it will be address below concerning equality in networking.

However, this is not to say that the strategic transnational concept cannot include a productive use of the model of *coordination by mutual adjustment.* The EEA shall act as the lead coordinating and facilitating transnational institution, and in the mix of possible transnational interactions between national administrations, the EEA shall learn when to stay clear, when to facilitate, and when to coordinate the networking actively.

Now, concluding on the incentives of network dynamics it follows from the above that networking and the behaviour of the participants are determined by the specific circumstances aligned to the network in question. In reality, networks can be more or less open to participation, and the interrelationship between the participants can be more or less equal. As long as such realities are clear and taken into account by the participants, these aspects do no necessarily cause problems for the realisation of the vision of networking or for transnational interaction. For instance, as will be discussed later, the EEA acknowledges that a current problem for the Agency is to scrutinise and coordinate all the information provided in the networking. Such aspects will be further discussed in Chapter 12.4 linked to the general issue of accountability and the issue of balancing and coordinating access to networking and the degree of equality among the network participants. Such management is important for ensuring the best possible interest for, input to and results from networking.

It also follows that the dynamics of the transnational interaction are based upon the direct interests of the participants and in the expected outcome. This is the backbone of transnational networking, and such interest and expectations are not necessarily in need of any legal and institutional framework attached.

However, legal and institutional frameworks can do more than merely structure the transnational activities in productive manners - they will also consolidate the

interactions, making the participation more attractive or appealing to otherwise reluctant states and thus, increase the willingness to participate.

Therefore, the legal and institutional structures of transnational management serve two purposes concerning the incentives for sovereign states and actors to participate: First; by structuring and facilitating the transnational interaction in productive manners, the incentive for participation becomes further attractive also for more reluctant actors. Second, continuously sound and consolidated transnational management promulgates the positive behaviour and may bolster the self-interest of states in consolidating their market and/or political positions.

Applying these incentives to the strategic transnational concept, the incentives for participating actors concern four aspects:

- Gained access to information and knowledge
- Expected increase in compliance and development of law
- Direct involvement in the development of cooperative law, and/or new legislation and thus, obtaining a certain ownership to the regulatory process, and to the development of EU law
- Self-interest of the individual participant based upon a consolidation of its marked/political position.

10.2.4 Incentives for Resource-Strong Nations

As the world consists of states with different political interests and unequal access to resources needed and available, this raises the question of how to ensure the incentives for the resource-strong actors to participate in transnational networking. How and why would resource-strong nations voluntarily participate in transnational processes subject to, for instance, the stewardship of the EEA?

The interest in participation is perhaps most expected from those actors who are in need of resources and have little themselves to offer in return. This would typically include the developing countries, and countries in economic transition.

However, incentives for resource-strong nations for transnational networking do exist. Such incentives relate to the basic concept in International Relations theory of interdependence, meaning mutual dependence based upon considerations of states in achieving *zero-sum* or *positive-sum* benefits. Strong actors may feel incentive to network, as their position may even get stronger based upon interaction – stronger in terms of added knowledge gained, but also in terms of consolidating and even enhancing their power position vis-à-vis other actors. Thus, depending of the situation, there can be more or less mutual dependence (Nye & Welch 2011, 246s and Keohane 1983).

Nye & Welch relate such mutual dependence to the overall view of constructivist theory, as "power is becoming more multidimensional, structures more complex, and states themselves more permeable". This added complexity means that world order must rest on more than the traditional military and economic balance of powers alone (Nye & Welch 2011, 320). In addition to *mutual* interdependency, transnational relations can no longer rest on traditional state bargaining. Instead, transnational relations are part of *multilevel* interdependence because "in a global information age, power is distributed among countries in a three-dimensional pattern of military power, economic power and transnational relation. Perhaps with the exception of the US military power, no state is today able to impose its own military or economic will unilaterally but must resort to bargaining. With regard to transnational relations, control is outside the control of governments and is chaotically dispersed" (Nye & Welch 2011, 319).

Nye & Welch even take the transnational power one step further in observing that globalisation in general concerns an increasing density of networks of interdependence. This is understood as an increasing number of complex global networks and transnational actors, which has also resulted in a rising number of relationships and

interconnection among the different networks; a phenomenon referred to as *pluralisation* (Nye & Welch 2011, 242s).

Multilevel interdependence and pluralisation are useful concepts for the understanding of the powers and also the management of transnational processes as advanced in this Thesis. As argued earlier in these sections, global environmental management is predominately a soft policy area, which requires a more horizontal and transnational management approach in contrast to the hard policy areas of military and economic power based upon a vertical regulatory approach. It follows that environmental management corresponds to the "bottom" transnational layer of the three-dimensional power distribution. Where states and/or supranational institutions intend to regulate global environmental objectives, they should address such objectives by means of transnational governance. Consequently, the management approach itself must be transnational in organisation and operation in order to attract, interact with and take regulatory advantage from the transnational processes. In this regard the current EEA has the advantage for further development based upon its already transnational organisation and transnational operational foundations.

It follows that the interdependence of states is, to a considerable extent, much more powerful than the idea of state sovereignty (Schermers & Blokker 2003, 1203ss). In this context, states must adapt their concept of sovereignty in order to maintain a certain degree of ability to act. In analysing such new sovereignty, Chayes & Chayes have argued that the strategy for managing compliance relies primarily on "a cooperative problem solving approach instead of a coercive one based upon an "enforcement model"" (Chayes & Chayes 1995, 3). Compliance strategies – i.e. compliance management – "seek to remove obstacles, clarify issues, and convince parties to change their behaviours. The dominant approach is cooperative rather than adversarial. Instances of apparent non-compliance are treated as problems to be solved, rather than as wrongs to be punished" (Chayes & Chayes 1995, 109).

Chayes & Chayes further explain that states can exercise such sovereignty only through participation and cooperation in global regimes. Reluctant or uncooperative states lose

allies and the ability to participate in effective coalitions with others, thereby limiting their room to manoeuvre, which cannot be regained by acting independently and autonomously. Ultimately, sovereignty is equivalent to the state's standing or reputation in the international system. Sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonable good standing in the regimes that make up the substance of international life. "To be a player, the state must submit to the pressure that international regulations impose. Sovereignty, in the end, is status – the vindication of the state's existence as a member of the international system. In conditions of the new sovereignty, a state's wilful and persistent refusal to comply can mushroom into a situation in which its overall status in the international system is threatened. The sanction for violating the norms and expectations generated by such networking is not penal, but exclusion from the network of solidarity and cooperation" (Chayes & Chayes 1995, 27 and 110, and Warning 2009, 21).

Now, in addition to such general perspectives, the following lines describe a few specific points on incentive for resource-strong actors:

First, basically no state worldwide is unwilling to interact internationally. In addition, most of the resource-strong actors are found among developed countries, which are already active members of the international community with declared and open intent of assisting development issues[242].

Second, as environmental problems and solutions cannot be confined to national borders, all states have an interest in seeking international and especially regional cooperation in order to improve the compliance rate also within other countries. In general, the incentive for international cooperation is based upon addressing the transboundary effects of environmental problems, "as states realised early that cooperation is better than unilateral action", and as such cooperation is in need of structures of international legal order applying basic concepts of rule of law (Louka 2006, 11 and Bingham 2010, 110ss).

[242] This is not to say that these countries necessarily always act in the interests of the developing countries. Rather, as argued in Chapter 11.1, the economic globalisation tends to favour, or at least not contradict, the domestic policy interests of the developed countries.

Third, economically strong countries typically have an economic interest in ensuring that other countries do not take a competitive "free rider" advantage by not applying the same strict environmental standards as applied by the domestic legal order. Again, cooperation based upon transnational networking (i.e. based upon the network dynamics as described earlier in these sections) could improve the chances for a higher compliance rate on a regional and global scale. For the same reasons, transnational management is an attempt to encourage national cooperation and eliminate risk for a "Race to the Bottom" - the so-called Delaware Effect - where countries attempt to increase their international competitiveness by competing on lowering their environmental standards and thus, the environmental costs. These aspects are also further discussed as part of the globalisation process in Chapter 11.1.

Fourth, developed countries derive domestic and international legitimacy in assisting third world countries. Domestic legitimacy concerns the global social responsibility, which appeals primarily to the populist political agenda. International legitimacy concerns the reputation in the international community as a socially and morally responsible global partner.

Fifth, valuable information and knowledge exist at the level of the less developed countries. In fact, a most valuable resource is “pure” information and knowledge held at national and sub-national levels also in the developing world and not easily known or accessible. Such significant information “hidden” at local levels could prove beneficial if exposed and made available to a wider scope of participants on a global scale. This could for instance concern the identification of problems and locally applied solutions/initiatives relating to the increasing urbanisation, waste management, poverty eradication, etc.[243].

[243] Relatedly, critique was raised by NGOs during televised discussions between NGO representatives and the newspaper The Economist, co-sponsor and co-organiser of the "The Copenhagen Consensus" held in Copenhagen in May 2004; critique that locally small-scale experiences and projects were not given serious consideration by the organisers, Televised debate, Deadline, DR2, 25 May 2004. The 2004 Copenhagen Consensus, see http://www.copenhagenconsensus.com/Default.aspx?ID=158

Generation of knowledge may not be complete, or may even be inadequate, when such information is missing. This also has implications for the knowledge base of the resource-strong actors in general. A solution would be to facilitate the needs by national and local administrations of accessing and distributing such information. It could also be possible to establish direct networking involving the local actors and hereby create secondary lines of information, where local administrations may not be able to do so. However, the risk here is of course the possible consequence of an immense amount of information generated, the risk of duplicating information, and the risk of obstruction caused by the sovereignty of the administration not allowing for such direct interaction.

The inadequate availability of such locally held information is often caused by insufficient resources. However, even where the information is generated and held by the local administration, availability and distribution are obstructed as possession of information is often regarded as a valuable political asset, which is not easily being shared – even not with other branches within the same government. Often, legal and administrative cultures are subject to extreme secrecy and protective ownership concerning information. Hopefully, by repeated transnational interaction it will be possible to convince such restricted legal regimes about the comparative advantage of openness and the sharing of resources increasing the flow and distribution of information[244].

Such involvement of local levels in global management corresponds to an alternative legal approach to globalisation "from below", as argued by Santos & Rodriguez-Garavito. This approach allows voices at lower level, normally "victimised by the neoliberal globalization", to bring forward experimentation and institutional creativity at grassroots level, and as advocated by local organisations and networks. This constitutes "a bottom-up approach to law and globalisation as "subaltern cosmopolitan legality" – being a mode of socio-legal theory and practice suitable to comprehend and further the mode of political thought and action embodied by counter-hegemonic globalization"

[244] Observations based upon my own experiences as a legal consultant in South-East Asia, Africa, Eastern Europe and the countries of the former Soviet Union. It is a frequent observation that governmental agencies lack the will to cooperate and to exchange information with other related resort agencies. This is due to an interest in preserving prerogatives and power. Also, the lack of resources means that information is only available for sale, which typically no one can afford.

(Santos & Rodriguez-Garavito 2005, 1ss). But it does more than that; if encouraged, it also brings forth the incentives and dynamics of the "lower" level to participate in the globalisation process, such as taking part in transnational networking. As a mutual benefit, resource-strong actors are incentivised by getting access to a myriad of low-scale, but potentially powerful innovations, information and experimental approaches.

10.2.5 Incentives – What's Different Compared to Traditional International Regimes?

The just outlined incentives for participation in transnational networking would to some degree also apply as incentives for traditional international cooperation.

However, as argued earlier, the horizontal nature of transnational management distinguishes itself from traditional international environmental regimes, which are often based upon a traditional dualistic and vertical governance approach, and thus, results in less incentive for states to comply. The transnational concept safeguards the notion of "ownership" and activates this notion in productive manners - not only at national levels, but also in the international (or rather transnational) setting.

For the same reasons, transnational administrative networks have emerged as a logical consequence of the "traditional" international organisations conforming to the increasing globalisation. Warning argued that globalisation affects national administrations in such ways that regulatory matters transcend borders, falling only partially – if at all – within the jurisdiction of individual states and their agencies. Thus, transnational administrative networks occur – and are even to some extent more or less deliberately applied by the international organisations themselves – as a response to such demands (Warning 2009, 32s, 36ss and 61s).

In addition, Slaughter observes that networks, in comparison with international organisations, have a number of advantages. International organisations can be "cumbersome and thus, inefficient, as a result of their rigid procedural rules, dwindling resources, and lack of state support". Networks, on the other hand, are "endowed with a

high degree of flexibility, stemming from their informal and non-hierarchical nature". Furthermore, networks offer "an escape from the traditional vertical approach involved in international decision making allowing for a direct involvement of the agencies in solving problems from the outset", (Slaughter 1997, 193ss, Slaughter 2004a, 264 and Warning 2009, 41).

The vertical construction of the traditional international environmental regimes is an inherent obstacle for such regimes to embrace transnational networking. The traditional regime creates a too distant relationship between the participating states themselves, between the states and the coordinating international institution or treaty secretariat, and even between the states and other participating international organisations. Due to their inherent vertical structure it may be of little use to design institutional support of coordinating bodies, even based upon transnational networking and mediating functions, as long as the "outer shell" is embedded in a rigid traditional vertical organisational structure. Such incompatibility between traditional vertical regimes and new horizontal transnational needs is not only a matter of legal and institutional design. It is also a matter of a conservative-minded international diplomacy, and organisational self-understanding.

Such vertical and dualistic structure of traditional international regimes may discourage active and dynamic participation at the "lower" level of cooperation. As mentioned, new horizontal mechanisms being introduced by such regimes may not take full benefit of networks dynamics as these mechanisms are still mixed into the predominant vertical framework. Further, the international organisations themselves participating in such horizontal schemes posses a unique vertical position unlike other "lower" level of participants. Such different structural levels and sets of standards create uncertainty and discouragement for participation.

International regimes based upon a mix of traditional vertical dualism and new horizontal integrative tendencies risk creating confusion. Applying "double" standards is incompatible, and a more coherent horizontal approach should be applied. This will most likely call for reforms of existing international regimes, and should be taken into

account when for instance formulating the organisation of a new GEO. Such reforms are necessary in order to stimulate the notion of "ownership", the dynamic interaction among participants and also to attract valuable actors[245].

Such incompatibility will be further addressed in Chapter 12.2 on the clarity in legal and institutional framework.

In addition to these perspectives, incentive for transnational networking beyond the traditional international organisation may also concern the following brief points:

First, the global traditional organisation may jeopardise the "community" spirit (i.e. the dynamics of decentralised teamwork) among the participants and thus, the incentive at local level to participate.

Second, traditional environmental regimes may appear fragmentised in applying a sector-based approach, lacking the overall coherent approach in achieving sustainable development.

Third, transnational networking preserves state sovereignty to a higher degree than participating in traditional international organisations and cooperation. States do not have to “relinquish power to another institution, and maintain to operate within the state boundaries safekeeping its monopoly” (Warning 2009, 41). However, the validity of such an argument depends of the reality of the networking. As described earlier in these sections, the mutual interests and reputation of the states participating in networking will determine certain behaviours, which – according to the benefits calculated – in reality may infringe upon the “sovereign” position of the state.

[245] Such conclusion is a logical consequence of horizontal regulation as promoted by international environmental law itself. Thus, the current dual system seems a paradox.

10.2.6 Equality in Networking

Incentive is also linked to the issue of equality among the participants. “Weaker" participants, in terms of influence upon the networking, might feel greater comfort in participation and deliberation when "protected" by procedural norms and by institutional facilitation ensuring access to networking and distribution of resources[246].

However, the transnational networking shall also be attractive for the resource-strong and more powerful actors. Otherwise, these might refrain from participating and opt for unilateral actions, especially where these actors posses sufficient resources themselves. They may also prefer exclusive networking with likeminded resource-strong actors only.

Therefore, "equality" shall not necessarily indicate fully equal partners in terms of political - and even legal – input, output and influence upon the networking. Some participating actors may gain special influence according to their political and financial interests - also due to the fact that these actors might finance a significant part of the operational costs.

Related is the understanding and integrity of the “sovereignty” of each participating actor. Louka observes that even the very concept of sovereignty; such as heralded by the UN Charter, cannot escape differentiation[247]. It might refer to the legal equality among states, however, should not be confused with the assumption of equal powers. As the reality of international politics indicates, certain states have more power and thus, yield more influence in the configuration of international relations than other states. Thus, states are not equal in their power and authority (Chayes & Chayes 1995, 133 and Louka 2006, 7 and 10).

[246] Related to the discussions by Nye & Welch earlier in these sections, Bhagwati addresses the somehow misleading term “interdependence” in a world of unequal states. Rather, the term should be “dependence”; “It is useful to remember that interdependence is a normatively attractive, soothing word, but when nations are unequal, it also leads to dependence and hence to the possibility of perverse policy interventions and aggressively impose conditions of policies with outcome that harm social good and the welfare of the dependent nations while advancing the interest of the powerful nations” (Bhagwati 2007, 226s)

[247] Art. 2(1) and (4) of the United Nations Charter, June 26, 1945.

Similarly, states are in reality not equal concerning the sharing and distributing of equity, as states possess different degrees of power and resources[248]. Louka points out: "For equity to be executed within an established order to achieve results, it must function within the rules of the game understood as the aggregate of formal and informal rules that regulate conduct in society. Such formal – and particular informal – rules have to do with the power configuration in the international society. Equitable outcomes must be accepted by the powerful and be satisfactory to the weak" (Louka 2006, 69).

Also, related to the procedural guarantees of the deliberative process as argued earlier in the Chapter, Chayes & Chayes invoke characteristics broadly related to "fairness" that enhance legitimacy and hence, the prospects for compliance. Such fairness depends on "the extent to which the norms or the management of the regime 1) emanates from a fair and accepted procedure, 2) is applied equally and without invidious discrimination, and 3) does not offend minimum substantive standards of fairness and equity" (Chayes & Chayes 1995, 127ss).

Now turning to the strategic transnational concept, "equality" means that the transnational procedural structures and the transnational lead institution shall ensure equal norms for all actors in order to ensure an even level for deliberation. Such norms are not only aimed at the "weaker" participants, as also the stronger participants need protection in order to avoid exploitation by other participants. In effect, such a system might impose some uneven consequences, as the incentive for participation is not necessarily linked to the actual influence of the particular actor. Rather, it is the expected interaction and outcome that fuel the dynamics among the participants. Thus, optimal transnational networking presupposes clear and fair operational norms and simple knowledge of the influence of the individual participants. *The proof of the pudding is in the eating*; participants will join upon an evaluation of all these factors. It

[248] Transnational regimes apply a mix of distributive and corrective equity, applying the definitions by Louka 2006, at 68:
"Distributive Equity involves the pursuit of equality through equal distribution of power and resources. Corrective equity aims at correcting the imbalance in the existence of power and resources by providing assistance to weaker participants".

is a matter of certainty, clarity and clear consequences. Therefore, I will clarify the second precondition made by Chaney & Chaney above (i.e. "applied equally and without invidious discrimination"), in such manners as equality and non-discriminative behaviour only relates to the predicted patterns of behaviour, influence, actual power differentials, and expected outcome within the network regime. Equality and non-discriminative behaviour do not necessarily mean that all participants must accept and assess equal influence.

Therefore, the legal and institutional structures of transnational networking shall in their design and operation reflect the political and legal reality of the transnational regime in question safeguarding clarity and certainty. As discussed further in Chapter 12, this will enhance sound deliberation and satisfy the perception of equality.

However, positive as this may be, transnational networking is not flawless in terms of equality. Despite procedural guarantees and good intentions it would be fair to say that the transnational concept resembles the neo-liberalistic take on globalisation, as it is a game of "survival of the fittest". Majone refers positively to networking as "competition with cooperation" (Majone 2009), which presupposes a general acceptance among the network participants of the "convincing by the better argument". So far, we have focused upon the many benefits associated with cooperation and healthy competition. However, competition may also result in domination.

Let us allow some critical points on the competitive aspect.

The strategic transnational concept is a valuable contribution to the generation of knowledge and development of norm. However, there is no guarantee that it is also a constructive approach. The transnational processes may be rather fragmentised and random; it is a "survival of the fittest" among competing transnational norms – a power process that may not necessarily advance the best solution. Hereby, there is a risk for leaving out – or eliminating - potentially sound emerging transnational patterns, behaviours or norms, which did not fall within the dominating interests in the networking. Such "eliminated" behaviours could perhaps have had alternative useful

potential for other actors, other regimes and even for further legal developments. Naturally, the outcome of the transnational process does not *per se* eliminate the possibility of such other patterns and norms to be observed, applied or developed simultaneously. However, the problem lies in the knowledge generation, and the distribution hereof, combined with the recourses available and the influence and interests of the individual transnational actor. For instance, stronger positioned actors would, even unintentionally, dominate the transnational interaction and thus, set the agenda and have a significant influence on the outcome in terms of norms. Such transnational interaction might risk eradicating or "over-shadowing" other transnational potentials, benefits and needs for other transnational actors. In such case, there would be little rescue in resorting to the procedural guarantees for a sound and fair process of deliberation. The problem is not the quality input and quality process of deliberation; the problem is that the insignificant weigh of the better argument is overpowered by the might of the dominant actor(s).

One could argue that nothing prevents these weaker actors from applying such alternative transnational behaviours. However the problem concerns the lack of distribution of such relevant information and knowledge associated with the alternative solutions. Due to the influence of the dominating transnational actors, such distribution may not even take place. Instead, only the information favoured by the dominating actors will flourish, involve all the participants and eventually consolidate itself into transnational norms – applicable for all actors. Therefore, the traditional transnational approach might risk leaving out valuable information and knowledge.

Such concerns are perhaps not so different from the reality of the "traditional" power-game involving international politics and law. This illustrates that even the strategic transnational concept has a price to pay, despite its merits and many advantages. We may even in specific cases experience an opposite tendency as weaker actors may find a stand difficult in the competitive world of transnational networking, and thus, seek comfort in the set organisation of the well-know traditional environmental regime, as imperfect as it may be. It is up to the individual actor to assess and determine which model to choose. As argued by this Thesis, the strategic transnational concept offers

advantages outweighing the disadvantages in international environmental management. Competition is healthy, and even the transnational model only benefits from competition amongst other regulatory models. The transnational model itself is also subject to a learning process.

10.3 EU Conformity

Having discussed the visions and incentives of the strategic transnational concept in the sections above, we shall now focus more directly upon the conformity with EU law.
Like the critical voices on the experimental approach and the OMC, critics may claim that the strategic transnational concept is naïve as it risks leading to EU instability and violating the EU harmonisation process.

Naturally, one must acknowledge the risk of such consequences in case the transnational process is not well planned for and carried out. However, as it will be argued in this chapter, the strategic transnational concept is in conformity with the EU Treaty and the harmonisation process. In fact, it enhances the harmonisation, and complements the positive and negative integration processes.

Let us recall the two-folded vision of the strategic transnational concept presented already in the Introduction to the Thesis: First, it structures the generation of knowledge and factual norms. Second, the Community may deliberately apply the strategic transnational concept as part of the EU regulatory process.

These two aspects together represent a new angle on negative harmonisation, as a third level of EU integration based upon cooperative law, as described earlier. The strategic transnational concept also corresponds with positive harmonisation when applied deliberately as an EU regulatory instrument, such as in EU framework legislation, and is a further advancement of EU experimental governance and the OMC.

Before turning to the aspects of positive and negative integration, the section below describes how the strategic transnational concept represents yet another aspect of flexible EU harmonisation.

10.3.1 EU Flexibility

In general, flexibility based upon experimentation and transnational networking is an accepted approach in the EU harmonisation process.

Such approaches fall within the concept of multi-level governance (MLG), which Philippart & Sie Dhian Ho describe as the process of regional integration as a process of diffusion of state authority; upwards to supranational institutions and downwards to subnational regions. Moreover, "political arenas are no longer seen as "nested" within the state, but more and more as "interconnected", that is to say, subnational actors now operate in both national and supranational arenas, forming dense transnational policy networks together with actors from those levels" (Philippart & Sie Dhian Ho 2000, 311s)[249]. Philippart & Sie Dhian Ho find two network variants to be distinguished; one based upon the strong EU institutional framework binding the various multi-level networks together. Second and opposite: "a plethora of non-hierarchical networks and regimes with weak or no common institutional framework able to tie the various regimes together". Comparing these variants to the network incentives described in the sections above, the first EU network structure based upon central coordination corresponds with the strategic transnational concept advanced in this Thesis. The second network structure resembles the *coordination by mutual adjustment* (Majone 2005), as discussed earlier under networking incentives.

It is also recognised that the recent approaches based upon flexibility and differentiation represent the reality in the EU, as there need not necessarily be "one inexorable path of integration implying harmonisation and gradual unification, but rather commitment to a

[249] Philippart & Sie Dhian Ho present four levels of EU governance, which to some extent also capture almost four hundred years of European integration processes in a nutshell; the Westphalian model, the intergovernmentalist model, the regulatory model, and relevant for this discussion; the MLG (Philippart & Sie Dhian Ho 2000, 307ss)

broad commonality within which room exists for varying degrees of difference and diversity: a model of Europe and of European integration in which not all states or areas commit themselves to the same centralised policies, but in which some choose to pursue different policies or similar policies in different ways, while remaining within the overall umbrella of the European polity" (Búrca & Scott 2000, 2).

Also, the need for flexibility in the harmonisation processes of the Community has gained understanding, as the European Union expands in regulatory competences and in the number of Member States. Especially the massive enlargement process has highlighted the importance of new and innovative measures in order to ensure successful European integration and market harmonisation among 27+ members, and the increasing legal, cultural and political pluralism. Also, the process leading to the 1992 Maastricht Treaty and beyond to the current 2007 Treaty of Lisbon made it clear that the European populations were in opposition to an ever increased union based upon total harmonisation and integration and centralism exercised by Bruxelles.

This has resulted in discussions, possibilities, and also concerns about new flexible forms of variable integration for a "multi-speed Europe", a "Europe a la Carte", "Europe at different speed" or a Europe of "variable geometry" (Weatherill 2010, 625ss, Krämer 2007, 973, and also "multi-linear" evolution, Majone 2011, 33ss) [250]. Eventually, such "opting in-opting out" has made its way to the EU Treaties as groups of Member States are allowed enhanced cooperation of their own under certain conditions, TEU Article 20, TFEU Art. 326-334. Also, the EU principle of Subsidiarity, TEU Article 5 is part of this new flexible approach (Weatherill 2010, 613ss). In fact, it has been claimed that the MLG is based upon the ideology of Subsidiarity (Philippart & Sie Dhian Ho 2000, 312).

[250] Similar, the TEU has adopted flexibility in terms of "closer cooperation", introduced by the 1997 Treaty of Amsterdam. This relates to the possibility of two or more Member States pursuing closer cooperation among themselves, using the institutions and framework of the EU, now TFEU Articles 326-334. See in general the volume of Búrca & Scott 2000.

Although the strategic transnational concept is part of this development of flexible EU harmonisation processes, it differs from the philosophy behind such "variable geometry", etc., and also from the principle of Subsidiarity.

Although flexible in approach, such instruments are not necessarily horizontal or transnational in nature. The flexible approach applied in the TEU of enhanced cooperation and Subsidiarity falls within the traditional vertical framework of the Community. The club of countries are allowed to enhance cooperation, and individual countries are allowed to apply the Subsidiarity principle, however, subject to overall supranational priority in objectives. The opting-out may not contradict the overall supranational ambitions of the EU. Both concepts are exceptions to the predominating EU objective of common harmonisation and shall as any expectation be interpreted narrowly. Also, neither concept allows *per se* for experimental learning processes where the aims and measures are not necessarily clear because of the uncertainty involved – an uncertainty that calls for an experimenting approach in order to gain knowledge. Further, with regard to the principle of Subsidiarity, this principle is the flip-side of the vertical supranational approach; it is an instrument for Member States in advancing national law. As argued earlier in this Chapter (in section 10.1.5), the strategic transnational concept is an escape from such supranational and national focus on creating a third level of EU integration based upon cooperative law.

Also, the strategic transnational concept does not apply a system of "opting in – opting out"; it is not a system that specifically divides Europe into clubs of rich advancing countries, leaving poor Member States behind. Naturally, one shall not disregard such risks. As described earlier, the dynamic incentives of transnational networking depend to some extent upon close relation between homogeneous states sharing the same economic level and interests. But this is exactly the main rationale for a coordinating EU transnational institution, such as the EEA, in stimulating for transnational relations, and at the same time ensuring that the knowledge generated is distributed and beneficial for the overall EU harmonisation and for the Member States alike. This is the function of well-structured legal and institutional framework safeguarding the deliberation process. Thus, the strategic transnational concept applies a horizontal "bottom-up"

structural framework to all countries setting the frame for individual state performance. Thus, it is not a "Europe a la carte"; it is a clear instrument for enhanced integration available for the European regulators.

10.3.2 A New Dimension of Positive Integration

Positive integration concerns the direct approximation of laws[251]. As described in the introduction to these sections, the Community may apply the strategic transnational concept in the regulatory process as part of positive integration. The EU directives may facilitate the transnational interaction among actors by the use of flexible frameworks allowing for significant flexibility for the Member States to meet the overall objectives and at the same directing the regulatory process by stimulating the knowledge generation and directing the valuable feedback into the EU regulatory process.

As argued, the strategic transnational concept is closely related to the principle of the EU experimental governance and the OMC. However, the difference is found in the transnational experimentation and in also the looser end-goals not necessarily focusing only upon the objectives of the Community.

Through the transnational processes, experiences and knowledge of legal relevance will be generated back to the regulatory process. The transnational process has a direct impact on the continuing development and consolidation of EU and European law. Therefore, the strategic transnational concept supplements and intensifies the current positive integration process.

On a critical note, it could be argued that emphasising national diversity contradicts the broader goal of ensuring and requiring total harmonisation and implementation (Krämer 2000, 140 and Krämer 2007, 98). Allowing EU Member States excessive discretion in

[251] Positive integration "involves the introduction of new laws or use of regulations as means to ensure that there is a level playing field for imported and domestically produced goods by the introduction of new Community-wide laws or by the setting up of new institutions to provide European-wide regulation and control" (Foster 2009, 257s). Also referred to as positive harmonisation as "the form of harmonisation by which common standards is introduced through-out the Union", see Steiner & Woods 2009, 361ss.

the actual implementation and application of the EU legislation seems at first hand as a set-back in the realisation of the common and internal market.

However, the strategic transnational concept does not have to contradict the broader goal of EU harmonisation. The strategic transnational concept sets out the structured framework for *controlled* diversity. The difference between the traditional Community Method and the strategic transnational concept concerns the methodology and regulatory philosophy, as the transnational concept adds an interim learning period and applies flexibility in implementation. Like any other EC legislation, the degree and extent of transnational interaction and national flexibility depend on the formulation of the EU legal obligations, i.e. the wording of the EU directives. Besides providing for flexibility, such wording shall also provide the structured roles and duties of the national authorities and provide the methodology ensuring the necessary feedback and evaluation into the EU regulatory processes.

Such framework structures of the strategic transnational concept (to be included in the wording of the EU directive) resemble the characteristics of a generic public management system based upon the classic Deming Circle[252]. It applies to the full regulatory process, which continuously repeats itself based upon self-evaluation and adjustments[253].

This means that the transnational directives must ensure comprehensive procedural norms in order to facilitate the transnational regulatory process. The transnational directives shall facilitate and in some instances specifically establish the frames for transnational interaction ensuring the learning process and the necessary feedback for the development of environmental law at national and EU levels. Also, where relevant, the EU directives should in a direct manner and by legally binding provisions encourage

[252] Also known as the PDCA (plan–do–check–act) iterative four-step management method, see for instance http://asq.org/learn-about-quality/project-planning-tools/overview/pdca-cycle.html

[253] Thus, the strategic transnational concept employs procedural norms in ensuring the transnational regulatory process, and also in ensuring self-monitoring allowing for the necessary ongoing evaluation and adjustments to the regulatory and institutional framework at all levels. This corresponds to the classic management circle based upon the process of activities: 1) setting of objective, 2) implementation measures, 3) monitoring, and 4) feed-back based upon lessons learned allowing for a revision of objectives, implementation measures, etc.

transnational interaction and management. For instance, the current Water Framework Directive should include mandatory transnational interaction, transnational public participation and transnational water management in general, and not relate only to water courses shared between two or more states.

Based upon the overall feedback provided by the process, the EU shall revise and adjust the regulatory framework itself in order to improve and facilitate the transnational management and process.

By these manners, the *controlled* diversity takes place within the EU framework applied in order to develop and establish harmonised EU and national norms. The EU transnational vision aims at EU harmonisation by means of flexibility and differentiation over a longer time-span in comparison with the traditional Community Method.

The Member States remain overall responsible for the implementation of EU transnational legislation. It is also the prerogative of the Member States to choose and apply the measures necessary for ensuring correct implementation, TEU Article 4(3). This means that the binding effect of the EU legal acts remains when applying the strategic transnational concept. By these means, the strategic transnational concept respects the overall TEU objective of harmonisation of EU law.

The EU Legal Mandate of EU Transnational Regulation

The wording of the individual EU legislation based upon the strategic transnational concept allows the Member States significant discretion and leeway in terms of the chosen implementation strategy.

In addition, also the TFEU legal basis of the EU legal act determines the possibility for national manoeuvring and application of stricter norms and standards. Allowing the

Member States controlled diversity, EU transnational law can be based either upon minimum harmonisation or on traditional total harmonisation as discussed below[254].

Minimum harmonisation would allow the Member States to apply their own more stringent standards and norms. In the environmental field, this may follow directly from the application of the environmental safety-clause in TFEU Article 114(4) and by minimum harmonisation based upon TFEU Article 193.

However, minimum harmonisation as traditionally applied by the Community may not easily conform to the philosophy of the strategic transnational concept. Minimum harmonisation is characterised by two implications; first, it gives the individual Member State a legitimate expectation of a policy area leaving room for national self-determination. If the criteria of TFEU Article 114(4) or 193 are successfully applied, the particular Member State may employ stricter national standards. Any later attempt from the EU in regulating the national proportion of the regulatory area would require sound justification and would most likely be met with stiff national opposition. Second, minimum harmonisation by TFEU Article 114(4) is an exemption to the main objective of total harmonisation. As an exception, any interpretation shall be applied narrowly. Similarly, the national use of TFEU Article 114(4) requires prior approval by the Commission.

In contrast to such traditional understanding of minimum harmonisation, harmonisation based upon the strategic transnational concept is an all-inclusive EU regulatory process, where it is clear for the Member States that the objective of the national room for manoeuvring is to gain experiences utilised for the ongoing consolidation of EU law. In this process, Member States will be met with no need for prior approval by the Commission and narrow interpretations of individual national or local measures. However, in the longer perspective it also means that the Member States will have no legitimate expectation of a regulated policy area for the individual Member States to decide upon. EU common and binding rules may – or may not – be the result of the transnational interaction replacing and overruling national measures. Certainty of such

[254] On minimum and total harmonisation, see in general Jans & Vedder 2008, 87ss and Steiner & Woods 2009, 363ss.

aspects is important. Such objectives shall be clearly expressed in the preamble to the EU transnational directive.

Instead, it is somehow adequate to associate the strategic transnational concept with total harmonisation in a redefined sense. The traditional distinction between total and minimum harmonisation does not precisely conform to the new transnational concept. Instead, "total harmonisation" refers to the EU transnational framework legislation providing the Member States with a clearly defined framework of set criteria and procedures, allowing for national manoeuvring and stimulation for the generation of experimentation and unique knowledge. Based upon common knowledge generated, the Community may later codify such knowledge into new EU legislation and repeal the prior EU transnational regulation if no more needed. If the strategic transnational approach, or elements hereof, is no more needed, the new EU legislation may also harmonise the national legal measures adopted during the "experimental learning" course of the transnational interaction.

Therefore, EU harmonisation based upon the strategic transnational concept falls within the current frames of the EU Treaties. Even to its most flexible extent, such EU transnational law can constitute a redefined "total" harmonisation"[255].

The Learning Process – Is it Really Something New? A Departure from Comitology

EU legislation includes, as a standard feature of most environmental directives, a reporting mechanism requiring the Member State to inform the Commission on the progress of implementation. Hereby, the Commission draws lessons based upon the national experiences concerning implementation and application.

[255] The EU legal act must clearly state the flexibility into its definitions and provisions, allowing the Member States space for their own initiatives. This may depart from the perception of traditional EU lawmaking and the inclusion of "meso-level" flexibility (Búrca 2000, 138s). Studies on the differentiation within the Common Market indicate that EU legislation often does not actually incorporate a degree of flexibility into the definition of the general policy requirements it contains. Instead, the specific provisions and flexible measures have already been negotiated, leading to the wording of the legislation (Búrca 2000, 138s).

The feedback is typically managed by the web of committees under the Commission with the purpose and mandate to propose revision and changes to the directive in question[256].

Such committees are part of the overall Comitology, which refers to the entire regime of EU committees[257]. These advisory and scientific committees assist the Commission in areas of high technicality[258].

In principle, the reporting scheme, the involvement of Comitology and the subsequent review of the directive are in line with the proposed "public management circle" of the strategic transnational concept. So, let us have a look at why there is a need for new feedback and learning processes.

As briefly discussed earlier in Chapter 10.1.5, the Comitology model differs from the strategic transnational concept in fundamental ways. In more general terms, the dynamic incentives of networking distance themselves from Comitology, as the committees are typically based upon firm structures and have a specific charge and function within a larger supranational governance structure as they ensure the views of the different EC Member States are fully represented in the legislative process (Vos 1999, 22 and Slaughter 2004b, 139).

Relatedly, the Comitology setting cannot escape the linage to the supranational setting, neither in terms of input, deliberation processes and organisational structures, nor outcome for the harmonisation of EU law (see similar Kjaer 2010, 11s). In contrast to Comitology, the strategic transnational concept is more of an experimental venue for the national administrations based upon structures that ensure that both the Member States, the sub-units hereof, and the EU could take advantage of "the multi-faceted potential of

[256] 681 of 707 EU regulations and directives adopted by the Commission in 2003 were based upon required committee procedures (Bergström 2005, 18s).
[257] For a comprehensive study and the control of the European Parliament, see Bergström 2005, who also defines Comitology as "the expression commonly used to denote the relationship between the Commission and the range of committees composed of representatives of national administrations; Committees that the Commission is required to involve in discussing the framing of implementing measures" (Bergström 2005, 6)
[258] Such committees are typically advisory - but consultation is mandatory, see case 212/91 Angelopharm 1994 ECR I, p. 171ff.

the outcome of the transnational process". Rather than set governance structures, the transnational concept focuses upon methodology and proceduralisation stimulating the learning process (Ladeur 1999).

Thus, the strategic transnational concept is a more open-ended and flexible approach than Comitology. In contrast to Comitology, the transnational processes and cognitive norms do not derive legitimacy through "the force of "arguments" in reaching Community decisions, but rather from their "preservation" in practice, which can only be understood partially as "discursively" based upon comparison of the different logics of the generation and operation of knowledge and uncertainty allowing for the organisation of productive competition between institutions" (Ladeur 2009, 230). In other words; Comitology focuses upon decision-making in order to generate norms. The strategic transnational concept focuses upon process and strategy for learning and information generation, which may eventually generate norms.

The recent "New Comitology Decision" maintains the fundamental supranational structures and the active role of the Commission[259], although it was anticipated that the new Treaty of Lisbon would change the Comitology structure significantly (Falke & Batura 2011, Horspool & Humphreys 2010, 119s and Commission 2009b, 2s)[260].

From the view of the Member States, the approach applied by Comitology is perhaps to some degree horizontal in bringing the Member States and their technical representatives closer to the decision-making process in Bruxelles[261]. However, the strategic transnational concept differs from the Comitology model with regard to the

[259] Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (the "New Comitology Decision"). This repeals Decision 1999/468/EC (the "old Comitology Decision'). See also http://eulaw.wordpress.com/2011/02/28/the-new-comitology-regulation-is-published/

[260] Prior to the adoption of the new decision, the Commission had in 2009 expressed its view that the implementation of TFEU 290 might replace the Comitology system as established under the TEC, possibly signalling a new era for Comitology under the Lisbon Treaty.

[261] Bergström observes that the representatives of the Member States may in real terms experience a true spirit of mutual respect to agree on common solutions to their problems. It is typically a well-functioning cooperation between Member States, and Member States and the Commission, where the Commission "is perceived as a coordinator or mediator, rather than a decision-maker, which is sustained by the very low rate of cases where the draft text presented to a committee was not supported by a positive opinion". As Bergström further notes, this is in principle remarkable taking into account "the fundamental conflict of interests between national and EU interests" (Bergström 2005, 32)

horizontal integration of the Member State and also with regard to even participation by actors. Despite the direct integration of the Member States applied by Comitology, the advisory committees under the Commission are still subject to influence by the Commission based upon the vertical approach. Typically, the EU Commission chairs the Committees, the Commission decides upon which proposals to bring forward in legislation and also, the meeting takes place at the Commission's domain in Bruxelles[262].

Besides, the accountability of Comitology suffers from a lack of openness and transparency. Relatedly, the total overview of committees in numbers and activities may be difficult to grasp for the public and professionals alike. These aspects cause problems for the overall democratic legitimacy of the Comitology model (Steiner & Woods 2009, 76ss).

The further integration of the Member States and other actors into the work of the committees might reduce some of these aspects. However, the fundamental supranational setting of the Committees within the traditional organisational culture of the Commission makes it unlikely for the Comitology model to "boost" further legitimacy. Especially, little public confidence would be generated.

Such lack of legitimacy of the Comitology model may be its Achilles heel in order to provide for a genuine deliberation process. The processes of Comitology may correspond well to the concept of *deliberate supranationalism*, as an efficient instrument of problem solving and decision-making in the EU[263]. Like the strategic transnational concept, the virtue of deliberate supranationalism is to combine the supranational and intergovernmentalist structures of the Community with the legitimacy of national democracies (Joerges & Neyer 1997, 1ss). However, Comitology and its deliberative processes may have a problem in preserving the legitimacy of national

[262] The Commission has no formal power to control the deliberation itself; however, studies by Bergström have shown that the national representatives may feel that the Chairman and the Commission still have "a certain scope to influence the result of the deliberation through, for instance, agenda setting, mediating, and summing-up". However, it has also been observed that the Commission is not likely "to push a matter, which is not given sufficient support in a committee" (Bergström 2005, 25s).
[263] Joerges 2006 and Joerges & Neyer 1996 and 1997 apply the deliberative processes of Comitology as an institutionalised response to the regulatory needs of the EU "multilevel system of governance".

democracies and at the same time fit the traditional nation state within a supranational community. The supranational structure and exclusiveness of Comitology simply makes it difficult to provide for a comprehensive deliberative process meeting the democratic legitimacy of the national state. The argument here is to shift from *deliberate supranationalism* to *deliberate transnationalism*. These aspects on democratic accountability are further discussed in Chapter 12.3.

10.3.3 A New Dimension of Negative Integration

The strategic transnational concept represents a new angle on negative integration. As argued earlier in this chapter, it represents a third level of EU integration based upon an experimental learning process and the generation of new European cooperative law.

Negative integration or harmonisation traditionally refers to "the removal of existing barriers by the striking down of national law" (Steiner & Woods 2009, 361)[264]. Thus, negative integration includes an active role of the CJEU based upon preliminary rulings (TFEU Article 267) and now also increasingly by the administrative reviews of the European Ombudsman satisfying the need for harmonisation of common norms in order to implement the positively formulated EU law.

The process of negative integration corresponds somehow to the process of the strategic transnational concept, although without the involvement of the CJEU.

Both processes may respond to the needs at Member State level for self-generated norms in order to implement substantive EU legislation. Like the strategic transnational concept, also the negative integration is in principle based upon a flexible learning process that allows both existing and new legislation to be strengthened and also allows for new norms to emerge. In this regard, negative integration is part of the general

[264] It is also referred to "prohibitions imposed on Member States of discriminatory behaviour and other restrictive practices," or to "the removal of existing impediments to free movement such as striking down national rules and practices, which obstruct or prevent achievement of the internal market" (Foster 2009, 256s, and Foster 2010, 249). As this sections concerns, the understanding of negative harmonisation concerns any norm or conduct undertaken or allowed by the Member State in which the consequence may constitute a barrier to the realisation of the objectives of the EU.

differentiated integration approach in view of the need for EU flexibility (Majone 2005, 159s)

Therefore, the strategic transnational concept and the negative integration process supplement each other. However, the two approaches also differ fundamentally, which the following discussion illustrates:

The dynamic network incentives of the strategic transnational concept differ fundamentally from the conflict-oriented negative integration. Negative integration is based upon conflict management. The legal development of the negative integration requires the involvement of the CJEU and thus, presupposes a legal conflict to be addressed by the Court. In contrast, the legal outcome of the transnational concept is based upon participation and accepted market behaviours based upon the positive dynamics of networking. Any conflicts among the parties would have been mitigated earlier in the process and have found a solution in the "acceptance of the better argument". Such consolidated and established norms based upon repeated market behaviour stand a better chance of acceptance by market actors in general. This is in contrast to the forced position based upon a court ruling, which do little in gaining acceptance or incentive for compliance.

In the same context, the strategic transnational concept allows the Member States (i.e. the network participants) early ex-ante "up-stream" stakeholder ownership to the process and a direct interest in seeking immediate solutions to administrative obstacles.

Involving the CJEU could jeopardise such dynamics. The integration process will exclusively become a later ex-post "down-stream" legal project to be decided by lawyers and distance itself from the dynamic interaction between the participants. This "legalisation" of the project does not necessarily correspond to the many other interests and values of political, cultural, etc. character, which are often an equally important part

of the transnational learning process. Thus, by activating the CJEU there is a risk that the integration process isolates itself from valuable aspects and inputs[265].

Also, by activating the CJEU the integration process becomes vertical as the CJEU itself is a traditional supranational EU institution positioned vertically vis-à-vis the Member States and distant to the EU citizens and private actors. Such an approach could jeopardise the fundamental horizontal structure of the transnational networking and the dynamic incentives for participation. In general, an involvement of legal activism by courts is inherently against the very notion of networking.

Finally, integration based upon the active role of the CJEU could appear as a bottleneck as the time-consuming legal processes involved for preparing and handling the cases for the court cannot easily meet the increasing demands for common norms and standards from the globalised market.

In conclusion, the strategic transnational concept allows for a productive supplement to the traditional vertical approach characteristic for both the positive and negative integration processes.

11 A Response to Globalisation

As argued earlier, the search for the rationale behind the strategic transnational concept must find its origin outside the EU, in the changing pattern of global governance.

The challenges for the EU and the relations between the Member States are all part of the globalisation processes. Lessons learned from the globalisation process are equally valid for the development of relations and law within the EU. Also, within the EU, the characteristics and impacts of the globalisation process are seen and felt in different

[265] Related to such "legalisation" of a conflict; the ECJ will have to balance trade concerns with other concerns in order to possibly strike down national legislation. Steiner & Woods suggest that the court may not always be the best body to assess such questions and instead suggest the use of positive harmonisation, (Steiner & Woods 2009, 412).

ways according to the specifics of the individual Member States as illustrated by the recent economic tumults in the Euro zone.

As the strategic transnational concept focuses on an active role of the state administration, we need to ask two questions relevant for both the EU and the global setting; first, why is the transnational concept a relevant instrument in managing the process of globalisation? Second, as we need to clarify the role of state, what is the defined role of national administration in such transnational processes?

The previous Chapter 10 has already provided some answers in the specific context of the rationale of cooperative law and managing complexity. The aim here is to broaden these perspectives further in a global transnational context.

Focusing on global environmental governance and law, sections 11.1 and 11.2 of this chapter relate to the legitimate role of the strategic transnational concept in managing the environmental consequences and needs arising from the globalisation process. It will be argued that the globalisation process causes an increase in global inequality in terms of legal and institutional capacity at local levels. It will also be argued that the changing power structures of globalisation block the traditional intergovernmental decision-making processes and spark new transnational initiatives. In this regard, the strategic transnational concept will be addressed as a potent governance tool in managing the soft policy area of international environmental law within the harder economic globalisation. Such aspects call for innovative processes for generation of norms and knowledge, and thus, constitute the rationale for networking based on the strategic transnational concept, also in a global context, in order to gain knowledge and experiences, and in advancing autonomous cooperative law as a third level "between" national law and international law.

Section 11.3 relates to the defined role of the national administration in EU and global transnational networking. The basic rationale of the strategic transnational concept involves the transgovernmental relations among national administrations. Therefore, this Chapter specifically addresses the legitimate role of the state and national

administration in the globalisation process – if states do not matter, the legitimacy of the transnational concept would be of little meaning. As it will be described, the central role of the national administration maintains a legitimate, albeit a redefined "disaggregated", function.

The last section (11.4) addresses the potentials of the EEA in global transnational management. The understanding of the global context not only contributes to the rationale of the strategic transnational concept, it also provides global potentials for the EU strategic transnational concept, and the EEA as the lead transnational institution. Such global ambitions correspond to the general global ambitions of the EU as outlined earlier in the introduction to Part III. Transnational networking, even beyond the EU, may strategically be coordinated and facilitated by the EEA

11.1 Globalised Inequality – Transnational Learning

The following discussions focus on the widening global development gap caused by the globalisation processes. A gap that enhances global diversity and provides a potential breading ground for transnational learning processes.

Specifically, it will be argued that the process of globalisation increases inequality among states and regions in terms of economic development and legal and institutional capacity. Such unequal development results in continuing global differentiation in terms of administrative, legal and institutional pluralism at the national level, increasing the overall complexity of modern environmental management, which again adds to the need for adequate management tools at the local level. The impact of global economic interests risks overpowering these local capacities, leading to malfunction or, even worse, as seen during recent economic crisis, to a meltdown of the national regulatory functions which then backfires negatively on the global economy and markets.

Therefore, the impact of globalisation on the individual nation state varies and causes different administrative reactions and experiences. Through transgovernmental networking, we may take advantage of such local and national differentiation in

experimental learning processes, and in the generation of norms based on cooperative law. This constitutes the rationale for the strategic transnational concept in the management of the global environment.

Now, let us have a look at legal pluralism before turning to the issues of diversity based on the increasing inequality.

Legal and Administrative Differentiation - Legal Pluralism

The specific term "Globalisation" is relatively young[266] in the overall internationalisation of law (Snyder 2010, 12)[267]. Thus, it would perhaps be more accurate to address the transnational approach, cooperative law and other legal aspects of the globalisation, as further aspects of the ongoing internationalisation of law[268].

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[266] Globalisation was formally introduced by the 2002 Johannesburg World Summit on Sustainable Development (WSSD) by the Plan of Implementation, paragraph 47, first section:

> *"Globalization offers opportunities and challenges for sustainable development.*
> *We recognize that globalization and interdependence are offering new opportunities for trade, investment and capital flows and advances in technology, including information technology, for the growth of the world economy, development and the improvement of living standards around the world. At the same time, there remain serious challenges, including serious financial crises, insecurity, poverty, exclusion and inequality within and among societies. The developing countries and countries with economies in transition face special difficulties in responding to those challenges and opportunities……"*

[267] Globalisation may be defined in different ways. Here is some examples:
Bhagwati defines globalisation as the "integration of national economies into the international economy through trade, direct foreign investments (by corporations and multinationals), short-term capital flows, international flows of workers and humanity generally, and flows of technology" (Bhagwati 2007, 3 and see also Louka 2006, 48).
Stiglitz defines globalisation as "the closer integration of the countries and people of the world, which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a less extent) people across borders" (Stiglitz 2002, 9).
Nye & Welch define globalisation as worldwide networks of interdependence (Nye & Welch 2011, 240).
Snyder defines globalisation as "an aggregate of multifaceted, uneven, often contradictory economic, political, social, cultural and legal processes, which are characteristic of our time" (Snyder 2001c, 3 and 2010, 42s)

[268] Internationalisation, europeanisation and globalisation are not new phenomena in the development of law. They are all parts of the development of the modern economy developed in western societies. Even in a historical perspective, the nation-based idea of sovereignty was considered to be fragile in several important aspects: This has been the case ever since the debate about the "crisis of the state" was linked to internationalisation (Heritier et al. 2004, 9s). Heritier continues "Even in the heydays of the national-state, which coincided with the industrial revolution, there was a strong tendency towards the internationalisation of law and systematic legal comparison, a huge increase in contractually agreed upon international standards and, at the same time, an increase in non-governmental standardisation" (Heritier et al. 2004, 10)

Globalisation may, in the words of Bhagwati, offer economic prosperity "to those who embrace it, for the opportunity it presents, instead of renouncing it due to the peril they fear it poses". Globalisation may be a force for advancing several social agendas, such as environmental management (Bhagwati 2007, 221).

This positive approach is sustained by this Thesis. The question is not whether globalisation is good or bad; the question is rather how to manage globalisation in order to prevent or control perils. Such management needs "appropriate governance" based on institutions and policies supporting the global integration of poor countries (Bhagwati 1997, 221 and 233). This Thesis presents the strategic transnational concept as this "appropriate governance".

As described earlier in Chapter 10.2.4, globalisation is characterised by an increasing density of networks of interdependence and interconnection among the different networks referred to as *pluralisation* (Nye & Welch 2011, 242s). It is widely observed that such processes result in legal pluralism and legal diffusion leading to fragmentised global law reflecting the fragmentised global society instead of establishing a unity of global law (Snyder 2010, 84, Snyder 2001b, 43, Santos 1992, 134, Santos 1995, 250ss, Santos 2002, 89ss and 437 and Fisher-Lescano & Teubner 2004, 1003 and 1117ss)[269]. It also means that globalisation leads to further legal, institutional and administrative pluralism. And, it also indicates a significant meaning for the individual capacity of national law, policies and institutions in meeting and regulating the global impact.

Pluralisation may not just be an issue among national states with different and diverse backgrounds. Even states sharing significant common cultures differ in regulatory approaches despite significant ongoing interaction, as observed in empirical studies of the persistency of national policies, such as health and safety regulations in the UK and the US (Wilson 1985, 151ss).

[269] Santos argues that "our legal life is constituted by an intersection of different legal orders, that is, by *interlegality"* as a "highly dynamic process addressing the uneven and unstable combinations of legal codes (in a semiotic sense) arising in the density of the different networks, which are part of the legal pluralism" (Santos 2002, 437s). In this respect, interlegality corresponds the strategic transnational concept in providing a reference for diversity management.

Despite such legal and administrative pluralism, it is likely that some unification of legal terms eventually will take place over a longer time perspective. The legal and administrative pluralism, as a result of the individual national adjustments to external legal norms and global processes, may be perceived as a temporary stage in the transition to global unification of norms. In this case, the globalisation process is rather similar to the learning process aligned the transnational management. Such a learning process should be seen as the temporary "experimental" phase of the individual states, which will encourage temporary legal pluralism among the individual states. The lessons derived from the national experiences will eventually materialise into cooperative law, or be codified into international (and/or EU) legal acts, and will then reappear in the states as binding norms in form of international conventions, EU legislation, etc. Also, the transnational interaction is likely eventually to have a direct unifying influence on the development of individual national laws. Thus, in a longer perspective one could argue that unification would take place based on globalisation processes supplemented by transnational processes.

However, despite such unifying aspects over a longer time perspective, legal and administrative pluralism is a distinctive consequence of the globalisation process.

Now, let us have a look at the pattern of global inequality in terms of legal and institutional capacity. Such inequality is further enhanced by the legal and administrative pluralism, and by the incapacity that weaker individual states may have in addressing the pressures from the globalised economy.

Global Inequality – Global Diversity

The globalisation process increases global inequality as it creates differentiated development patterns.

The lack of capacity in general is related to the traditional global phenomena of the North-South problem, which, to some degree, has changed its pattern after the end of the Cold War and the emergence of the age of globalisation. The end of the Cold War

has re-structured the financial flow and the scope of countries receiving assistance from the wealthier nations and international organisations. No longer barred or favoured by pure political and strategic motivations, all countries in the developing world are now in principle eligible for assistance and for participation in the world economy taking advantage of the globalisation process. Further, the breakdown of the Soviet Empire has added a West-East dimension to the classic North-South problem.

Yet another gap is emerging, adding another dimension to the North-South and the West-East dimensions. This is the South-South gap between the newly developed states - such as the BRIC-SAM (Brazil, Russia, India and China – South Africa and Mexico) - and the less developed countries (see in general O'Neil 2009, 49ss). Especially China is an exponent of this new development, where China itself undertakes a role as *developed* donor towards developing countries, promoting its own programmes of financial aid, investments and political interests. At the same time, China applies its status as traditional *developing* country at the ongoing climate negotiations, arguing that the traditional developed countries must undertake the severer commitments in terms of financial mechanisms and reduction in CO2-emissions.

The development gaps between the developed countries and the developing countries continue to widen (Louka 2006, 9). National development programmes (i.e. of the donor countries) tend to target specific countries and regions often selected based on domestic political, economic and security self-interest (of the donor country)[270].

Therefore, it may be argued that the "unifying" effects of globalisation seem to be linked to domestic political and economic interests in the developed world without much consideration for the real development needs at the global level. The powerful economic globalisation process foremost targets and accelerates the development and

[270] Significant resources have been allocated to Eastern- and Central Europe, the Balkans, and the ex-Soviet republics following the collapse of the Communist regimes. The wars in Iraq and Afghanistan have also raised public awareness in the West, followed by significant aid programmes. And the 2011 events and public uprising in North Africa and in the Middle East will most likely be followed by massive investments in, for instance, Libya. This is in stark contrast to other regions in need, such as Sub-Saharan Africa, which predominately attracts real public attention only in terms of famine and hunger catastrophes, and little in terms of sustained investments. However, oil interests in Sudan, and, especially, the increasing Chinese general interest in Africa may encourage further investment and political interest in the region, see note 271 just below.

economic investment in regions and countries based on cost-benefits assessments. As such, massive investments are being allocated to countries and regions by the EU enlargement process. The current massive investments pouring into Iraq and Afghanistan are other examples. Other areas and regions, such as significant parts of Africa and Central Asia, suffer from the lack of political and economic interest at a global level[271].

Such global investments even target specific areas within the national state, which results in an uneven development within the national state itself. An example hereof is the development of the Chinese special economic zones, encouraged by national policy, along the coast-line and especially around Shanghai, Shenzhen and Guangdong, which are in stark contrast to the lack of development in rural China (Snyder 2001b, 27s and 2010, 68).

The process is a matter of inclusion in, or exclusion from, the global markets, and tends to have an accumulative effect, widening the "vertical" gap between the developed and the developing world, and also widening the "horizontal" gap between developing countries and, as just described concerning China, even within national states[272].

Such an unstructured globalisation process tends to jeopardise the institutional and legal capacity involved in environmental management in two ways:

First, the fragile capacity of the domestic legal and institutional institution, especially in the social policy sphere, cannot control the impact of such external pressures. Too much

[271] Some changes may occur, as also Africa is becoming the focus for global economic interests. China has for a decade increased its investments in Africa significantly. Already in 2004, China raised its investments with more than 50% (New York Times, 8 August 2004), and China is now the dominant investor in Africa, and is expected to exercise a significant economic and political influence in Africa in the future.
This is in stark contrast to the limited US investments and commercial interests in the same region. However, also the US increasingly recognises the geo-political and economic importance of Africa, especially concerning access to the supply of oil. This is illustrated indirectly by the high-level importance shown by the US Administration in the 2011 national Sudanese Referendum and the following creation of the independent Republic of Southern Sudan – a state that possesses significant potential oil reserves. China, together with Malaysia, already has significant oil investments in Sudan.
[272] It can be argued that horizontal competition exists at both the "top" and the "bottom" level. In addition to the competition among receiving countries, in order to please the conditions of the “donors” countries, also these “donor” countries compete in providing aid programmes and investments.

economic pressure may result in an uncontrolled and over-heated "bubble" economy. Further, such pressure makes the domestic market intensely dependent on external influences and thus, sensitive to any external changes. Such "over-heating" of the domestic legal and institutional framework risks over-stretching the limited capabilities available. The result can be fatal, and directly lead to an economic, political, legal and institutional meltdown severely damaging for the country in question, and with significant negative regional and global consequences. Such consequences were seen in the late 1990s with the financial collapse in South-East Asia with severe effect on the world economy in general (Stiglitz 2002, 89ss and Bhagwati 2007, 199ss). Also, the current financial crisis from 2008 originated with overheating of the global financial markets with little regulatory control (Nye & Welch 2011, 244 and Fergusson 2008). These crises illustrate the current interdependency of the world economy and the shared risks involved, as illustrated by the 2008 collapse of the US domestic mortgage market and the worldwide implications (Ferguson, 2008, 230ss and 269).

Second, the fragmented focus on profitable markets may cause regulatory competition among poorer countries that may alter their own domestic requirements in order to attract donations and investments (Vogel 1995 and 1997, Bhagwati 2007, 144, 148ss and 164ss and Wouters & Verhoeven 2005, 260s). There is a risk of a "Race to the Bottom" – or the so-called "Delaware Effect". In order to attract investors, these countries are willing to underbid each other in easing regulatory and financial requirements. Thus, a real need for sound environmental and other social policies may follow[273]. But there is also a risk for the opposite "Race to the Top" – or the "California-Effect", as poorer states compete for stricter standards, believing that it may attract the interests of the global consumer markets as a result of the increased focus on Cooperate Social Responsibility (CSR) standards, and the elimination of unfavourable and unfair

[273] Wouters & Verhoeven warn against such a Race to the Bottom as "a consequence of mutual recognition, being reciprocal agreements among jurisdictions to accept the others' regulatory standards that govern the creation of companies and businesses. The decentralised nature of such agreements encourage competition between regulatory jurisdictions, often leading to a general lowering of standards" (Wouters & Verhoeven 2005, 260s)

conditions[274]. As a result, poorer states may compete on introducing stricter greener standards that are beyond their legal and institutional capacity to implement.

The problem, related to such regulatory competition, concerns not only the actual wording of the "black-letter" legislation itself, being strict or lax in order to attract foreign investment. Rather, the problem concerns the ability and capacity of the poorer country to support such legal and institutional environmental management. In both cases, if the legislation is too lax, or the domestic capacity cannot support the highly proclaimed green goals, environmental management, environmental implementation and environmental protection may lose.

Globalisation and the Strategic Transnational Concept

The inequality based on the fragmentised development patterns is counterproductive to anchoring national and global environmental law, and to providing the needed legal and institutional capacity.

It is generally observed that countries under such stress and without adequate resources cannot adapt legally and institutionally to the regulatory needs. Without the platform of a solid national legal and institutional infrastructure, any legal and institutional reform risk facing sever difficulties especially in poor and small countries with weak governance (Stiglitz 2002, 180ss, 236ss and 251, Bhagwati 2007, 141, 167ss and 237ss, and Louka 2006, 48s). Nye & Welch address such implications of climate changes and the stress on weak states (Nye & Welch 2011, 313)[275]. In addition, such influences increase the dependency of the less developed countries on the political and economic

[274] On the possible development of voluntary and/or mandatory CSR norms, see Birnie, Boyle & Redgwell 2009, 327s and Bhagwati 2007, 190ss.

[275] In his *Defence of Globalization*, Bhagwati at 138ss provides a differentiated view in arguing that such deterioration *may* happen in case of free trade and absence of appropriate environmental policy – this is not to say that it necessarily *must* happen - it all depends on the particular case. Such an argument is in line with my argument just below on uneven and fragmented development patterns, depending on the political and commercial interests involved.

agenda of the developed world, which is in contradiction with any declared sustainable development objectives[276].

The increasing inequality will have a negative effect on the global sustainable development, as it differentiates national states into "have" and "have not". This means that modern environmental management, which is in need of significant knowledge, expertise, and information management, will increasingly be a developing matter for those countries with the adequate resources available - and eventually, an unachievable objective for those countries with less resources. The international gap in environmental management is at risk of widening.

Therefore, the fragmentised development pattern leads to different categories of states and administrations in terms of environmental capacity. Examples hereof are:

First, states in possession of adequate and independent resources in order to fulfil their own environmental agenda, i.e. typical developed countries.

Second, states with resources available, but at the same time, dependent on external economic and political interests. Such states may face difficulties in pursuing their own independent environmental agenda.

Third, states with no resources available. These states are without sufficient legal and administrative framework, and at risk of being overrun by external economic and political interests. These states have no capacity in setting up or fulfilling an environmental agenda of their own.

In this context, the strategic transnational concept may provide needed resources. The poorer countries may have no resources, or political clout, in setting an independent

[276] Johannesburg World Summit on Sustainable Development (WSSD) also addresses these concerns; The Implementation Plan, paragraph 47, first section, second part:
"Globalization should be fully inclusive and equitable, and there is a strong need for policies and measures at the national and international levels, formulated and implemented with the full and effective participation of developing countries and countries with economies in transition, to help them to respond effectively to those challenges and opportunities…."

environmental agenda, if any agenda, of their own. The autonomous rationale behind the third level of the strategic transnational concept may allow the national administration to advance its own agenda and to distance itself from both the national and international policy interests and economic influences.

This is not to say that the strategic transnational concept should provide a national agenda for such poor countries. Instead, these countries may find knowledge and confidence in the transnational networking, enabling them to provide for own environmental agendas, fighting off influential economic or domestic political interests.

However, we have already learned that transnational relations perhaps are best played out among a club of homogeneous members. Therefore, these points made are not to suggest a naïve approach of an all-together global transnational approach. Nevertheless, also as described earlier, the composition of any network constellation and the incentives involved depends of many variable factors. Therefore, networks may emerge and evolve based on a learning process of their own. The possible ideas of network constellations are in principle countless, at a regional, global, and regional/global level. The next section will illustrate global networks with the examples of the C40 and the R20 transnational climate initiatives.

11.2 The Failure of Intergovernmental Decision-making – New Transnational Opportunities

This section will argue that the changing power structures of globalisation block the traditional environmental intergovernmental decision-making processes. This failure calls for innovative processes for the generation of norms and knowledge, which constitutes another rationale for the strategic transnational concept in a global context.

The obstruction of decision-making has sparked new transnational private initiatives. The strategic transnational concept, as advanced here, may actively address, stimulate and utilise such initiatives. This is addressed further at the end of the section.

The new challenge for norm setting at an intergovernmental level is illustrated by the failure to reach a climate agreement, as seen at the 2009 COP 15 in Copenhagen, and at the succeeding conferences - the 2010 COP 16 in Cancun and the 2011 COP 17 in Durban.

In line with the development patterns described in the earlier section, new global power dimensions have now emerged, challenging the traditional influence of the US and the Western World. At COP 15, the US, together with the developed countries, could no longer exclusively facilitate a compromise agreement, which instead was powered by China, South Africa and Brazil. Also, the Copenhagen COP 15 illustrated clearly the new influence exercised by the group of developing countries, as the Group of G77 effectively left its mark on the negotiations and the process of the COP. Now, the G77 of developing states is confronting "the power of elite with the powers of numbers of states" (Louka 2006, 9).

The same pattern was seen at the 2010 G20 Summit in Seoul, where the US president was in the unprecedented position of being unable to facilitate a global economic agreement[277].

This development illustrates a shift in negotiation and decision-making processes at the inter-governmental level, where especially the BRIC countries (Brazil, Russia, India and China) together with South Africa and Mexico (BRIC-SAM) are expected to exercise more global influence in the future. The higher number of influential global actors involved in the inter-governmental processes also increases the risk of diffuse and paralysing negotiation processes.

However, the recent failure of the climate negotiations is not only a result of diffused negotiation processes. The stalemate in the climate negotiations is also sparked by the

[277] See *Why world leaders smacked down Obama at G20 summit*, The Christian Science Monitor, 12 November 2010, at http://www.csmonitor.com/USA/Foreign-Policy/2010/1112/Why-world-leaders-smacked-down-Obama-at-G20-summit
See also, *Obama leaves G-20 empty-handed on currency spat*, Msnbc.com, 12 November 2010, at http://www.msnbc.msn.com/id/40143947/ns/business-world_business/t/obama-leaves-g--empty-handed-currency-spat/#.TowjxE-zhpE

reluctant attitude among most of the major industrial powers in making dramatic economic cuts, and in redefining their energy markets. But why has this negative development occurred, as it earlier was possible to reach a consensus on international climate agreements?

The world was able to agree on earlier environmental agenda, including the 1992 Rio Documents and Agenda 21, which were reaffirmed at the 2002 Johannesburg WSSD. The Kyoto Agreement was considered a relative success when signed in Kyoto, but has later faced problems with regard to ratification and implementation. The 2009 Copenhagen COP 15 was perhaps a fiasco due to the extremely ambitious expectations on reaching a global legal binding agreement. Lately, the Cancun 2010 COP 16 and the Durban 2011 COP 17 could be labelled as a semi-fiascos or -successes, as expectations on reaching a global agreement were accordingly low. However, Cancun and Durban were in reality fiascos for the state of the world environment, as it became evident that no significant global legal binding climate agreement is foreseen in the near future. However, especially Cancun did save the day, by revitalising the UN process. Had the COP 16 have ended in the same deadlock as the COP 15, the UN climate process would have risked total collapse.

Why this negative development? Why was it relatively easier 20 years ago to reach world consensus? A qualified guess could be that the "gravity of the situation" both in ecological and economic terms is more apparent now in 2012 than it was in 1992. In 1992, the world foresaw problems if no action were taken, but it was still relatively a problem of the future. In the years after 1992, the scientific evidence and the spectacular ecological consequences of increasing global warming have raised a massive public demand for immediate solutions - and at the same time, made it clear that such changes require massive investments with severe economic consequences for the national state. Such decisions are typically hard to make for any politician. And as the COP 15 clearly indicated, an agreement is deeply entangled with the concerns of the poorer countries for a fairer distribution of the costs related to combat global warming.

In addition to these tendencies, a major contemporary obstacle for reaching a common decision is the risk that the US is not involved in the new climate agreement replacing the current Kyoto by 2012. Based on the results of the US mid-term elections in November 2010, and the current Republican majority in the House of Representatives, it is unlikely that the US will sign a new adequate agreement at all. This has created a sense of further uncertainty in the ongoing climate negations, resulting in further deadlock among the vast number of participating actors, now discussing procedures and processes related to the climate negotiations themselves, rather than actual constructive agreement negotiations. Such tendencies were evident at the opening of the June 2011 UN Climate Change Conference in Bonn.

The tendencies of the COP 15 and the following conferences COP 16 and COP 17 indicate that no major legal instrument is to be expected in the near future. Perhaps as a consequence of the deadlock in the international climate negotiations, and because of the dynamic incentives of networking, new transnational networks have emerged on the global climate management stage, bypassing the traditional decision-making processes in generating knowledge and norms. Examples hereof are the global C40 network among major cities worldwide[278], and the related, more recent, global R20 network between regions worldwide[279].

The potential of private initiatives has led to the general argument that the challenge for the stalemated international climate cooperation now is to stimulate local and regional initiatives, and to find similar innovative ways of facilitating the transfer and distribution of technology and knowhow to all states in need of this[280].

[278] See in general; http://www.c40cities.org/
[279] See in general; http://regions20.org/
After the end of his governorship, the former Governor of California, Arnold Schwarzenegger, will concentrate on promoting the R-20 initiative. The R-20 initiative focuses on regions and regional solutions in addressing climate change - in particular energy efficiency, sustainable energy and clean transportation. The R-20 will be based on the concept of C-40, which has the same objectives and is based on networking between major cities worldwide, *Information 25 November 2010.*
[280] Discussion between Martin Lidegaard, former director of the Green Think Tank Concito (currently Danish Government Minister of Energy and Climate), Katherine Richardson, head of the Danish Climate Commission, and Bjørn Lomborg, Director Copenhagen Consensus, *Deadline*, Danish Radio, DR2, 24 November 2010.

This indicates a productive opportunity, where the traditional international regime (e.g. the EU, the UN climate management, etc.) actively may address, stimulate and utilise such private initiatives by strategic partnerships. Such partnerships are part of the strategic transnational concept, argued in this Thesis, providing for a transnational deliberation process involving public international regime, private governance, and private knowledge and norm generation. For instance, the EEA could take part in such a global partnership with the C40 and R20 networking or similar environmental networking[281].

The C40 and R20 initiatives sustain the visionary global approach advanced by this Thesis and show that transnational networking is not necessarily performed best in a confined regional setting. The initiatives emphasise that such transnational relations are well performed in a club of homogeneous actors sharing the same interest and objectives. However, the transnational C40 also indicates that the Club can include a global variety of "homogeneous" members at different economic, cultural, and political levels. Cities in this group span from Lagos in Nigeria, Ho Chi Minh City in Vietnam, Karachi in Pakistan, Mumbai in India, and Dhaka in Bangladesh to New York City in the US, Berlin in Germany, Copenhagen in Denmark, Shanghai in China, and Moscow in Russia. Similarly, the more recent R20 includes regions from the Delta State in Nigeria to the state of California in the US.

Such constellations of global transnational cooperation illustrate the point already made here that the right amount of incentives in any network constellation and the definition of "homogeneous" actors depend of many variable factors.

The partnerships between the EEA and global transnational initiatives, also beyond the examples of the C40 and R20, are part of the global role of the EEA and the strategic transnational concept as presented later in the chapter. It is not the purpose to impose the EEA or in any way direct, control or influence such private networking. Rather, the point is to establish a kind of affiliation for the mutual benefit of a common strategic

[281] A similar initiative, based on traditional cooperation, is the joint C40 and World Bank partnership, see http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22928707~pagePK:64257043~piPK:437376~theSitePK:4607,00.html?cid=ISG_E_WBWeeklyUpdate_NL

transnational concept in complex environmental and climate management. The benefits concern the strategic autonomous position of the EEA, separated from the national and international regulatory processes and policy influences, which may prove useful for actors with little capacity, such as the less resourceful members of the C40.

Especially within the climate and environmental field, such affiliation between private initiatives and public international organisations may prove productive. As argued earlier in this section, the imperfection of the traditional intergovernmental decision-making processes may have shifted the focus to transnational initiatives. However, public international governance and law cannot leave such innovations to private governance alone. As argued earlier in Chapter 10.1.4, private governance cannot replace the need for public "meta-governance". Thus, public international governance and law cannot allow "missing out" on providing for such overall public policy and law. Thus, the relevant issue is not whether the global private sector and initiatives have taken over as a consequence of the failures within the international public regulatory processes. Rather, the issues is *how* the public international regulatory process can move forward, in taking advantages of and utilising such private initiatives, and how to apply and incorporate the productive outcome into the public regulatory process. It is not a question of either or, as there is no alternative to public international governance and law.

So, the question is how to attach such innovative private transnational processes to public international governance? How to provide a linkage? This is addressed by the strategic transnational concept presented here. Also, to address private transnational initiatives, the international organisations need a transnational approach. Thus, the EEA, as the transnational environmental institution within the vertical supranational EU, may perform such role. A transnational EEA employed by the supranational EU may appear as a Trojan Horse; it is an appropriate transnational vehicle of the supranational setting in gaining credible access and working relations to external transnational networks – a credibility, the vertical supranational or traditional intergovernmental organisation only with difficulty could achieve on their own, as the vertical organisational structure poorly

conforms to the horizontal transnational organisation of such external transnational regimes.

The transnational linkage employed by the supranational EU is an example of the strategic use of the autonomous position of the EEA. The Community may use the autonomous EEA strategically in order to obtain new knowledge for the continuous development of EU environmental law and policy. In this approach, it makes no difference whether the deliberative playing field is a network among European administrators or it also involves global networking involving private initiatives. The strategic outcome, also from the supranational point of view, is to gain knowledge, to gain legitimacy at EU and world level, and to consolidate the position of EU environmental law and policy as public international law and governance.

One could ask why a private club of major cities in C40 would find incentives to cooperate with the EEA in the strategic transnational concept? The answer is found in the incentives based on the network dynamics addressed earlier in Chapter 10.2. The partnership must also be strategic in the sense that it reflects the mutual benefits in the generation of knowledge and norms, a partnership without any dominating structures and a partnership where both parties gain access to an even larger playing field of actors. In addition, both parties consolidate their positions by a partnership. The C40 gains legitimacy in teaming up with the EU/EEA and it facilitates access to additional resources and capacity. Also, the EEA and the EU consolidate their position as a world leading climate (environmental) regime and at the same time, ensure vital input for the development of public EU climate (environmental) policy and law. The same basic incentives for partnership may apply to the recent partnership between the C40 and the World Bank[282], a partnership more general in nature than the ambitious strategic transnational partnership proposed in this Thesis between C40 and the EEA.

[282] Ibid. note 281.

11.3 The Redefined Role of National Administration in Globalisation

Up to now, the discussions have described the rationale for the strategic transnational concept in managing global inequality and also in utilising productively, the emerging transnational initiatives caused by the failures of the traditional intergovernmental decision-making processes.

Now, as the strategic transnational concept focuses on an active role of the state administration, this section clarifies the role of the national administration in globalised transnational processes.

Transgovernmental Networks

Already in Chapter 10.1.4, it was described that the European agencification process brings about relative autonomy at the domestic level (Martens 2008). Such domestic autonomy will base itself on the same strategic concept as argued for the EEA, and would, in general terms, conform to the institutional balance within the national state. Therefore, it is not necessarily an issue of legal autonomy for the national environmental agency; it is rather an issue of strategic autonomy.

Such domestic autonomy of the third level national administration derives even further legitimacy based on the increasing transnational relations caused by the globalisation processes. The role of national administration is changing as the governance of globalisation includes a significant element of interdependence between domestic and international dimensions (Bhagwati 2007, 223).

Let us therefore have a look at the "globalised" legitimacy of national administration at this third level of deliberative transnational networking, or rather, transgovernmental networking, as we refer to national administrations. What is the defined role of national administration in globalised transgovernmental processes? It is not just an issue of whether the state matters in globalisation, but rather how the state matters.

Chapter 10.1 has already addressed the general rationale behind the rise of transnational administrative networks. Now in a globalised context, this autonomous position of the transnational administrative networks is a logical consequence of the inability of the traditional international organisations, and of the traditional national state in conforming to increasing globalisation. Warning observes that globalisation affects national administrations in such ways that regulatory matters transcend borders falling only partially – if at all – within the jurisdiction of individual states and their agencies. Thus, transnational administrative networks occur as a response to such demands. Warning even calls this development "the deficiencies of international organizations", stating that international organisations always have been "flawed and imperfect resulting from a poor institutional design, which becomes particularly apparent in the age of globalization" (Warning 2009, 32s, 36ss and 61). It may well be concluded that transnational means processes that develop beyond the impact of the well-known international government-based treaties (Ladeur 2004b, 2).

These transgovernmental network relations concern the increasingly diverse and important direct connections between sub-units of different governments (Nye & Welch 2011, 282)[283]. These transgovernmental regulatory networks enhance the ability of states to work together to address common problems as a new form of global governance without the centralised bureaucracy of formal international institutions (Slaughter 2004b, 122s). They are non-hierarchical informal networks of national government officials collecting and disseminating information, enabling coordination and cooperation in strategies, regulatory matters and national policies, and fostering the harmonisation of rules and standards (Slaughter 2004a, 131ss and Warning 2009, 40).

In this context, Slaughter has defined three categories of transnational networking linking administrative agencies in the broader context of globalisation (Slaughter 2004a, 45ss, and Slaughter 2004b, 129ss):

[283] Nye and Welch concluded in their recent 2011 study at p. 322 that "it is clear that world government is not just around the corner. There is too much social and political diversity in the world and not a sufficient sense of community to support world government. Reforms of the United Nations or the development of new institutions offers new ways for states to work with each other as well as for non-state actors to facilitate cooperation. In some instances, transnational networks of government officials will foster such cooperation; in other instances mixed coalitions of governments and private actors will do the job".

First, networking based on the meeting of parties within international organisations, such as the WTO and NATO.

Second, implementation networks of the international organisations, which support the realisation of the treaty objectives.

And third, networks of governmental agencies are spontaneously emerging outside the international organisations forming a loose institution for regulatory cooperation.

The strategic transgovernmental concept advanced here resembles the third category of networking. The strategic transnational concept incorporates the benefits of the "loose" transgovernmental networks, as they permit a loose, flexible structure that can bring in national officials from a wide range of different countries as needed to address specific problems. Slaughter states that they "can target problems at their roots, plug loopholes in national jurisdictions, and respond to goods, people, and ideas streaming across borders. Their members can educate, bolster, and regulate one another in essentially the same ways that make private transnational networks efficient". Therefore, they are indeed the "institutions of globalization", and, based on the strategic transnational concept, suited to global governance in an age of globalisation and information (Slaughter 2004a, 264).

However, the problem of such loose networks is precisely the "looseness". The strategic transnational concept takes direct advantage of such loose networking however, within a structured framework allowing for balanced and fair deliberative processes. It is a structured framework based on the institutional settings of the EEA and its operation, and a structured framework advancing EU law and policy objectives by transnational means. Therefore, the strategic transnational concept does not fall directly within any of the transnational administrative network categories defined by Slaughter. As the strategic transnational concept combines the looseness of the third category of networking with a structured strategic approach, it represents a new fourth category of

transgovernmental networking in addition to the three network categories presented by Slaughter.

These perspectives highlight the continuing significant role of the state and national administration. Globalisation is strongly affecting domestic governance but is far from making the national state obsolete (Keohane & Nye 2000, 36). National regulation and institutions continue to matter, in a redefined manner[284].

Repositioning of the State – the Disaggregated State

Discussions on the redefined role of the state do not alter the general need for public "meta-governance" provided for by the state, as we have discussed earlier in Chapter 10.1.4 (Conzelmann & Wolf 2008, 112s). O'Neil writes that only states can provide the many vital functions in the international system, such as force of law and order, a legitimacy grounded in years of political practise, financial aid and policy tools that make states essential to effective global governance even in partnership with other actors. That not all these functions are directed "towards a greener world is more a matter of reforming, or repositioning, the state, rather than an impossible goal" (O'Neil 2009, 53)[285].

In addressing such repositioning, we may once again borrow from Slaughter, employing the concept of the "disaggregated state" referring to the rising need and capacity of different domestic government institutions to engage in activities beyond the borders

[284] As argued in the Introduction, this Thesis continues to apply a significant position of the state in a globalised world; as the state agency represents a vital focal point in combining and interacting the transgovernmental networking with the regulatory and institutional processes at national level. Therefore, the issue discussed here is not whether the state matters in an increasingly globalised world, but rather how to define the "disaggregated" repositioning of the national agencies in terms of the strategic transnational concept. Therefore, instead of focusing upon the traditional unity of state, or upon the uniformity and homogeneity in networking, the strategic transnational concept applies actively diffusion and diversity. The target is management rather than uniformity. This also means that the repositioning of the state agency shall take place within such diversity management beyond the traditional unity of the state. Thus, the redefined role of the disaggregated national agency positions it "within and without" the traditional national regulatory agenda and institutional order.

[285] Also, Warning concludes based on empirical studies, that the state and its administration are still "an indispensable element of global governance". It seems "incorrect and premature to declare that the state is incapable of dealing with global problems. The state's power is not diminishing. Instead, the state reconstitutes its powers and seeks other ways to apply it" (Warning 2009, 22, 169 and 173).

(Slaughter 2004a, 12ss). Such disaggregation or "breaking-up" of administrative culture, provides agencies with the degree of autonomy necessary "to connect with their foreign counterparts" and participate in such networks (Warning 2009, 40).

The concept of "disaggregated state" combines the continuous role of the state with the demand for transgovernmental networking. It constitutes a New World Order based on five premises (Slaughter 2004a, 18):

- "States are still the most important actors in the international system, although not alone."

- "States are not disappearing, but are disaggregating into its component institutions, which are increasingly interacting principally with their foreign counterparts across borders."

- "These institutions still represent distinct national or state interests, even as they also recognise common identities and experience as regulators and legislators."

- "Different states have evolved and will continue to evolve mechanisms for re-aggregating the interests of their distinct institutions when necessary. In many circumstances, therefore, states will still interact with one another as unitary actors in more traditional ways."

- "Government networks exist alongside and sometime within more traditional international organisations."

The concept of a New World Order and the disaggregated state addresses the rise of and the needs of multilevel governance in the EU and elsewhere, and address also the legal pluralism and differentiation caused by the globalisation processes.

The strategic transnational concept fits within such concepts. The rationale of the strategic transnational concept employs such disaggregated transgovernmental

networking based on the strategic autonomy of the national administration rather than legal sovereignty. This "disaggregated sovereignty" enhances the accountability of the participants in government networks by bringing them measures of individual, or rather institutional, sovereignty (Slaughter 2004a, 266ss).

Central for the transgovernmental networks is the *pluralisation* following the increasing density of interdependence and interconnection among the different networks (Nye & Welch 2011, 242s). Pluralisation based on the increasing flow of information has added to such disaggregation of the state. States remain "the most important actors on the stage of world politics but in an information age the stage has become more crowed" (Nye & Welch 2011, 292). Based on "information technology, the economic and information networks in the 21st century lead to an increase in diffusion of powers away from the central government moving some functions of governance to higher and lower levels of government, and some from formal government to the private and non-profit sectors" (Nye & Welch 2011, 303s).

Let us in the following explore the concept of the disaggregated state and the repositioning of the states in managing pluralisation.

Repositioning of the State – Managing Pluralism

As with the disaggregated concept, Ladeur positions the state centrally in responding to pluralisation and the transnational processes of networking or the "society of networks" (Ladeur 2004b, 11). Based on this repositioning, Ladeur argues that the state plays a significant role in steering the new trends in a globalised economy by focusing on "flexible adaptation to uncertainty" and cooperation based on proceduralisation as a productive element – not to replace substantive material rule making – but "to focus upon cognitive conditions of decision-making to be generated into the decision-making process itself. This would imply a shift from substantive rules to procedural meta-rules focusing upon the modelling of reality, the monitoring of the implementation of norms,

the evaluation of consequences of the implementation of certain decision, etc." (Ladeur 2004b, 11 and 17s and Ladeur 2004c, 116s) [286].

Such procedures bring about a structured institutional coordination as coordination is needed in managing "network pluralisation based upon overlapping systems of "parallel governments" – international, supranational, transnational, national – no longer following the traditional model of stable (federal state) or vertical (intergovernmental) demarcation, but rather a "intersystematicity" of cooperative harmonization between regulatory systems" (Ladeur 2004c, 111).

The need for coordination and procedural structure not only provides the rationale for national administration in disaggregated manners. Also, it provides the rationale for a strategic autonomous EEA as the lead facilitating transnational institution. The independent EEA may provide for meta-coordination and a meta-procedural structure that the 27+ national administrations would find difficult in reaching on their own. Pluralisation understood as the differentiated interests and strategies of the Member States, implies a state of competition among institutions, which could be encouraged and applied productively by the EEA, as the dynamic drive of the strategic transnational concept.

Such findings confirm the point made earlier that pluralisation, including legal pluralism, allows the state to maintain a central role although no longer monopolised (Santos 1992, 134, Santos 1995, 274ss, and Snyder 2010, 15s)[287].

Also, Snyder allocates a central, although redefined, role of the state in the management of pluralisation. Snyder points out that global economic governance is based on global economic networks governed by "the totality of strategically determined, situationally

[286] Ladeur finds that state is being transformed "inevitably taking up elements of transnational de-territorialised self-organisation of variable networks, and orienting itself, for instance, towards border-crossing trans-nationally variable interests rather than just to national clienteles. In this way, the state's territorial unity becomes permeable both from the inside and from the outside for the pursuit of changed interests, calling for new procedural forms for upholding them" (Ladeur 2004c, 111s).

[287] The state also in a transnational setting shall manage such pluralisation in what Santos describes as two forms of globalisation: *globalised localism* and *localised globalism*. The former refers to the process by which "local phenomena are successful globalised", while the latter "denotes the impact of transnational practices on local conditions "(Santos 1995, 263).

specific, and often episodic conjunctions of a multiplicity of institutional, normative and processual sites of governance throughout the world". The totality of such sites represents a new global form of legal pluralism (Snyder 2010, 84 and Snyder 2001b, 43). Within this governance, "the state - among a diversity of regional and international organisations - represents an important sites that locate and produce the institutions, norms and dispute-resolutions process involved in global legal pluralism" (Snyder 2010, 50s, and 53s, and Snyder 2001b, 1s, and 10ss)[288].

The state and its national administration as "sites" for global governance is not only an example of the role of the disaggregated state but also close to the essence of the strategic transnational concept. The national focal points – or sites – of the transnational approach anchor the multiplicity of sites and legal pluralism. As with the strategic transnational concept, also the site of governance applies and combines public, private, and hybrid forms of governance with an emphasis on strategic action in the management of global legal pluralism (Snyder 2010, 31s).

Perhaps the concept of sites of governance is even wider in scope than the strategic transnational concept advanced here. In principle, the sites of governance include the full range of multiple sites engaged in the economic processes of globalisation and this is not confined to transnational relations alone.

However, both concepts apply the same dynamics in the deliberative processes for the generation of norms such as cooperative law. In relation to the multi-level governance that emerged on the EU level, Snyder argues that the "interwoven sets of norms, which comprise global legal pluralism, amount to new regimes for governing global economic networks. They are less a structure of multi-level governance, than conjunction of

[288] According to Snyder, global legal pluralism comprises two different aspects: The first is structural and the other is relational (Snyder 2001b, 10ss and Snyder 2010, 2 and 53ss).
Structural, "global legal pluralism involves a variety of institutions, norms and dispute-resolution processes located and produced at different structured sites around the world."
Relational, "the relations of structure and processes constitute the global legal playing field and thus, the basic characteristics of global legal pluralism, such as equality or hierarchy, dominance or submission, creatively or imitation, convergence or divergence, etc. They influence profoundly the growth, development and survival of the different sites – and the relations between sites also varies; structurally, they may be autonomous or even independent, part of the same of different regimes, part of a single system of multi-level governance, or otherwise interconnected. In terms of process, they may be distinct and discrete, competing, overlapping, or feed into each other" (Snyder 2001b, 11s and Snyder 2010, 54).

distinctive institutional and normative sites for the production, implementation and sanctioning of rules" (Snyder 2010, 85 and Snyder 2001b, 44).

Also, both concepts call for a structured approach in order to enhance accountability. The wide playing fields of global governance are followed by a demand for legitimacy, democracy and accountability based on deliberation (Snyder 2010, 34ss). The current system is "unbalanced in favour of countries, organisations and individuals who can afford technical and, in particular, legal expertise. Also, reforms must be addressed in including the global civil society, further than simply rebalancing access to expertise and structuring NGO participation in decision-making keeping in mind the diffuse numbers, understanding and roles undertaken by NGO's; many of which have become important sectoral players and thus, competitors of the state in legal as well as factual terms" (Snyder 2010, 38). This corresponds to the proposed structured involvement of NGOs in the deliberative processes of the EEA and transnational networking. Such aspects of accountability issues are addressed further in Chapter 12.

Accountability based on deliberation and meta-procedural norms requires a strong focal point in the sense of opening and setting the floor for the deliberation processes. This is in contrast to weak focal points giving in to the pressures of globalisation and the pluralisation of interests[289]. As argued by both Ladeur and Snyder above, the state and the national administration may undertake such a strong role.

The central argument to make here is that the concept of sites of governance, the strategic transnational concept, and the concept of the disaggregated state in a New World Order, all together apply a continuously, although redefined, non-monopolised central role of the state and the national administration acting as focal points of the transnational relations, or rather the transgovernmental relations in managing globalisation.

[289] A strong national focal point may encourage the quality of the deliberation process. The strong state may, by the use of the precautionary principle, and its' emphasis on uncertainty, risk management and the reverse burden of proof ("no data, no market)" encourage deliberation among marked actors (Dilling 2011, 151ss).

The next section addresses the global potentials of the EEA in global transnational management. The understanding of the global context not only contributes to the rationale of the EEA strategic transnational concept, and the role of disaggregated national administrations, it also provides for visions of global potentials of the EU strategic transnational concept itself, which corresponds to the general global ambitions of the EU, as outlined earlier.

11.4 A Global Strategic Transnational Concept

The potentials of the EU strategic transnational concept, including the potentials of the EEA, have implications beyond the Community. These aspects will be presented below arguing that the EEA today already has an extraterritorial approach within the narrowly defined geographical scope of Europe.

It will be argued that the EEA has an added potential global dimension. The EU is, based on its unique supranational setting, a powerful breeding ground for transnational lessons (Slaughter 2004a, 134 and Slaughter 2004b, 145). As it will be described, the EEA could, due to its impartial role, even undertake lead coordination of transnational management in different parts of the world. The global involvement of the strategic transnational is a natural "extension" of the strategic transnational processes within the EU, and the management of diversity and complexity.

Earlier in this Chapter, it has been argued that the EEA may participate actively in global private governance, for example the global climate networks C40 and R20. Such common efforts would employ the strategic transnational concept in generating global cooperative law. The significant differences among the members of the C40 and the R20 in cultural, geographical, economic and political settings are prime examples of the possibilities for global transnational networking. They also represent an understanding of a worldwide "homogeneous" club of members based on their common problems and objectives in climate management as major cities and regions, and also based on a common recognition of the power of learning processes.

The global dimension of C40 and the R20, and the wide differences among the members also illustrate the increasing global interdependency. This interdependency may be enhanced even further by internal processes. O'Neil argues that the recent trends and consequences of globalisation facilitate a broader, truly global, understanding of the transnational dimension. For instance, problems and concerns of water management have become visible as global environmental issues, as problems no longer just are shared based on the physical river catchment area or based on an understanding among states facing the same problem, such as a down-stream river state. "The interconnection, interdependency and interrelationship generated by the neoliberal globalisation now bring states together worldwide, as such truly global problems not longer only concern the individual states and local jurisdictions. The neoliberal globalization exacerbates and connects previously unconnected environmental problems. And the emergence of transnational activist networks has created linkages and common strategies between activities around the world combating similar problems – and even in linking environmental issues to the broader questions of human rights and global justice" (O'Neil 2009, 41).

This creates a truly global playing field for the strategic transnational concept in, for instance, global water management. It also positions the EEA as a potential transnational institutional facilitator.

The full scale of the global strategic transnational concept may for the moment perhaps be rather academic, as it would require legal revision of the scope of the EEA, and likewise a legal discussion on the constitutional possibilities in the EU for such an extraterritorial approach. However, the EU would have a strong political and commercial interest in competing against other global and regional powers in seeing its EEA as the international flagship in terms of transnational stewardship. The EU has already stated such global ambitions for an involvement in global environmental governance as expressed directly by the Sixth Community Environmental Action Programme (Commission 2002b, preamble 30)[290]. Also, such ambitions may be based

[290] Preamble 30 of the 6th EAP states: "Economic globalisation means that environmental action is increasingly needed at international level, including on transport policies, requiring new responses from

on the new foreign policy aspirations of the EU (Majone 2009, 13ss, 199ss and 231ss) combined with the extraterritorial dimension of the EU environmental law. Thus, the potential global position of the EEA is in fact part of the overall global ambitions of the EU to play a leading role in global environmental affairs using "the window of opportunity opened by the low profile maintained by countries like the United States and Japan in this area" (Majone 2005, 119).

Nevertheless, such a global approach must be carefully designed avoiding "the risk for mismatch between commitments, expectations and available resources" as perhaps observed in the foreign policy of the EU (Majone 2009, 170ss and 189) [291]. Is this to fail, due to "lack of support by political will, lack of shared understanding of Europe's vital interest, and lack of adequate resources, it can only undermine the credibility of the Union as a global actor "(Majone 2009, 233).

The following sections will first address the competitive expansion of the EU environmental law, which is part of a global, competitive game of regulatory models and influence. The following section addresses the external approach already employed by the EEA, as the EEA includes and works with third countries. The final section looks at the tendencies of international water management, illustrating the potentials for the involvement of the EEA based on the strategic transnational concept.

11.4.1 Competitive Expansion of EU Environmental law

The political and economic interest of the EU has already led to a competitive expansion of the EU environmental law. The possibility of applying the strategic transnational concept should be seen in this context. This is not to say, that the strategic transnational concept itself will be based on sharing the same economic and political objectives. The point is rather that the prospects of engaging the EEA, and the strategic

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the Community linked to policy related to trade, development and external affairs enabling sustainable development to be pursued in other countries. Good governance should make a contribution to this end".

[291] I.e. the current attempts to effectuate the meaningful role of the newly enacted foreign policy and the High Representative for Foreign Affairs and Security Policy, TEU Title V.

transnational concept in generating knowledge and norms at a external regional level, is made possible by the already external foundation of EU interest and influence.

Let us first take a look at the competitive advantage of the appeal of EU environmental law and then, the expansive significance of EU environmental law.

The Appeal of EU Environmental Law

Both the EU and the international community have experienced an almost parallel development of environmental law. For both communities, 1992 was a milestone in the development of environmental law. The 1992 UNCED set the framework for modern international environmental law. Also, in 1992, the EU Maastricht Treaty incorporated environmental policy among its main objectives.

Both communities influence and stimulate each other in the ongoing development of international environmental law. They share most of the same common objectives, and the EU even actively promotes and applies directly international environmental law by implementing it into its own legal framework. In other words, international environmental law has become an integrated part of the *Acquis Communitaire*[292].

In comparing the EU to other international communities, it would perhaps be right to conclude that the EU has become the most advanced international legal regimes in terms of integrating environmental law. This is very much based on the unique characteristics of EU law[293]. The development in the EU has indeed been impressive. Over relatively few years, from the late 1980s, the EU has developed strong legal commitments and true integration of environmental policies. The EU has constantly up-graded its environmental law and policy, developing these in three major phases (see similar thoughts, although in five phases, in Jans & Vedder 2008, 6ss).

[292] The EU is an individual part to most UN and international environmental agreements relevant for Europe and beyond. This means that the EU as a political entity is obliged, as any other signatory state, to implement the obligations arising from these agreements.
[293] Based upon 1) The well-developed body of EU environmental law and the Principle of Direct Effect, 2) TEU environmental principles, 3) The integration of environmental principles, 4) The decision-making procedures, and 5) a regulatory system increasingly based upon flexibility and differentiation.

The first phase introduced environmental law merely as a "supplementing policy area" for the realisation of the economic objectives of the EEC. This phase took place from approximately 1967 to the late 1980s, and the environmental objectives were derived from other legal bases in the TEC, as the environmental objectives were without any individual constitutional legal basis on their own.

The second phase began in the late 1980s in support of implementation of the Internal Market, and, for the first time, the EEC environmental policy was adopted based on an individual TEC environmental legal basis.

Finally, the 1992 Maastricht Treaty introduced the third phase, including environmental protection as a fundamental constitutional TEC principle[294].

Also, rather unique at international and supranational level, in regulatory output, the EU has in the entire period established a significant regime of environmental law and policy. The EU has established a comprehensive environmental *Acquis* based on a significant volume of environmental regulation and case law, which enjoys a relatively high compliance rate for any international or supranational regime.

It is not surprising that such environmental commitment, combined with economic and political potentials and impact, has made the EU an attractive partner or an inspiration for countries in search of advanced legal models in environmental law.

The Expansive Significance of EU Environmental Law

The EU has expanded rather rapidly over the last 20 years[295]. In addition to this expansion process, the implications of EU environmental law go far beyond the scope

[294] In general on the evolution of EU environmental law, see Horspool & Humphreys 2010, 531ss, Homeyer 2009, and Krämer 1996 and 2000.
[295] The EU has lately experienced a significant enlargement; from 12 Member States in 1994 to 27 Member States by 2007, where Romania and Bulgarian became the newest members of the EU. More European states are expected to become members in the future, notably the current candidate countries of

of the present, and even future, applicant countries, which could be referred to as the extraterritorial enlargement process.

The environment regulated by the EU Treaties is not limited to the Community environment as the Community can and does take measures to protect the environment outside the territory covered by the EU Treaties. This concerns measures such as to protect the ozone layer, combat climate change, protect endangered species in the Third World or ban the export of waste to non-industrialised countries (Krämer 2007, 3). Also, the present TFEU Article 191 in principle allows room for extraterritorial environmental objectives. It is now clearly stated that the objective of the Union is "promoting measures at international level to deal with regional or worldwide environmental problems". Jans & Vedder hereby find that the existing practise has been confirmed (Jans & Vedder 2008, 31ss). The extraterritorial objective is also sustained by the Sixth Community Environmental Action Programme in stressing the need for "a positive and constructive role of the European Union in the protection of the global environment" (Commission 2002b, preamble 1, 6 and 30 and Articles 2.2, 2.6 and 9.1).

However, the extraterritorial enlargement process is not just about the direct legal scope of EU environmental legislation. Basically, all Euro-Asian and Central Asian countries, which include the former Soviet republics, the Balkan states and the Republic of Mongolia are transposing the EU environmental *Acquis* at various levels based on agreements with the EU, and carried out through the former TACIS programme, or current EuropeAid programme[296]. Such extraterritorial implementation of the *Acquis* is in the interest of the EU in terms of economic and political gains, and also in terms of consolidating the domestic and external legitimacy of the EU. Such interest is essential for three specific reasons:

Croatia, the Former Yugoslav Republic of Macedonia, Iceland and Turkey. However, as the case of Turkey illustrates, a candidature is no guarantee for swift membership.

[296] EU "Technical Assistance to the Commonwealth of Independent States" programme to assist members of the Commonwealth of Independent States (as well as Mongolia) in their transition to democratic market-oriented economies. TACIS is now subsumed in the EuropeAid programme. From the 2007-2013 EU Financial Perspective, the TACIS Programme was replaced by the European Neighbourhood and Partnership Instrument for the countries of the European Neighbourhood Policy (ENP) and Russia. See http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17003_en.htm

First, ensuring successful implementation will not only prove the strength and quality of environmental law, but will also sustain the legitimacy of the EU in general. The extraterritorial implementation of EU law is a "show-case" for countries "shopping" in the international market for adequate legal models. The EU typically is competing against US, Russian, Turkish and Chinese legal and economic models in these markets. Successful implementation helps bring about the domestic public support (i.e. of the third countries) for the EU, and for the enlargement process, keeping in mind that major parts of the populations, for instance in the territories of the former Soviet Union, do not necessarily support an accession to the EU or even a closer alignment with the EU[297]. Alternatives to the EU exist in the region, such as for example the Commonwealth of Independent States (CIS) and the Shanghai Cooperation Organisation (SCO), and other regional cooperation championed by regional powers such as Turkey and China, which already have significant influence in Central Asia. Also, Russia has in resent years consolidated – or has attempted to reconsolidate - its position in the region[298]. This has for instance brought about ideas for a renewed union between Russia and Byelorussia.

In addition, EU environmental law has global influences. An example is the Malaysian decisions at state and federal level to adopt water and river basin management along the lines of the EU Water Framework Directive[299].

Second, environmental issues and accidents often have trans-border implications, perhaps best illustrated by the catastrophic nuclear meltdown at Chernobyl in the former Soviet Union, now Ukraine. Therefore, extraterritorial implementation of sound environmental law and management is also a matter of self-interest of the EU.

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[297] An example hereof is seen in the recent Ukrainian general elections where Eastern Ukraine tends to favour closer relations with Russia, whereas Western Ukraine supports closer ties with the EU, *Five Years on in Kiev,* The Economist, 21 January, 2010.

[298] Geopolitically, the US and the EU appear to have accepted that Russia increasingly improves its position in the region filling the vacuum left by the 1991 collapse of the Soviet Union. This was illustrated recently by the 2008 Russian-Georgian War and its political aftermath, and the 2010 Kyrgyz uprising and overthrow of the government where Russia was seen as the legitimate superpower to directly react or intervene (which did not happen).

[299] For instance, based on own professional experiences in the Malaysian states of Selangor, Sabah and Kedah, see for instance:
http://www.didkedah.gov.my/jpsusa/index.php?option=com_content&view=article&id=53&Itemid=58&showall=1

Third, significant EU commercial interests are related to a successful extraterritorial implementation of EU environmental law. EU enterprises are currently investing significant resources in the CIS and moving the production of goods and services accordingly. The implementation of EU environmental law facilitates this process by establishing a similar legal framework. This means lower risk and lower costs involved in the establishment of business and running operations for the European industry.

11.4.2 The External Mandates of the EEA

The global economic and political interest aligned EU environmental law must be seen as a valid rationale for mandating the EEA to expand its operations beyond the borders of the EU. This, of course, is in addition to the primary objective of safeguarding the European environment.

Equipped with such external mandates, the global role of the EEA corresponds well to the organisational self-understanding and performance already undertaken by the Agency from its very beginning. Rather uniquely among EU institutions, the EEA is open for membership to other countries i.e. non-members of the Community[300].

However, the potential cooperation of the EEA with third countries is not only limited to candidate countries and countries aiming at membership of the EEA. The 1999 revision of the EEA introduced a specific mandate allowing for EEA cooperation with national institutions in non-EU Member States (EEA Regulation Article 15 (3)).

The external focus of the EEA has been a part of its daily operations for nearly two decades. Based on such experiences, the EEA is already a consolidated global organisation, which is a productive starting point for applying the strategic transnational concept in a global context. Almost 20 years of external global cooperation creates confidence, credibility and legitimacy not only for the EEA itself, but also for its standing around the world.

[300] EEA Regulation, Article 19.

In order to understand this global confidence of the EEA, let us have a brief overview at the broad external outlook practised since the early 1990s[301].

International Organisations

Internationally, the EEA is supposed to promote the incorporation of European environmental information into international environmental monitoring programmes and to carry out its functions in close cooperation with other international bodies in order to exchange information and experiences and to avoid duplicating work and efforts[302].

Thus, the EEA participates in increasingly international regimes of networking in order to obtain information. The Agency has established relations to other international organisations, for instance the WHO, enabling the EEA to participate in providing an interface between environmental and health related issues, and to the OECD, to ensure mutual compatibility of data, information and approaches for measurement, analyses and assessment in the environmental field, to help fully address both the environmental and socio-economic dimensions. From the early beginning the EEA, close ties with the UNEP were also established, including cooperation on the UNEP programme for Central and Eastern Europe (ENRIN), which in the 1990s facilitated the extension of the EIONET in the region. Also, agreements with the World Bank and the Council of Europe have been obtained along with the US EPA, in order to exchange information and cooperate in a global network of environmental agencies. The coordination of programmes with international organisations is typically carried out by Memorandums of Understanding (MoU) (Jiménez-Beltran 1996a, 6) [303].

[301] On an early account of the cooperation with non-EU countries and other institutions, see Davies 1994, 330ss.
[302] EEA Regulation Articles 2(g) and 15(2).
[303] See also EEA 1995, 8 and EEA Newsletter 6, Dec. 95 p. 4.

Third Countries

The third countries have from the beginning of the EEA enjoyed the possibility of becoming direct members of the Agency and being part of the management of the Agency, which is a rather unique possibility at a Community institution (EEA Regulation Article 19).

As a young organisation, the EEA gained legitimacy due to its involvement in Eastern and Central Europe, and consolidated its institutional position. The EEA is still one of the first contact points for third countries desiring to cooperate with the EU on environmental issues at a technical level[304]. It is today recognised that the EEA has played a significant role in helping third countries become familiar with the EC environmental *acquis* and best practices, as candidate countries have been participating in the EEA from an early stage (Commission 2008b, 5). Not only did the early cooperation streamline the organisational cultures and interactions between the EU and the Eastern and Central European states, it also sent an important signal and gave a boost to the European and democratic movements in the region[305].

Third country cooperation and EEA membership has been ever increasing since the beginning of the EEA. The twelve new Central and Eastern EU members all started as third countries EEA members, obtaining full EEA member status on EU accession. Already before the EU accession began, the (then) third countries EEA Member States almost equalled the number of EU members. Today, the ongoing expansion into Eastern Europe and the Balkans has brought the number of EEA members to 38. The number is considered high and has taken place in a, perhaps unexpectedly, short time. Such rapid expansion has had two consequences.

First, as presented earlier in Part II, in order to preserve the efficiency of the EEA Management Board of more than 40 members, the 1999 EEA Regulation established a

[304] Commission 2003b, 13 and the reference to the context of the programmes Wider Europe Imitative and the Thessaloniki Agenda.
[305] The EEA membership is often referred to as an EU „blue-print", and as a first step towards desired EU accession. See also, Commission 2003b, 13.

Bureau. This may be a practical turn, but is nevertheless also an indication of the eroding transnational nature of the EEA allowing for further influence of the Commission.

Second, the Commission has previously argued that any further EEA expansion should wait for the already large group of EEA members and participants to function well (Commission 2003b, 13 and 21 and Chapter 8.2 above). This is perhaps a reasonable reaction in order to control and manage the EEA and its operations, although it could be seen as a deviation from the earlier stated policy goal of an expanded coverage of the EEA into Eastern and Central Europe and its earlier commitments followed by the pan-Environmental Programme for Europe (EPE), (see below). Nevertheless, the EEA has in only 15 years succeeded in achieving the major policy objective of including the (then) candidate Eastern and Central European Countries.

Already from its very beginning, the EEA participated in the pan-European environmental work, which began in June 1991, and which has helped to consolidate the position of the EEA, and the environmental networking throughout Europe. The early work resulted in the Pan-European State of the Environment Report, "Europe's Environment: The Dobris Assessment". This report was prepared for and confirmed by the Third Conference of Environment Ministers held in Sofia in October 1995. The work served as the basis for developing the Environment Programme for Europe (EPE), which promoted a pan-European network linked to the EEA and the EIONET for environmental data collection, analysis and dissemination, and to assist countries in transition with capacity-building on environmental information issues. The EPE also called for the participation of all European countries in the work of the EEA, in order to improve comparability and harmonisation of data and to co-ordinate data collection. The EEA was mandated by the 1995 Sofia Ministerial Declaration to carry out the Programme[306].

[306] In addition, the EEA has from its beginning prioritised and extended its activities and cooperation with the Central and Eastern European countries under - and financed by - the PHARE and TACIS programmes (EEA 1995, 10). This approach was shared by the House of Lords, which saw the Agency as an important factor in improving the framework of monitoring across the Eastern and Central European region, and recommended full membership a soon as possible (House of Lords 1995b, 29).

Thus, the EEA mandate given already by the 1995 Sofia Meeting represents the European endorsement of the EEA as a truly European environmental organisation. This act of confidence was, and still is, one of the fundamental pillars of legitimacy for the transnational EEA and for the successful European operation so far.

It is such confidence and legitimacy that will be the foundation of the global strategic transnational concept of the EEA.

11.4.3 The Example of Global Transnational Water Management

Especially the transnational management of water may be a potential area of the EEA and the global strategic transnational concept.

In general, a global approach to water management is necessary, as the access to clean domestic water in many parts of the world is limited and cannot fulfil the demands of increasing population and urbanisation[307]. Furthermore, such limited access to water causes conflicts, and the number of water related conflicts must expect to increase in the future, as a result of the ever-rising demand for access to water and the increasing population in regions where water resources already are scarce[308]. The lack of effective trans-boundary water management often has resulted in negative consequences for the environment and for regional development[309].

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[307] Despite the transnational character of watercourses, and the increasing need for transnational solutions in water management, trans-boundary water management is typically based on national self-interest.
The incentive for cooperation among up-stream and down-stream states concerns primarily the necessity to protect and manage the water flow, to ensure the quality and quantity of the available waters, and to ensure the protection of environment and aquatic life. However, these common objectives are often overpowered by vast domestic interests in the utilisation of water, for example for drinking water, irrigation, fishing, power generation, as recipients of wastewaters and other economic interests.

[308] Illustratively, the control of waters is an inherent part of the dispute between Israel and Syria over the Golan Hills, and also Israel and Jordan over the Jordan River. For such conflicts and the causes hereof, see Giordano & Wolf (2003), 164ss.
See also Louka 2006, at 174ss and 218ss on the regional context concerning the Nile, the Ganges, the Jordan River and the Mekong.

[309] Based on a mix of political, economic and military influence, Turkey possesses the classic de facto veto power as an up-stream state with regard to Syria and Iraq. Egypt is an example of the powerful effectively de facto veto down-stream states with respect to Sudan and Ethiopia (Louka 2006, 172ss)
Examples of excessive water utilisation with catastrophic consequences include the drying out of inland lakes, such as the Aral Sea and the Chad Lake, and the drying out of the final run of the Colorado River into Baia Califonia.

This calls for innovative management approaches and impartial mediators. The EU may play an active transnational role in such management. First of all, because transnational water management corresponds to the transnational nature of water flows. But also, because the EU has developed one of the most advanced water management systems yet seen at an international scale, the WFD. The WFD is an advanced regulatory instrument that is recognised and sought after internationally[310]. The WFD is directly relevant, and inspirational, for international attempt to provide for the related concept of integrated river basin management (IRBM). Employing the potentials of the WFD would be in line with the global ambitions of the EU experimental governance approach, as described in the introduction to Part III (Sabel & Zeitlin 2010b).

In a global context, the WFD is unique because it not only prescribes the legislation that states must adopt, but also outlines the administrative structures that states must establish in order to engage successfully in integrated water management (Louka 2006, 223).

The WFD is one of the first attempts to establish the principle of integrated water management on a regional scale. However, given that the WFD "is developed within the mature context of an organization, that straddles the boundaries of a federal state and an international entity", it is unclear to which extent the full application of the WFD may be transferred to other regions in the world (Louka 2006, 225). Also of concern for the successful outcome of integrated water management is the significant, required administrative and institutional capacity, as developing countries often lack the strong institutions that would make integrated water management possible (Louka 2006, 170).

To guide such reforms, the EEA could actively employ and assist in transnational water management in different parts of the world. It could take part directly as the coordinating transnational institution within such transnational regimes or it could facilitate, train and support such coordination in the initial starting phase of the regimes. The EEA could be involved in assisting with the establishment of such transitional

[310] Ibid. note 299.

schemes or provide softer influences by offering training and twinning programmes. The actual involvement, and the strategic interaction between such transnational regimes and the EEA in the generation of knowledge and norms, depends on the individual possibilities of each regime. Based on its external, impartial, and autonomous role, the EEA could perhaps even provide regional transnational water management, where regional cooperation is troublesome, such as in the Middle East.

The global transnational interdependency as argued by O'Neil (O'Neil 2009, 41), and presented earlier in this sub-chapter, may also bring together common interests shared by all states in sustainable river management. For instance, down-stream states from different parts of the word could benefit from networking on a variety of specific issues related to down-stream states specifically.

12 EEA Accountability

The autonomous position of the EEA places it somehow outside the traditional democratic control of the constitutional state (i.e. the Member States) and outside the traditional political and regulatory control of the Community. This Chapter analyses the accountability of the EEA based on procedural democratisation and a structured framework for balanced deliberative processes.

As outlined in the introduction to Part III, the rationale of the strategic transnational concept depends on its ability to convey sound deliberative processes. Deliberation is the driving force behind the generation of knowledge and norms, and the deliberation process is considered a functional equivalent to democracy, making up for the democratic deficit of the EEA as a non-majoritarian organisation (see also Kjaer 2010, 35s and164s).

It will be argued that accountability is more than structures for a balanced deliberative process. Accountability must be understood also in the sense of legitimacy or perception among stakeholders and in the public eye, as accountability also is a matter of

confidence in a credible agency. Such confidence and credibility require a firm and precise legal operational framework, not just with regard to the deliberative processes, as argued, but also with regard to clarity in objectives and mandates. Participants relevant for delicate networking must have a clear prior idea of the purpose and the functions of the transnational regime. Lack of clarity causes uncertainty, which may result in losing potential participants. Lack of clarity also may attract the interference of other biased interests.

The first part of the chapter briefly describes the broader perspectives of the accountability of the transnational environmental information agency.

The second part addresses specifically the structural framework, especially concerning clarity in the legal framework, with regard to mandates and objectives of the Agency.

The third part concerns the structures related to the deliberative process. First, we will focus on the rationale for procedural democratisation. Then, we will address specific procedural structures related to the influence, involvement and control of the Community, the Member States and third actors in networking and the management and operations of the Agency. This concerns access to deliberation, access to information and balancing of interests.

12.1 The Generic Legitimacy of Transnational Information Agencies

Before turning to the specifics of accountability in terms of deliberation and democratic procedures, it may be useful to outline the overall legitimacy of transnational information agencies.

The earlier chapters have argued that information management plays an increasingly important role in the transnational processes of globalisation, as the globalisation processes are predominately based on enhanced flow of information and a complex number of transnational actors (Nye & Welch 2011, 268ss). Likewise, it has been

argued that especially EU transnational information management has global legitimacy, as the EU may act as a pioneer for global transgovernmental networking (Slaughter 2004a, 134 and Slaughter 2004b, 145).

In this type of management, the overall legitimacy of global transnational information agencies is based on the ability to provide information to national officials and helping to coordinate relations among them, rather than taking power from such officials (Slaughter 2004b, 137). Further, these agencies would service not only transnational governmental agencies, but also transnational networks within their policy areas, working to bring together both private and public actors in a particular policy sector. Hereby, transgovernmental networks can be folded into larger *"mixed networks"* of governmental and private actors adding to the breakdown of the traditional distinction between public and private (Pollack & Shaffer 2001b, 301ss). This allows for a wide range of multiple channels for sharing of information and for coordinating efforts to transfer parallel domestic information (Slaughter 2004b, 137).

This legitimacy brings about advantages for the overall accountability of the global transnational information agencies. In addition, Slaughter has provided a list of generic legitimacy for transnational information agencies also relevant for the discussions on the EEA (Slaughter 2004b, 143ss):

1) "Transnational legitimacy - An international institution "only" with informational powers would highlight the existence and importance of current transgovernmental networks, helping to legitimate them by acknowledging them as key elements of a system of global governance. The purpose of the Agency would be to facilitate the functioning of these networks and to expand them both to other governments and to private actors as necessary".

2) "National democracy - Paradoxically, the creation of a global entity would emphasise the national identity of network participants. A small group of international bureaucrats to meet the needs of national officials can only emphasise the location of actual

decision-making power in national hands – and thus, stimulate national democratic institutions".

3) "Transparency - It will generate a discussion on "good and bad" information, and highlight information in general, which added public openness would further boost transparency and the public possibility for participating in decision making and implementation".

4) "Coordination in fragmentised - Based upon the EU model, such informational networking should include and bring together all public and private actors on issues critical to global public interest. Transgovernmental and transnational networks currently parallel each other in many cases and intersect in all sorts of ways. The process is haphazard and in some cases chaotic. Information agencies could provide focus and a minimum degree of organization".

Such aspects are all directly relevant for the legitimate positioning of the EEA and the strategic transnational concept. "Transnational legitimacy" and legitimacy based on "coordination in fragmentation" are directly employed by the EU strategic transnational concept as operationalised by the EEA. The deliberation processes and clear structural frameworks bring legitimacy based on "transparency". Finally, the disaggregated repositioning of the state combined with the strategic autonomy of the individual national administration provide for legitimacy as "national democracy".

Based on almost 20 years of operation, the EEA has consolidated its legitimate position based on such aspects and may indeed enjoy the status as a pioneering transnational information agency on a global scale.

This consolidated position not only legitimises the current operations of the EEA, it also constitutes the necessary foundation for advancing the deliberative processes, based on the strategic transnational concept as argued in this Thesis.

Thus, the overall legitimacy of the EEA concerns the management of information and the management of networks. The strategic transnational concept based on the coordinating role of the EEA in the networking of disaggregated national administrations is a constructive institutional approach in such management within and beyond the EU.

However, such networks and the involved information strategies must be managed carefully in order to maintain legitimacy. They are orchestrated among large numbers of actors with different professions, languages, and worldviews. In this setting, there may be a risk for capture by special and dominating interests. Also, the amount of "misunderstandings, ignorance, and misinterpretations of the position of the actors on the other side of boundaries may be significant. Perceived differences jeopardize the creation of a common understanding" (DiMento 2003, 157). Although the strategic transnational concept implies diversity, and allows for different strategies for different actors, the risk of "perceived differences" must not be underestimated.

In order to minimise this risk, the transnational management is in need of deliberative processes based on a structural framework.

12.2 The Structural Legal and Institutional Framework

The deliberation processes are in need of a structural framework in order to balance the deliberation of different views and interests. The following sections address the central elements of such structures, asking: which generic elements of a legal and institutional framework must be included in order to provide accountable, deliberation processes?

This concerns the balancing of conditions related to the governance of networks characterised by legal and organisational hierarchy (Kjaer 2010). However, applying the new EU governance concept as formulated by Kjaer, the strategic transnational concept is a hybrid between a *governance* and a *governing* dimension characterised by legal and

organisational hierarchy[311]. The function of governance structures is to ensure "the embeddedness of the governing dimension in the wider society" based on deliberative processes. Instead of representing contradictory developments, "the two dimensions are therefore mutually constitutive in the sense that more governing implies more governance and vice versa" (Kjaer 2010).

Therefore, the structural framework of the EEA refers to governing and to governance. Both dimensions are in need of a set of conditions and clarity in the legal and institutional framework (Magnette 2005, 14s).

The first set of conditions concerns governing, which requires clear definitions in the legal and institutional framework to safeguard the autonomous position of the Agency. This concerns the legal autonomy of the EEA in order to preserve the autonomous integrity of the Agency, regulating the degree of legal and political influence. The legal autonomy in relation to the TEU institutional balance has already been discussed in Part II. The following sections will address the specific autonomy of mandates, authority and objectives of the EEA[312]. As argued below, governing requires clarity in the legal and institutional framework allowing the Agency to operate and to meet its objectives without uncertainty, as uncertainty risks attracting the interference of other interests, leading to intransparency.

[311] Kjaer argued for that the OMC, Comitology and the regulatory EU Agencies form the most important structures of new EU governance (Kjaer 2010, 2s). For clarity, when arguing for governing structures, Kjaer proposes a basic law of governance, which merges the Comitology Decision, a (yet to come) clear legal framework on EU agencies, and a framework on OMC processes, into a single coherent legal framework (Kjaer 2010, 162).

[312] Magnette defines three aspects to be taken into account when regulating the degree of legal and political influence (Magnette 2005, 14s):
a) "*Rules of appointment* defining the independence favouring and reducing the political interference, placing the regulator in a position that he/she does not have to anticipate the principal's reaction, long and non-renewable mandates, multi-institutional appointment procedures, participation of the regulator in the appointment, rules reducing the scope of new appointments, conditions of professional expertise, incompatibilities and "cooling-off periods", absence of sanctions".
b) "*Definition of the regulator's mandate* – a narrow and clearly defined mandate, neatly separated from the principal's own responsibility, reduces the risk of interference and conflict".
c) "The *legal nature of such conditions* – favours or discourages the political interference: the easier it is for the political branch to alter the agent's mandate or independence, the more the agent will be tempted to anticipate its reaction. This, for instance, would be to grant the legal status by constitutional mandate".

The second set of conditions relates to the governance of networking based on deliberation, which primarily concerns a structural framework based on procedural and institutional rules. This involves an obligation of the EEA, by means of networking and daily management, to consult and involve the Commission and the stakeholders in the deliberation so as "to have an opportunity to have their voice heard" (Magnette 2005, 14s). As it will be discussed below in Chapter 12.3, the structures for governance provide for deliberation processes based on procedural democratisation. As part hereof, the EEA shall give access to information and documents. It shall provide reasoning for decisions, and it shall report on actions. These are mechanisms "pursuing a deliberative objective in that they set the conditions for development of counter-arguments" (Magnette 2005, 14s).

The current EEA legal and institutional structures provide for such governing and governance conditions to some degree. The existing framework may be adequate for the present transnational processes of the EEA based on the EEA Regulation and the relatively high public legitimacy. The question is whether the current framework can support the legitimacy of enhanced transnational networking as part of the strategic transnational concept?

This Chapter discusses the legal and institutional conditions that balance the strategic autonomous position of the EEA, and at the same time provide for sound deliberation based on the procedural democratisation. The EEA legal and institutional framework must be carefully designed as not to interfere in the dynamic of the transnational networking itself. First, the following sections analyses the need for clarity in the legal and institutional framework concerning mandates, coordination and authority. Then, Chapter 12.3 focuses exclusively on the governance dimension, analysing the procedural structures for deliberation in the networking of the strategic transnational concept.

12.2.1 Mandates and Coordination[313]

With regard to clarity in coordination and mandate, the transnational institution must have a clear and comprehensive legal and institutional mandate responding to the objectives desired.

First, the mandates must be sufficient in order to facilitate the transnational networking itself, the overall process and the interface with other relevant regimes and institutions. This also includes the evaluation and feedback to the regulatory processes. Taking into account the flexibility of the strategic transnational concept, the mandates and objectives must also allow for - or rather not object to - such flexibility concerning innovative implementation strategies and transnational interaction, including all relevant participation. In other words, the dynamics of transnational management are based on innovation and flexibility in terms of means and participation. It is important that the legal framework supports and stimulates the realisation hereof.

Second, the need for clarity in coordination and mandate concerns the increasing number of actors and intensity involved environmental regulation and management. As earlier discussed, the development in environmental regulation and the greening of policies and organisations is a result of the interdependency and interrelationship caused by the globalisation process, which has significantly increased the number of institutional actors, environmental schemes and instruments. Further, the integration of NGOs, public and private actors and the scientific and epistemic communities into the political and legal process have multiplied the number of environmental actors and created a web of activities and policy processes.

Paradoxically, the increased volume of environmental schemes and the increased number of actors have to a certain degree become victims of their own success. The

[313] Nye & Welch conclude in their 2011 study: "We need to think harder about norms and procedures for the governance of globalization… we need changes in processes that take advantage of the multiple forms of accountability that exists in modern democracies. International institutions are not international government, but they are crucial for international governance in a global information age" (Nye & Welch 2011, 323)

increase will eventually threaten accountability and transparency as the web of regimes risks becoming unclear and too complex to comprehend.

Therefore, the mandate shall include coordination and cooperation among relevant external environmental regimes and actors. The lead transnational institution should serve as a hybrid between the transnational regime and the different regimes, organisations, institutions and private and public actors, which may have different objectives, interests and regulatory approaches.

In other words, transnational environmental regimes will globally network with other transnational regimes and also more traditional environmental regimes at national and international levels. This constitutes in itself an expanded network - or a network of networks.

Such external coordination could be beneficial where international regimes tend to overlap in regulatory and geographically terms. Especially the UNECE has made significant contributions to the development of regional environmental law, and studies have shown the "behavioural interaction" between the EU, and notably the UNECE, in the development of the WFD, and IPPC and related international conventions (Birnie, Boyle & Redgwell 2009, 72s and 83s, Farmer 2006 and Oberthűr & Gehring 2006a, 8s).

The hybrid between the transnational EEA and the process of cooperative law on one side, and the international UNECE and the traditional intergovernmental regulatory process on the other, could turn out to be productive for developing law. This would be a rather innovative approach, as Oberthűr & Gehring have observed that conceptual work on interaction between international and EU institutions is still at an early stage (Oberthűr & Gehring 2006b, 22). Therefore, the strategic transnational concept is an attempt to provide such conceptual interaction, placing the EEA strategically as a hybrid to the international community, such as the UN and its specific agencies, programmes and conventions, and any other international regimes relevant for the scope, work and geographic area of the EEA.

The concept of an EEA hybrid goes beyond simple "coordination" in the traditional sense and as mandated by the current EEA Regulation. In line with the experimenting nature of transnational management, in broader terms the mandate should allow the EEA to engage in flexible and innovative cooperation as part of the strategic transnational concept. It would establish an "institutional interaction understood as a casual relationship between two or more institutions". This "institutional interaction" will be a complex web of interactions in which the individual relationship and influences must be understood in a disaggregated manner (Oberthűr & Gehring 2006a, 6ss and Oberthűr & Gehring 2006b, 29ss). Institutional interaction applied to the strategic transnational concept would primarily concern "cognitive interaction", which refers to the transfer of knowledge and learning, and which also may result in an influence on behaviour ("behavioural Interaction"), (Oberthűr & Gehring 2006a, 8s and 14, and Oberthűr & Gehring 2006b, 35ss and 39ss). See also the related discussion below on *behavioural steering* as part of the authority of the EEA.

Third, clarity in the delineation of mandates, tasks and responsibilities also creates certainty, not only for the individual organisation such as the EEA itself, but also for the *overall* organisation and the *other* institutions within the same organisation. Such overall clarity concerns a government structure of public agencies operating in closely related areas, for instance agencies managing the environment, climate, health, occupational health, etc. Within such closely related policy areas, a clear definition in mandates tasks and responsibilities minimise the risk of mal-management, as lack of mandate, overlap of mandates, and uncertainty in mandates risk blurring responsibility, which may lead to institutional inactivity. Thus, clarity concerns the formulation of mandate, tasks and functions of the individual institution and also presupposes the avoidance of overlapping and/or lacking competencies. The mandates of each specific institution must, as far as possible, take the comprehensive institutional framework into account, avoiding overlap and lack in competencies and responsibilities[314].

[314] Lacking and overlapping competencies are often a matter of poor governmental organisation. Overlapping competencies do not *per se* constitute a problem where coordination among the competent agencies takes place. However, the lack of such coordination risks resulting in inactivity, especially where available resources are limited; Inaction seems somehow "easier" to justify where the responsibility is blurred and falls within two or more agencies.

Fourth, the mandate must convey clear criteria for the institutional management. This concerns clear procedures for the sound deliberative processes. This concerns administrative norms and clarity in priority setting, and the application hereof by the daily management executed by the institution. These procedural aspects of the deliberation processes shall be discussed later in the chapter, but a few points shall be made already here in the context of the clarity of mandates and coordination.

As discussed earlier, transnational interaction among the European administrations and the EEA requires a certain harmonisation of process norms in order to provide an equal playing field. Thus, issues like access to information, confidentiality, participation and measures for accountability should be addressed in a unified way, ensuring the needed certainty important for legitimacy and accountability. Such harmonisation of administrative and procedural norms facilitates the cooperation of environmental organisations as part of the transnational process. Separate conflicting administrative norms lead to uncertainty and open-ended institutional management. For instance, different approaches to confidentiality could lead to secrecy in institution A and disclosures in institution B. Such an environment does little in creating confidence, trust, and legitimacy, and eventually may jeopardise the deliberation processes. Uncertainty means fewer participants and less input of useful information.

Such common administrative process norms are partly being provided by the EEA Regulation, and partly by the processes of the European agencification and global administrative law, as described earlier. However, these processes are not flawless in a transnational setting. The EEA Regulation mainly applies the administrative norms of the traditional EU institutions (e.g. the Commission), ignoring the transnational nature of the organisation of the EEA. Also, the outcome of the global administration law and the European agencification processes are not easily available or understood in terms of administration norms and rights. They may represent a promising development, and the deliberative processes may in themselves develop and bring certainty to such norms, but the same processes and the legal framework involved is unclear and non-transparent, and thus causes uncertainty and lack of general public legitimacy, jeopardising accountability. These aspects will be discussed later.

12.2.2 Authority

Clarity also relates to the authority or power of the transnational lead organisation (see also Young 1983, 103s). The transnational institution must be equipped with adequate authority in order to fulfil the outlined objectives. Again, the degree of authority depends of the regime in question.

In defining the "adequate authority" in transnational management, the concept of "networked minimum" should be applied because transnational governance will only be acceptable if it does not supersede national governance, as if its intrusions into the autonomy of states and communities are clearly justified in terms of cooperative results (Keohane & Nye 2000, 14). It also indicates that the authority of the transnational lead institution relates to the cooperative results. Due to the uncertainty involved, and the interdependency among participants, the transnational regime and the transnational lead institution cannot base itself on *behavioural steering* (Ladeur 2004b, 16s). However, the process leading to such cooperative results shall not be underestimated, as the transnational regimes and the lead transnational institution may exercise *behavioural interaction* as argued earlier (Oberthűr & Gehring 2006a, 8s and 14, and Oberthűr & Gehring 2006b, 35ss and 39ss).

In addition to the powers allocated, clarity in authority also concerns the defined position within an overall regulatory system, especially where a transnational organisation is part of an overall supranational regime. This brings the focus once again on the hybrid between the EEA and the Commission, and the need for clarity in the authority of the EEA. It is not only a matter of clarity in mandate; it is also a matter of clarity in influences and control.

In general, a "soft" transnational regime calls for a pure facilitating lead institution whereas a "hard" economic regime allows for more regulatory powers[315]. As discussed earlier in Chapter 10.2.2, efficient international management of "soft" policy areas like the protection of the environment, climate, health, and social, labour and human rights

[315] See the earlier general discussion on soft powers in a transnational setting, above in Chapter 10.2.2 - For the definition of "soft" regimes or rather, "soft" power, see Nye 2004, 5-32 and 9 – 125.

relies and legitimises itself significantly on the interaction and the inclusion of both public and political actors. This is in contrast to the "hard" and dominating political areas, like defence and security, stability of energy supply, international finance and international trade policy. Such "hard" regimes can manage and obtain the needed legitimacy through a relatively low degree of public involvement and political control, and by non-transparent procedures, secrecy and wide discretionary powers (Keohane & Nye 2001)[316].

In this respect, the soft transnational authority of the EEA is linked to the hard regulatory authority of the Commission (and likewise of the Member States). Such a hybrid constellation is part of the rationale of the strategic transnational concept outlined in this Thesis. As argued, the rationale of the strategic transnational concept is twofold. First, the rationale concerns the ability to provide a third level of EU and European integration based on cooperative law. The second rationale relates to the strategic utilisation by the Commission, applying the EEA and the transnational processes in generating knowledge for the development of the traditional supranational Community integration based on traditional community law and regulatory process. In other words, the aim is to develop supranational EU law, not by means of the traditional Community Method, but by strategic use of the transnational processes. Likewise, the Member States may apply a similar transnational strategic in developing national law. The hybrid constellation between the EEA and the Community refers primarily to the second rationale of the strategic transnational concept. The strategic use allows the Community to apply the transnational EEA as a technically specialised and independent lead transnational institution serving as a facilitator of the transnational interaction and as hybrid/focal point to the regulatory process.

The hybrid between the "soft" transnational regime and the "hard" regulatory regime serves two purposes:

[316] Louka points to the North Atlantic Treaty Organisation (NATO) and the World Trade Organisation (WTO) as examples of organisations with little transparency, which at the same time is viewed as the key to effectiveness. This lack of transparency "gives freedom to officials involved in these organizations to put together package deals without being constantly scrutinized by the media and the public" (Louka 2006, 10s).

First, it will allow the EU and national regulator to take advantage of the transnational processes and ingenuity in the generation of norms and knowledge useful for the development of new law and compliance with existing law. Similar, the hybrid allows the public regulator to involve the important transnational processes that has emerged as a consequence of the failures of the traditional decision-making processes.

Second, the hybrid allows the transnational institution to work with "underlying" or "indirect" regulatory powers by means of links to compliance mechanisms further "up" in the regime organisation. For instance, in case of non-compliance, the simple annual progress reporting by the EEA could initiate compliance mechanisms further "up" in the system. This might make the transnational lead institution a "paper tiger" however, a paper tiger with the right connections, which in itself will pose a certain encouraging – and deterring - effect among the network participants without necessarily damaging the legitimacy of the transnational institution, or the horizontal dynamics of the networking[317].

The combination of an enhanced transnational EEA linked to the regulatory EU Commission, and the national environmental institutions together provide a powerful institutional arrangement.

Thus, generally speaking the hybrid constellation enhances the public legitimacy and accountability of both the transnational and the supranational regime, as an effective division of work. Also, the association with the regulatory authority may, based on successful management over time, consolidate the position of the transnational regime, and add legitimacy and political motivation for the later allocation of regulatory powers to the transnational institution.

Based on this division of work, and the added legitimacy and accountability, in general it could be concluded that the predominantly "softer" policy areas should be subject to transnational governance by delegation to a transnational and horizontally oriented agency, whereas the regulatory EU Commission, due to its strong vertical position, is

[317] Related, Slaughter 2004a at 168s on the hard power of national agencies operating in transnational government networking by resort to state authorities for the implementation of their decisions.

well suited to operate in the "harder" policy areas. In short, a "softer" policy area requires a "softer" regulatory player, or perhaps more adequately put, a "co-player".

For these reasons, the EEA would be well positioned to undertake the role as the EU institutional focal point for the development of environmental law based on the strategic transnational concept. Such a role would be less suitable for the Commission itself.

However, the partnership between the supranational Commission and the transnational EEA may suffer from a fundamental problem related to the interference between the transnational and the supranational settings. The overall supranational setting of the EU and the influences of the Commission on the transnational EEA, as already discussed, restrict the clarity of the authority of the Agency. The legitimacy of the hybrid approach depends on a delicate balance of matching transnational processes and incentives within a vertical supranational structure. In contrast to the earlier discussions on incentives for transnational networking, we are here addressing a difficult task, as we intend to attract the same incentives in a transnational regime closely related to the regulatory Commission. The EEA may become an advanced transnational organisation, enjoying strategic autonomy and performing efficiently in an optimal transnational setting among transnational actors. However, the EEA will risk appearing to be in the shadow of the Commission and the supranational EU. Therefore, in designing the legal and institutional framework of the EEA, it is a challenge to balance and combine the hybrid function and, at the same time, provide incentives for optimal transnational networking. Again, the legitimacy of this balance is found in the clarity of the EEA legal and institutional framework.

The problem of interference is fundamental in nature; the EEA represents a new horizontal legal and institutional approach in line with current integrated environmental management. However, the underlying EU legal and institutional framework establishing and supporting the Agency is based on a traditional vertical legal and institutional approach, emphasising separate national and supranational levels of European environmental management. Thus, the underlying vertical EU legal and institutional framework, which is supposed to interact with and support the EEA,

conflicts with the horizontal intentions and institutional framework of the Agency, creating uncertainty of the exact scope of the authority of the Agency. In itself, these fundamental differences in approach constitute an obstacle to the further development of the EEA.

The consequences of such interference are seen, as the already established operational *modus operandi* is eroding. As argued, the vertical "interference" of the Commission has increased since the EEA was established in the early 1990s, especially by the changes to the EEA Regulation in 1999 and 2003.

Also, the interference is illustrated by the change in 2003, from a transnational to a vertical administration, with respect to access to EEA information. Prior to this, the access to EEA information was regulated in true transnational sense by referring to the rules of the Member States. Through the revision in 2003, access to EEA information now exclusively follows the rules applicable for the Commission. Applying the rules of the Commission represents the traditional vertical distinction as it presents and encourages a dual approach based on different administrative norms for the national and the supranational levels – an approach impossible to apply in a transnational setting. These aspects of access to EEA information will be addressed further in the section 12.4.

The setting of a horizontal transnational regime imposed by legal and institutional norms of vertical and dualistic nature endangers the fundamental legitimacy and accountability of the transnational regime. Perhaps this unlikely match of attempting to establish transnational regimes within traditional vertical supranational or international regimes may prove to be the greatest threat to the realisation of the strategic transnational concept presented in this Thesis. In contrast to any *intended*, and thus controllable influence and control of the Commission over the EEA, the mismatch of transnational and dualistic supranational structures may be an *unintended*, and thus less manageable influence firmly based on a long-lived vertical organisational tradition and the self-understanding of supranational and international organisations. It may turn out that these traditional organisations are so embedded in traditional vertical structures and

organisational self-understanding that any changes will take time, if the changes are ever to succeed. The inability of the traditional vertical organisation to adjust rapidly has already been described earlier in the Thesis by the failures of the intergovernmental decision making in global climate management, and as a consequence in the rise in private transnational networks emerging as new governance structures responding to the actual needs. In this sense, the transnational EEA will not just become a pioneer on global scale for advanced transnational networking, it will also, due to its embedment within the traditional supranational setting of the EU, become a pioneer in testing out the prospect of changing the organisational self-understanding of a vertical supranational organisation.

It follows that clarity not just is a matter of clarity in the legal and institutional framework as worded in the EEA Regulation and regulated by the case law related to the TEU institutional balance. In addition, it requires a profound clarity within the overall organisational EU framework. It requires a credible approach and an understanding of the specific needs of the transnational EEA embedded in the overall legal and institutional framework of the EU, within the EU policy and legal processes, within the role and position of the Court of Justice of the European Union (CJEU), and within the general perception of the EU among the public, and among the EU officials themselves. These frameworks are all predominately supranational. The question is how easily these supranational-minded EU institutions may understand, provide and adapt to support and service the profound transnational nature and needs of new EU transnational regimes?

In addition, the fundamental problem of interference is not only a challenge for the supranational EU in addressing transnational governance. In general, traditional EU and international environmental law currently apply a conventional dualistic approach by encouraging a set of administrative norms for international institutions and a different set for national institutions. Such recommendations will lead to a separate strengthening of the international level and of the national level. The recommendations do not address the important inter-relationship between the international and the national levels on how to strengthen common capacity or norms. The recommendations fall short of promoting

the importance of raising the administrative culture of the international environmental organisations to the same level as required by the national administrations. In general terms, both the EU and the Rio process emphasise the importance of improved public participation and openness at the international level, but does not recognise the importance of equal norms for national and international institutions[318].

The dualistic approach ignores the increasing inter-linkage and inter-relationships between national and international environmental administrations especially within the horizontal and integrative regulatory approach, such as IPPC, EIA, etc. In this regard, the dualistic approach is rather conservative – or anachronistic - in operating at two poles: the international regime and the national regime. The problem is significant for regimes based on "traditional" regulation because also the traditional regimes increasingly are subject to horizontal management and internationalisation in terms of integration and participation, as illustrated by the IPPC and the EIA processes, and also by the EU commitment to the Aarhus Convention addressed later in the Thesis (see also Krämer 2007, 468ss)[319]. Such horizontal management breaks down the earlier vertical approach, not only in terms of regulation, but also in terms of positioning of the regulator and the individual actors. Preserving an exclusively vertical position for the international institutions makes little sense in the eyes of the participating actors, which jeopardises the legitimate standing of the international institutions. Also, as addressed just above, the problem relates directly to regimes based on the transnational approach, such as the EEA itself, which themselves require a horizontal and integrated administrative approach and institutional design.

A final comment on the overall authority concerns the physical location of the lead institution. Legitimacy and credibility might be enhanced by placing the institution

[318] Ibid. note 82. The traditional dualistic approach is seen for instance in the Commission recommendations on access to justice (Commission 1996a, 11s) and also by the UNCED recommendations mainly addressing the national level (UNCED and Agenda 21 chap. 38-40). This EU dualistic approach is still present, as will be further discussed below in section 12.4. Also today, the EU institutions apply different sets of rules for public participation, access to justice, and access to information than required by the Members States.

[319] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Aarhus, Denmark at the Fourth Ministerial Conference in the 'Environment for Europe' process. See http://www.unece.org/env/pp/welcome.html

geographically outside the main organisational headquarters, or even outside the location of the leading political power centres of the world. Thus, the location of the EU independent agencies outside Brussels – and also the location of the UNEP in Nairobi - could serve as good examples for enhanced transnational management, especially as e-communication is improving globally, minimising the logistic problems and costs.

12.2.3 The EEA Objective: Promotion of EU Environmental Policy

As an illustration of clarity in the legal framework, the objectives of the current EEA are discussed in this section.

The objectives of the EEA are stated in EEA Regulation Article 1. The objectives are to achieve "the aims of environmental protection and improvement laid down by *the Treaty and by successive Community action programmes on the environment,* by providing *the Community and the Member States* with objective, reliable and comparable information at European level enabling *them* to take the requisite measures to protect the environment, to assess the results of such measures, and to ensure that the public is properly informed about the state of the environment", EEA Regulation Article 1 (2).

The formulation of the objectives in article 1 raises some uncertainties concerning the aim of the EEA. As argued above, uncertainties with regard to mandate are counterproductive to the legitimacy and thus, jeopardise the success of a transnational EEA. Unclear, and even to a less degree limited, objectives would risk diminishing the motivation for participation in the transnational networking.

In fact, EEA Regulation Article 1(2) states that the EEA shall promote *EU environmental policy,* which logically means that the EEA in legal terms is committed only to supporting Member States in achieving Community policy, and not their own environmental policies, whether local, national and/or international. A narrow scope such as this potentially endangers the incentive for Member States to participate in the EEA. From a legal point of view, the national environmental policy or objectives

pursued by private transnational governance would be out of the scope of the EEA. Legally, support would not even be possible as a matter of secondary ranking in case of prioritisation or conflict between EU and national legal order.

This narrow scope of article 1 seems intended. The original article 1 of the proposed 1989 EEA Regulation included the support of environmental goals at *international, national, regional and local levels.* However, the scope of the objectives was narrowed down as shown in the final EEA Regulation[320].

This limited focus appears to be in contradiction with the broader intentions of the EEA[321]. Thus, the objective stated in Article 1 should reflect the Agency's commitment to facilitate improved environmental conditions in general with no geographical limitation and for the benefit of both Community, national, local and private environmental policies. The current formulation aiming at promoting only Community environmental policy sends the rather unattractive message to third countries joining the EEA (based on Article 19) that they must participate in fulfilling EC environmental policy rather than their own policies.

Also, and again based on the strict legal interpretation of Article 1(2), a narrow objective focusing only on the realisation of EU environmental law and policy would jeopardise the possibilities of the EEA for participating in networking or other interaction, which have no immediate benefit to the EU policies. Thus, the EEA would exclude itself from potentially relevant information and networks.

A similarly narrow scope applies to the international relations of the EEA. Again, the problem concerns the formulation and the "one-way approach" of the EEA in promoting EU policy only: The Agency is supposed to cooperate with and participate in international environmental programmes and networks, EEA Regulation Articles 2(g)

[320] The proposal; OJ No C 217, 23.8.1989, p.7 and COM (89) 303 final, 12.7.1989, p.2

[321] See Preamble paragraph 5 (enabling the Member States to protect the environment) and paragraph 12 (the Agency is open for Third Countries) and EEA Regulation Article 2(b); the task of the EEA is - among others - to provide Member States with information for framing and implementing environmental policies. Such broad interpretation is also shared by the Agency itself; it states that one of the goals of the Agency is to provide "information for those concerned with framing, implementing and further developing European environmental policy...", EEA Annual Report 1994, p.2 point 1.3.

and 15(2), especially to *promote the incorporation of European environmental information into such programmes*, Article 2 (g). In addition, the final EEA Regulation has narrowed down the scope of Article 15(2) stating that the Agency actively shall carry out its functions in cooperation with existing national and international facilities. This wording has been chosen instead of the broader formulation, which originally suggested *close* cooperation with third countries and international organisations necessary *as far as possible* concerning systematic monitoring and harmonised collection, validation and processing of environmental data[322].

In order to promote and support (further) transnational regulation, the objectives of the EEA as formulated mainly be Article 1(2) should be modified in order to ensure the support of the Agency in fulfilling also the Member State's own environmental policies. This should also include the environmental policies of the EEA third member countries, which participate in the work of the Agency. Further, the wording of the Agency objective should include an even broader mandate to pursue environmental objectives beyond what is stated by the EU or the EEA Member States. The Agency should also be allowed the flexibility to initiate and participate in cooperation defined and participated in by other countries, international regimes and private and public actors as argued earlier. Such flexible mandates would allow for – and must be seen as a precondition for – the realisation of the enhanced transnational visions and interactions as presented by this Thesis. In order not to create legal confusion and conflict, the objective could state that EEA primarily follows EU environmental law and policy in case of conflicts with other priorities and agendas. However, in support of the enhanced vision of EEA transnational management, in such conflicting cases, the EEA should be obliged to provide positive support to the individual Member States as far as not compromising EU law and policies.

Naturally, all this is not to say that the current EEA Regulation eliminates the Agency's possibility for exchange of information and cooperation with the international community, individual states or other regimes. Perhaps it could be argued that the current EEA mandates are sufficiently legally based on the wide and international

[322] Paragraph 11 and Article 9 (2) of the proposal 1989 EEA Regulation.

objective of EU environmental policy in geographic and substantive terms, i.e. the objectives in Article 130r (TEU) and its extraterritorial significance as described earlier in Chapter 11.4 (see also Krämer 2007, 3). Based on this argument, the reference to EU environmental policies would then cover, and give sufficient mandate for the Agency's involvement in, also national and other environmental policies.

However, such arguments suffer from shortcomings. First, because the EU legally only may promote and safeguard the EU environmental policy objectives when directly part of a broader setting, such as within individual European and/or international environmental policy and law. Second and with direct relevance for the efficiency of transnational management, the wording of the current EEA objectives creates unnecessary uncertainty among the participants and thus, creates a barrier for the further development of the transnational regime. The problem is simply that the international approach undertaken by the EU and the EEA legally focuses on a "one-way" realisation and promotion of EU policy objectives only.

As mentioned above, the "watering-down" of the objectives in the original 1989 EEA proposals indicates that the narrow approach is intended. In principle, such a narrow approach focusing on EU environmental policy and law only is understandable for three reasons[323]: First, simply because the EEA is a part of the EU institutional framework. Second, because the demand for coherent and coordinated EU policies does not allow for a wide-spread policy orientation at the executive EU level unless strictly mandated. The EU decision makers would most likely not favour an EU institution potentially formulating, altering or promoting policies beyond the control of the established EU policy processes. This "fear" is even emphasised by the autonomous status of the Agency. Third, because the Agency, regardless of its "independent" status, operates under the responsibilities of the EU Commission, which itself is responsible for the implementation of the EU policies.

However, also these arguments are not convincing. The objectives of EU environmental policy and law reflect the traditional vertical regulatory approach between the EU and

[323] Generally, these three points have also been sustained by the view of the Commission (Commission 2003b, 7, 9, 10 and 20).

the Member States. As argued above, this conflict with the horizontal and flexible approach of enhanced EU transnational environmental management. This contradiction jeopardises the development of an enhanced transnational EEA.

Also, the focus only on EU policy objectives risks contradicting the fundamental environmental principle of addressing environmental problems at the source, and taking local diversity and the local conditions, measures and management into account, TFEU Article 191(2). The wording of the EEA Regulation seems only to accept such measures when in explicit conformity with the EU policy objectives. Thus, the evaluation involved does not necessarily concern what is best for the environment. Rather, it is an evaluation of whether the national measures and objectives are in explicit parallel with the set EU policy objectives.

The transnational legal reform of the EEA should introduce flexible objectives and at the same time anchor the Agency foremost as an EU institution.

The flexible objectives should be backed by a preamble stating that the EEA shall manage the flexible approach in the context of EU environmental law and policy, and facilitate the EU regulatory process within and as part of the national and local objectives as well. The preamble shall also make direct reference to the benefits of transnational management for the development of both EU and national environmental policies. Hereby, the EEA remains primarily an EU institution pursuing EU policies although allowing itself active participation in cooperation involving other policy objectives.

Also, for clarity, the preamble shall provide a reference, which positions the transnational processes as a coherent part of the overall development of the EU regulatory process. Also, the preamble shall specifically address the possibility of initiating EU law based on transnational processes facilitated by the EEA as the transnational environmental lead institution.

In addition to the clear mandates spelled out by the EEA Regulation, future sectoral EU transnational directives similarly should mandate the flexible approach for national and transnational determined regulation and anchor this process within the EU regulatory process. The same EU transnational directives should also supplement and provide specific institutional requirements and mandates of the EEA in order to perform as the EU transnational lead institution.

12.2.4 The European Environmental *and Climate* Agency

The EEA involvement in EU climate management is another example of uncertainty as a result of the legal framework of the Agency.

The EEA is currently significantly involved in climate management. However, the EEA Regulation makes no reference to the involvement of the EEA in the EU climate regulation and policies. In fact, the EEA Regulation does not mention the term "climate" at all.

In principle, this is not a problem as climate management is part of the overall objective of environmental management. However, as described in Part I, climate management has increasingly been separated from environmental management for populist and political reasons. This causes uncertainty:
First, because the terminology of the EEA Regulation leads to the wrong conclusion that the Agency only is aligned with environmental management in traditional terms, and thus only has close links with the environmental DG XI of the Commission.

Second, it is confusing and inconsistent for the EU to have established a DG Climate in addition to the DG Environment without updating the EU legal and institutional framework accordingly. The public could very easily arrive at the wrong conclusion that the EEA does not have a major role to play in the formulation of the EU climate policy and regulation. If so, there is a risk of lack of public legitimacy as the climate debate already attracts more attention than the traditional environmental agenda. Also, due to

the uncertainty there would be risk that potential actors relevant for the EEA climate management lose out.

As the EEA also provides information on the state of the climate and thus, links directly to the climate institutions and regulators within the EU, the EEA Regulation should be revised thoroughly, providing clarity on the specific objectives of climate management and by referring to the interrelationship with the specific climate institutions at EU, national and international levels[324].

Based on the latest EEA evaluation, it is clear that the Commission for a long time has relied on the EEA in climate management. Climate management is even considered a core area of the EEA, where the Agency contributes on a number of policy issues particularly in areas where there is a strong need for reporting (Rambøll 2009, Vol. III, 85).

Also, the Agency itself prioritises climate management among its strategies and activities, especially studies of the impact of climate change and of climate adaptation. The EEA has undertaken a strategic orientation of its activities in climate management responding directly to the outcome of the 2009 COP 15 in Copenhagen (EEA 2010, 5 and 17s).

Taking the importance of climate management into account, the EEA's strategic prioritisation seems promising. It is promising for the management of an important policy area and it is promising for the legitimacy of the EEA, as part of the strategic transnational concept.

The legitimacy of the EEA is not only a matter of clarity in the legal and institutional framework, it is also a matter of applying the strategic transnational concept as a consequence of the failure of the traditional intergovernmental processes as seen at the 2009 COP 15. As argued earlier in Chapter 3.2, it is a matter of legitimacy of the EEA,

[324] See for instance the recent initiative launched by the Commission and the EEA in March 2012: "Major new website to assist with climate change adaptation in Europe" http://climate-adapt.eea.europa.eu/ and http://www.eea.europa.eu/highlights/major-new-website-to-assist?&utm_campaign=major-new-website-to-assist&utm_medium=email&utm_source=EEASubscriptions

adjusting to the changing environmental agenda, an agenda where the general public is losing interest in the traditional environmental agenda. Instead, public interest concerns the climate agenda and foremost, the economic agenda.
Also, global climate management already includes transnational elements, which could be further developed with a future potential role of the EEA. This could for instance include support for the trading in CO2-quotas (such as the 2005 EU Emissions Trading System ETS) within the EU and on a global scale[325]. Such trading could take advantage of the knowledge, networking and dynamics of the global strategic transnational concept involving both private and public transnational governance schemes. Also, such transnational trading regimes could take advantage of the transnational institutional support provided by the EEA.

The specifics of these transnational possibilities for climate management and the potential role of the EEA shall not be pursued further here. The point made here is simply that climate management is an essential part of the strategic transnational concept and that the EEA legal and institutional framework must provide clarity concerning this issue.

12.3 A Structured Deliberative Process

The following sections focus on the governance dimension, analysing the procedural structures for deliberation in networking based on the strategic transnational concept.

The following sections fall in two parts: First part addresses the needs and conditions of the procedural democratisation for the deliberative processes. Second part addresses the legal and institutional framework for participation and influence on the deliberative processes played out in the transnational networking of the EEA. Focusing on participation, this part will include an analysis of the legal framework on the access to EEA information.

[325] See http://ec.europa.eu/clima/policies/ets/index_en.htm

12.3.1 Democratic Legitimacy

> *"[The European Parliament] ……. Believes that the priority of the common framework for inter-institutional understanding should be to rationalise the operation and maximise the added value of the regulatory agencies by creating greater transparency, visible democratic control and improved efficiency"* (European Parliament 2008,4)

The following discussion addresses the democratic values of the deliberative processes and the need for procedural norms.

Procedural democratisation is needed in order to face the non-democratic nature of the EU institutions, which also applies to the EEA. Procedural democratisation provides public legitimacy in transnational networking and balances fair influence and participation.

Let us first address the democratic legitimacy in general terms; or rather the democratic deficit related to the non-majoritarian EU institutions including the EEA[326].

The problem of the democratic deficit with regard to the EU institutions and processes concerns foremost the public legitimacy. The public often feels detached from the EU decision-making process and is discouraged by the lack of participation, openness and access to information and review mechanisms normally characteristic for democratic government.

The overall problem of advancing public legitimacy based on democratic participation and control, as known from the constitutional democracy of the national state, is once

[326] The issue is closely linked to the ongoing crisis of the distancing of the public from the development of the EU, as illustrated by several national rejections of earlier proposals for revision of the European constitution (such as the 1992 Danish referendum on the Maastricht Treaty, the 2001 (first) Irish referendum on the Nice Treaty and the 2005 French and Dutch referendums rejecting the Rome Treaty). Also, public scepticism towards the recent Lisbon Treaty has not diminished and is even sustained by several Member States that have chosen not to hold general referendums before ratification. The status of the European Union remains frail with regard to the public legitimacy. The future of the European process is still in need of a fundamental democratic reform.

again rooted in the supranational nature of the EU. The public has no direct control over the non-majoritarian institutions of the EU. Instead, public legitimacy is indirect and represented by the influence and control of the national governments over the EU institutions as the process of EU integration traditionally has been understood as delegation of powers from the principal (the national state) to the agent (the Commission) (Curtin 2005, 89 and Pollack 2003, 75ss). In this context, the EU Commission is an agent of the principals - the Member States. The Commission itself could be labelled a "generalist independent agency" (Scott 2005, 77).

The democratic control of the EU institutions is even further complicated by the "dual agency role" of the Commission, as the Commission itself, as a principal, further delegates regulatory tasks and policy formulation to its own agents. This concerns delegation to the autonomous EU agencies, but it also concerns the widespread delegation of regulatory tasks to private governance as described in Part I as part of the New Approach. Such "double" delegation, based on the dual agency role of the Commission, is a further separation from the democratic control by the Member States (Graz & Nölke 2008, 240s and Christou & Simpson 2008, 162 and 165s)[327].

Based on the "dual agency role" of the Commission, the EEA becomes an agent of the Commission. But, the strategic transnational concept represents an additional "third agency role" in terms of delegation and democratic control. The EEA itself may become a principal in relation to the involvement of private and public governance, which are part of the strategic transnational concept, in the development of cooperative law and new norms. It is a third layer that makes democratic control based on the traditional principal-agent relationship of Member States and Commission almost illusory.

[327] Christou & Simpson provide the example of the European governance for the "dot eu" Internet domain name system and the role of the non-profit organisation European Registry for Domain Names (EURID). In the double agencification process, Member States have delegated regulatory powers to the Commission for reason of functional expertise, and the Commission, in turn, has further delegated the day-to-day management of dot eu to EURID because of its technical expertise and knowledge of the market. Such double delegation, and the strong regulatory position of the EURID, causes some concern regarding Member State control.

Within EU institutional organisation, we could even add two more layers to this "multi-principal-system" of EU governance, as the EU agencies also are accountable to the Council and to the European Parliament (Saurer 2009, 487).

To complicate the picture even further, we can define a "fourth agency layer" separating the control even further from the European public. The democratic control at domestic level also concerns several layers of delegation as the public constitutes the principals and the national parliamentarian represents the agent of the people. In most parliamentarian systems, also the parliamentarians perform a "dual agency role" by delegating authority to the executive branch, the government, which is not directly accountable to the people. The government typically represents national interests in the international and supranational organisations and also in the Commission and the EEA. Therefore, the national parliaments only indirectly exercise influence and control over EU governance and institutions by means of traditional parliamentarian control over the national government. Often, it is a matter of constitutional prerogative allowing the national government the exclusive right to represent the national interests and participation in EU governance. Thus, the involvement of the national parliaments, and also of the local and the regional governments, relies on the national legal order. The national citizens are able only indirectly to influence the EU governance by holding the parliamentarians directly accountable, who also are able only indirectly to influence the EU governance by holding the government accountable. Such indirect lines of influence and accountability may give cause for a public sense of remoteness to the EU regulatory and policy processes. It may do little in providing for the necessary public legitimacy of the EU institutions (see related, Bellamy & Castiglione 2011, 124s)[328].

[328] This indirect line of accountability may be disrupted with significant risk for the further public legitimacy of the EU institutions. The 2011 and 2012 economic tumults in the Euro zone have brought technocratic governments in place in Greece and Italy. In the view of the Greek and Italian public, the changes have occurred as a result of pressure from the EU, as conditions for providing financial aid. Such processes may damage the public legitimacy of the EU institutions in general as technocratic governments enjoy little public legitimacy (in a democratic sense). This may corrupt the described indirect chain of accountability between the public and the EU institutions. The significance hereof may not just confine itself to Italy and Greece, as the signal value may influence the public legitimacy of the EU institutions in other part of the EU. See also *"Can Technocratic Government be Democratic*?" by Professor Vivian A. Schmidt, Telos, 23 November 2011, http://www.telos-eu.com/en/article/can-technocratic-government-be-democratic, and *"Regime Change in Europe: Do Greece and Italy Amount to a Bankers' Coup?"*, Time World, 11 November 2011, http://www.time.com/time/world/article/0,8599,2099350,00.html.

In addition to the "multi-principal-agent" system, there is an inherent contradiction in attempting to apply an accountability scheme of the transnational EEA within a supranational institutional framework. This contradiction has been discussed earlier in the Thesis, as it represents one of the fundamental problems in establishing a truly transnational EEA. Both the Commission and the EEA are non-majoritarian institutions. The shift from the Commission to a transnational agency where Member States are more involved does not per se constitute a shift from non-majoritarian to majoritarian institutions. However, the transnational nature of the EEA requires a different approach on accountability. The mechanisms of accountability of the vertically positioned supranational Commission cannot respond to the need for mechanisms in the horizontally positioned transnational EEA, as both institutions and both regimes fulfil different policy roles. The Commission is in need of measures of accountability to address its decisive role and function in policy formulation and regulatory functions as fully responsible for the implementation and enforcement of EU policies and law. In contrast, the EEA is hardly, if at all, a decision-making institution; its function is to generate and facilitate informational flows for the benefit of the decision makers - a rather soft and compelling task, which calls for interactive measures aimed at participation and deliberation.

Focusing on the specifics of the EEA, one could argue that the transnational nature of the EEA actually bypasses the chain of accountability via the Commission. If so argued, the transnational EEA brings democratic control closer to the public by the direct involvement of Member States in the EEA Management Board. Hereby, the exercise of democratic control becomes an extension of the domestic parliamentarian control as the legislative branch may directly control the executive branch involved the management of the EEA. True, that such national influence may contribute to an additional accountability mechanism. However, it is unlikely that it will improve public legitimacy, as the involvement is non-transparent and purely based on technical specialisation. National involvement in the management of the EEA is typically performed by highly specialised technical officials, which may be part of the executive branch, or may be appointed from private or public institutions. Such officials typically

are not involved in policy formulation at high executive levels of government, and are not always accountable to the public. Therefore, it may prove difficult to establish a sense of democratic legitimacy, as these specialised technical functions are distant from the public political and regulatory processes, and non-transparent in the public eye.

Also, the transnational organisation of the EEA cannot escape its legal and institutional positioning within the supranational EU. The EEA is subject to the established EU legal and political schemes of accountability, and thus entangled in the layers of supranational principal-agent delegation. As described in Part II, the price for such a supranational setting is significant influence and control by the Commission and the Parliament, allowing them to preserve their EU institutional prerogatives and responsibilities. In such a system, the role of national democratic control becomes cumbersome and the overall intermix of the transnational possibilities and the supranational reality appears non- transparent to the public.

The specifics of the EEA also involve its independent status. As discussed earlier, independency may distance the Agency from the influences of the Commission and the Member States. But in terms of accountability, the independency of the transnational EU agencies disrupts or breaks the "chain of accountability" or the "chain of delegation" of the parliamentarian state even further than described above. Magnette argues that this deviates from the classic majoritarian model, which "gives the elected authority the power to sanction its agent". As such powers of the elected authority no longer are "compatible with the agent's independence, another mechanism must be forged to hold the regulatory accountable" (Magnette 2005, 11s). Such a new mechanism of EU agency accountability is procedural democratisation as argued later in this Chapter.

The Paradox of Democratisation

Addressing the problem of democratic deficit contains a paradox. An enhancement of truly democratic EU institutions would at the same time risk eroding the position and influence of the individual Member States. A truly democratic EU would increasingly

base its decisions on majority decisions reflecting the proper composition of citizens within the Union and to a lesser extent within the Member States. As a consequence, the current influential position of the smaller Member States most likely would diminish, which probably would meet resistance among the EU public especially within the less-populated Member States.

The popular support for preserving the national prerogatives makes it difficult to develop the Union into a truly democratic project, or even a federal union. The EU citizens seem sceptical towards the will of other EU Member States and other citizens; this scepticism eventually leads to a defence for the strong position of the Member States within the Union. This scepticism is intensified by the rapid expansion of the EU, and the inclusion of significant numbers of new EU citizens from Central and Eastern Europe into the Union, as well as the possibility of including the Balkan States and also Turkey with 60 million citizens of its own[329]. The latest revision of the Treaty by the Lisbon Treaty has not lead to any further democratisation of the EU institutions. Rather, the focus is on adjusting the position and interrelationship of the Members States, achieving a new institutional balance between the smaller and bigger Member States in an expanding Union of 27+ Member States.

This paradox, combined with the general democratic deficit addressed above, highlights the need for new approaches to safeguard the democratic legitimacy of EU governance. It may even be questioned whether it is possible to provide for truly democratic processes in a classic constitutional sense. Is it productive to continue addressing democratic legitimacy and further EU integration based on the notion of a "public", understood as a "European demos", as the citizens of Europe foremost indentify themselves as nationals (Ladeur 2008)?

[329] Illustratively, the EU Parliament is currently the most democratic EU institution with direct representation yet with limited powers allocated. Consequently, the voter turnout at the EU parliamentary elections is extremely low. This is not necessarily caused by a lack of interest in making the EU institutions more democratic. Rather, it is a sign of frustration that the EU citizens only are allowed direct influence at one EU institution level with limited powers.

The answer is yes, however it must be addressed in innovative manners[330]. As just argued, the traditional control based on principal-agent delegation of powers from Member State to Commission cannot meet the needs for democratic legitimacy and also not for advanced transnational setting as argued here in this Thesis. The current principal-agent delegation applies two poles only in a classic dualistic approach. It concerns the democratic sentiments at national level addressing accountable governance at supranational or international levels. The third transnational dimension is missing.

Therefore, accountability and democratic legitimacy are not found in the traditional principal-agent delegation; rather, it is based on procedural democratisation.

The procedural democratisation is comprehensive in terms of "input and output" democratic legitimacy (Scharpf 1999, 6ss, 10ss and187ss, Warning 2009, 182s and Weatherill 2010, 670ss)[331]. In the classic principal-agent delegation, a trustee may rely on "output legitimacy" rather than on "input legitimacy". However, in a deliberative process, comprehensive participation is needed. Output legitimacy cannot replace input legitimacy; at best, it can supplement it (Magnette 2005, 11s).

Procedural democratisation is comprehensive in the sense that the deliberative process should involve participating at all policy levels: from planning and policy formulation, to implementation and evaluation. In the refined words of Everson, the process should stay clear of the risk of "a reactive instead of a proactive approach - reactive in the sense of *ex ante* addressing implementing instead of *ex priori* promoting the stimulation of public discussions setting the political agenda on particular issues as part of the policy formulation" (Everson 2005, 143ss).

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[330] Also Bellamy is rather sceptical of the existence of "a European demos" (Bellamy 2006). Ladeur goes further as his point of departure is based on the mere fact that there (currently) are no such European people (Ladeur 2008). Nevertheless, both authors agree that the discussions on the existence of a European demos do not change the need for democratic legitimacy – however, it may influence the recommendations on how to safeguard such legitimacy.

[331] According to Scharpf, input legitimacy is based on "demos and the participation and consensus by the people", i.e. "government by the people". Output legitimacy focuses on the outcome of the political decision, i.e. "government for the people". Such output legitimacy requires "stable and multifunctional structures" and requires also "a defined political entity, which does not necessarily have to be closely linked to the demos of input legitimacy" (Scharpf 1999, 6ss, 10ss and187ss).
In the current context of EU institutions, both the output and the input based legitimacy fails in achieving democratic legitimacy (Bellamy 2010, Bellamy & Castiglione 2011, and also Harlow 2010, 15s).

We will address the conditions of the procedural democratisation in the following. But let us first defend the democratisation of the EU institutions, as difficult it may seem, against the temptation of overcoming the democratic deficit by applying a technocratic governance approach legitimised by outcome rather than a comprehensive deliberative process.

A Stand Against Technocratic Governance?

An argument presented to overcome the democratic deficit concerns the merits of the specialised and technocratic approach of the agencies. The current non-democratic nature of the Agency is compensated by enhanced accountability achieved by the independent and specialised status of the Agency. Being outside the normal policy influences, being predominately technocratic and being able to concentrate on repeated and reliable specialised performance and output may bring about accountability and public legitimacy otherwise only achieved by a traditional democratic institution[332].

However, such an argument might be more of a reflection of the status quo in providing for a productive alternative for democratic institutions in the traditional sense. However, technocratic institutions cannot replace democratic institutions or government. The technocratic specialisation cannot fulfil the gap left open by the democratic deficit as it deviates from the overall focus of improving the public confidence in the EU regimes.

Several authors support this stand against technocratic governance. Instead of technocratic regimes, Harlow recognises the value of democratic legitimacy as it reflects "the growing dominance of democratic values in the western world and widespread belief in the 'functional necessity to base complex social order on democratic procedures'. It draws attention also to the importance of accountability at every level of public affairs" (Harlow 2010, 13ss and 20s).

[332] Presentation of such a technocratic "non-majoritarian" approach of the EU by the use of greater functional differentiation in acknowledging the autonomous "regulatory estate", see Majone 1998 and 2002. As an attempt to escape such technocratic governance, Joerges and Neyer have instead agued for the concept of Deliberative Supranationalism (Joerges 2002, and also Joerges & Neyer 1997).

Bellamy is also critical to addressing the democratic deficit by 'non-political' democratic procedure. This is because there is "no consensus on rights or the public interest apart from the majority view of a demos secured through parliamentary institutions" (Bellamy 2006, 725). "If an EU demos can be said to exist, then a move should be made towards enhancing the role played by directly elected majoritarian decision-making bodies within the EU. If, as seems more likely, an EU demos and public sphere remain absent with little immediate prospect of being established, then means need to be found for enhancing the democratic accountability of EU decision-makers within the established democracies of the Member States" (Bellamy 2006, 742).

Likewise, Shapiro is sceptical of increasing expert governance that would compromise transparent democratic decision making (Shapiro 2001, 373ss). Similarly, Slaughter also addresses the risk of "emerging massive global technocratic networks and actors dissociating themselves from the social, economic or political concerns of citizens" (Slaughter 204, 219ss).

In addition, the following points address the stand further against democratic legitimacy based upon technocratic governance:

First, focusing on the technocratic governance risks providing legitimacy to and argumentation for maintaining the current EU administrative culture of little direct public engagement and thus, tends to sidetrack the focus on the democratic deficit.

Second, the technocratic argument is rather academic. It would most likely not pass the test of being accepted or understood by the general European public as a legitimate substitution for democratic institutions.

Third, technocratic governance based on the direct involvement of the Member States in the EEA leads only to indirect public input, engagement and involvement, as argued earlier in this chapter. The linkage from the public to the national representatives on the EEA Management Board is often remote and thus, does not promote the needed sense

of public ownership, input and participation. Naturally, in principle the public is able to influence both the national government and the national representatives on the Management Board by direct communication - individually or represented by interest groups. However, the remote distance hardly provides the individual citizens with a confident sense of ownership of or proximity to the EU decision-making process.

Fourth, the technocratic legitimacy relates specifically to the technocratic nature of the specialised EU agencies. Therefore, such legitimacy provides a fragmentised and inadequate response to the general problem of the EU democratic deficit in terms of EU decision-making processes and EU institutions. Applying different legitimacy standards for individual EU institutions seems confusing and thus, does little in eliminating the overall EU democratic deficit.

Fifth, the technocratic approach might be a pragmatic approach, taking the EU democratic paradox into account. However, the difficulties involved in the democratisation of the EU do not necessarily call for pragmatic solutions. Democratisation of the EU institutions foremost means an improved public stake in the EU decision-making processes. This is unlikely to be achieved simply by technocratic agencies allowing the national governments more saying, without at the same time providing the public with a direct, or legitimate sense of involvement.

Sixth, one could perhaps argue that democratic legitimacy based on either direct public input or output-based technocratic governance only is a matter of policy choice; what really matters is the final outcome. If the EU citizens are satisfied, despite any academic worries about democratic deficits, the adequate legitimacy of the EU regimes is secured. In the words of Scharpf, such output-based legitimacy based on "government *for* the people" could be justified by "stable and multifunctional structures and a defined political entity" (Scharpf 1999, 6ss, 10ss and 187ss). However, such an approach, where the goal justifies the means, directly jeopardises the overall legitimacy of the EU. It could endanger the overall EU objective of securing democratic institutions as such argumentation could serve counterproductive for the future integration of the EU, including the enlargement process. The EU is committed to enhancing democratic

institutions, a commitment that also concerns the EU institutions themselves, i.e. the 1993 Copenhagen Criteria[333]. In this democratisation process, the process in itself is as important as the final outcome.

The inclusion of several new, and thus, fragile democracies in the Union requires that the current and established EU institutions must set the example of and principles for firm democratic institutions. One could even go further, saying that it might be better not to compromise on these fundamental issues, and for the time being accept leaving the issue of democratic deficit unsolved, instead of bending democratic principles by allowing for more pragmatic, i.e. technocratic solutions[334]. Such bending of principles could easily be misunderstood, or directly abused, by the Member States and in the national political processes[335]. Naturally, this issue not only concerns the direct implications to the new and exiting Member States. A democratic EU also serves as a powerful message the rest of the world[336].

Now, let us turn to the procedural democratisation. Such a process-orientated approach is not intended to replace other EU democratisation efforts. Rather, it serves as a supplement to overcome the democratic deficit – a deficit a technocratic legitimacy cannot meet.

[333] Ibid. note 127.
[334] As argued in terms of the current Euro crisis, see note 328 above.
[335] Several of the new, and potential, Member States are new democracies still in the process of securing a legal and institutional culture based on the Rule of Law. Without a clear democratic foundation of the EU institutions, there is a risk for failure of these nations in conforming to the established democratic political and legal structures of the existing EU. Without such a clear foundation, the adequate capacity of the EU could be questioned. A second implication could be that the non-democratic EU institutions and management could serve as an argument for national anti-democratic political movements and developments. Further, there is even a risk of back-clash as the existing EU structure itself could be victimised by influences from Member States with fragile democratic political and legal structures.
[336] This argumentation is similar to the protection of fundamental rights based on the Rule of Law. Both the US and Western Europe have for decade been seen as the foremost promoters of such right (Bingham 2010, 10ss and 66ss). Illustratively, the US, during the Bush Administration (2001-2009), suffered from criticisms for having abolished basic rights in its "War on Terrorism" (Bingham 2010, 133ss).

12.3.2 Procedural Democratisation

Procedural democratisation refers to accountability and democratic legitimacy based on deliberative processes.

Ladeur observes that the democratic legitimacy of transnational deliberative processes is detached from its former national sentiment, and is now based on borderless deliberative processes. The democratic processes are safeguarded by procedures ensuring sound and comprehensive participation and deliberation processes[337]. Democracy in "a non-hierarchical transnational context is less focused upon sovereignty, as it is focused upon producing a distributed self-observation and observations of others made possible by networking" (Ladeur 2004c, 113). In this way, the democratic rationale concerns the process of deliberation allowing for different priorities for different actors. It allows for "a strategic cognitive process acknowledging the rationality in choice in stimulating for the information needed in meeting the strategic goals set, and at the same time recognising the risk, uncertainty and incompleteness related to the process itself" (Simon 1997, 72ss).

Such a horizontal deliberative democracy is based on a diversity of individuals and "the organization of societies being members of polyarchy societies" (Schmalz-Bruns 2007 and Ladeur 2004c, 100ss). Ladeur and Slaughter describe such an organisation as taking place in multiple networks or even communities "dis-embedded from the traditional state, and independent in terms of compiling and cumulating knowledge, problem solving capacity, and normative frameworks". "They are self-organising, self-transforming, and de-territorialised". "The traditional separation between formulation and application of rules is being dissolved by technology, a development that is in turn undermining a shared common knowledge basis of practical experience. Instead, public and private actors are coming together to develop new ways of decision making under conditions of complexity" (Ladeur 2004d and Slaughter 2004b, 151ss).

[337] Following Luhmann, procedures convey legitimacy in a complex society as procedures create stability in assigning certain roles and processes, (Luhmann 1993, 53ss, King & Thornhill 2003, 186ss and Warning 2009, 181ss).

With such complexity involved, this indicates that the need for accountability schemes and democratic legitimacy may vary among the network participants. It also indicates a need for diversity management in safeguarding the procedural democracy, and at the same time, allowing for different accountability schemes to be in place. It calls for an institutional organisation and procedural structures, which will be addressed below.

The management of such a "disaggregated democracy" fits well with the role of the "disaggregated" state in ensuring that such democratic deliberation takes place (Slaughter 2004b, 145ss). It may even be argued that there is no democratisation without a state, as this form for deliberative democratisation "cannot do without a state, that is to say, a hierarchical form of self-intervention, since a system of governance, to be considered democratic, has to posses an organised capacity to act" (Schmalz-Bruns 2007, 296ss and Kohler-Koch & Rittberger 2007, 25s).

The task for transnational institutional management – based on the disaggregated state and the international transnational organisation (i.e. the EEA) - is to develop and support the transnational deliberative processes "bringing about a synthesis", or orchestration "of anti-majoritarian rationales, deliberative politics, and self-actualization through networks of every kind that it can be both operationalised and actually communicated to the people it is to serve" (Slaughter 2004b, 155).

In addition to the institutional organisation, procedural structures anchored by law provide this synthesis, or orchestration. The role of law is to provide for procedures and processes safeguarding democratic "deliberation through multiplicity of viewpoints" (Ladeur 2004c, 102ss and Abbott & Snidal 2010). As described earlier, law can no longer fully regulate science or the complexity of environmental management (Everson & Vos 2009b, 11). Therefore, in order to get "these plural interests into deliberative play, the law and institutions should promote and further strengthening discursively established legitimacy through procedural values and transparency, participation, independence and excellence" (Fisher 2009, 21, 25s and 38s, and Everson & Vos 2009b, 10s). Safeguarding the democratic legitimacy, these processes should be based on procedural meta-norms being "administrative constitutionalism" (Everson 1999) or

"transnational justice" (Neyer 2010). The point is "to establish a deliberative learning process for constitutive deliberation between competing rationalities and interests". Such a process must be structured and promoted, ensuring respect for "the contestation within the governance regime, and, further, for the establishment of a clear set of procedures and rules, which address conflict. This shall ensure the quality of the debate ensuring that each scientific, rational or ethical argument promoted is retained with its own integrity, and thus, ability to convince in concrete cases" (Fisher 2009, 21, 25s and 38s, and Everson & Vos 2009b, 11).

Procedural structures as anchored by law should be understood broadly: Procedural structures refer to the legal and institutional framework of the EEA and the also relevant legal and institutional framework of the EU and the Member States, which in administrative terms supports the transnational deliberative processes. In addition, procedural structures include the common administrative norms generated as part of the European agencification process, as part of the processes of global administrative law, and as part of the similar transgovernmental processes among disaggregated states.

The development of procedural structures based on global administrative norms is a dynamic process of cooperative law and European agencification in which the EEA and the disaggregated national administrations actively take part. As argued earlier, the generation of global administrative law fills the vacuum left by the lack of EU and national administrative law, allowing the agencies to develop an "internal law" of their own, establishing a set of administrative European meta-norms understood as "administrative constitutionalism". This also means that the procedural structures safeguarding the democratic transnational deliberation most likely are to be based on such meta-norms of "internal law" generated by the processes of global administrative law and the European agencification.

In such a process, global administrative norms must apply the same principles of administrative justice and good governance as traditionally applied, however now in a global transnational and flexible context. Such norms must apply the classic concept of natural justice understood as "a series of interlocking principles that lead to good and

fair decisions; participation, hearings before decision is reached, reasoning for a decision, and other procedural right safeguarding person's interests based upon Rule of Law" (Horspool & Humphreys 2010, 168ss). Also, organisational transparency is needed, as "organisational independence is no guarantee of operational independence" (Scott 2005, 79).

This is a significant task, which should not be underestimated, as risks are involved. The following points aim to make us aware that the design and realisation of true procedural democratisation is not without risks.

If the procedural democratisation fails in providing sound and administrative justice, the democratic legitimacy is endangered. As described in Chapter 10.2.6, transnational networking and the "convincing by the better argument" may in reality be based on tough bargaining in a power game of survival of the fittest. Likewise, extracted from the quote from Fisher, Everson and Vos just above, deliberation includes "competition", "conflicts" and "ability to convince" (Fisher 2009, 21, 25s and 38s, and Everson & Vos 2009b, 11). If the procedural structures cannot safeguard the democratic deliberation, then the transitional process and its actors are left on their own.

In general, Sabel & Zeitlin finds that the accountability schemes of networking, experimental governance, OMC and multi level governance (MLG) may generate novel forms of accountability such as peer-review of processes "by which EU decision makers learn from and correct each other even as they set goals and performance standards for the Union". Peer review represents a dynamic accountability "that anticipates the transformation of rules in use". Hereby, peer review shares the same characteristics as global administrative law, as addressed above, in becoming "anomalous administrative law: the exceptional kind of administrative law that must become the rule when administration is not built on a "core of command and control", and cannot be because it does not operate in the state's shadow. Then, this is the form of accountability that does not require a central, delegating authority, and it supports transparency, reduces the costs of control for parliaments and stimulates public discussion on policies" (Sabel & Zeitlin 2010b, 12 and Benz 2007).

However, such accountability schemes of networking and multilevel governance risk "undermining the democratic dimension mainly for the following reasons: the weak visibility of MLG networks, their selective composition and the prevalence of peer over public forms of accountability" (Papadopoulos 2007 and Benz 2007).

Also, risk to the democratic proceduralisation concerns the involvement of private transnational governance; it suffers from a democratic deficit as it primarily is based on output legitimacy, as the input legitimacy is limited. Graz & Nölke argue that typically not all "societal groups are equally represented within the decision-making institutions of transnational private governance with a particular powerful role being kept for major corporations or even oligopolies" (Graz & Nölke 2008, 240s). For instance, in the field of the European social dialogue based on the mutual recognition among the social partners practise has seen a tendency to centralisation of negotiation by the main associations (Smismans 2008, 193). Compared to domestic models of democracy, or a truly comprehensive deliberative process, the private transnational governance clearly remains inadequate in terms of limited transparency and accountability, which is even more problematic where the private governance is separated further from democratic control by the dual agency role of the Commission as discussed in the earlier sections (Graz & Nölke 2008, 240s and Christou & Simpson 2008, 162 and 165s).

These points should not discourage the process of advancing procedural democratisation. It rather indicates that the actual design of accountability is particular of each regime and may even vary within the same regime. It is a challenge to make such ends meet. For instance, the strategic transnational concept may involve comprehensive input legitimacy in transgovernmental networking and at the same time accommodate output-based legitimacy when involving private governance.

Thus, the accountability schemes of any agency differ as the interdependence between agency and key stakeholders vary. In addition to the interdependence with the Commission, the agencies depend on cooperation both from Member States and from undertakings within Member States, particularly for gathering information and for

knowledge about the operation of activities within their particular domain. For these reasons, agencies are liable to be caught within networks of accountability (Scott 2005, 80 and Everson et al 1999, 14s). Likewise, Sauer has observed that due to "the lack of unifying provisions in the European Treaty framework", or perhaps even following the lack in the understanding of the conceptual framework of accountability (Bovens 2007), "the accountability regimes for EU agencies are remarkably diverse, a diversity that may lead to several accountability perspectives or schemes" (Saurer 2009, 487)[338].

However, applying several accountability schemes may not necessarily cause problems in diversity management, as the aim of the strategic transnational concept is to apply diversity also in accountability schemes. This need for diversity management, coordination and openness brings about yet another rationale for the autonomous EEA in "institutionalising transparency and accountancy to cope with global complex problems, and in organizing the necessary knowledge basis for decisions as it no longer is possible to rely on the spontaneous production of knowledge" (Ladeur 2004c, 114).

However, deliberative processes are no guarantee for democratic legitimacy. The remainder of this section will discuss such aspects in relation to deliberative supranationalism and Comitology. As with the strategic transnational concept, also deliberative supranationalism offers a new third perspective on supranationalism and democratic legitimacy as a response to the stalemate with the conventional criticism of the "democratic deficit" of the EU (the "input legitimacy") and the problem-solving capacity of the EU (the "output legitimacy") (Joerges & Neyer 1997). Also, deliberative supranationalism is a stand against technocratic governance[339]. Also similar to the procedural democratisation, the regulatory procedures should be designed in inclusive manner focusing on the deliberative process in an effort to overcome or compensate for the shortcomings of the constitutional nation-state (Nickel 2009b, 6s).

[338] Similarly, Harlow & Rawlings find that 'accountability networks' may be emerging, composed of agencies "specializing in a specific mode of accountability, which come together or coalesce in a relationship of support, fortified by shared professional expertise and ethos. At present fragmentary and imperfect, these might ultimately be capable of providing effective machinery for accountability in network governance systems" (Harlow & Rawlings 2007).

[339] See the discussions earlier in this Chapter (Section 12.3.1), especially at note 332.

In this process, Joerges views the process of Comitology as a form of transnational deliberation that makes the states "amenable to promoting a pluralised public interest beyond their own borders compensating the deficit of democratic legitimacy" (Joerges 1999). Comitology is able to provide for a deliberative system based on, and controlled by, constitutional provisions favouring a transnational 'deliberative' style of problem solving based on good governance (Joerges & Neyer 1997, 282, Joerges 1999, 332ss and Slaughter 2004b, 149). Comitology derives democratic legitimacy from both the transnational processes and from the control of the European Parliament, as the Parliament comes closest among EU institutions as a majoritarian institution directly accountable to the European people.

However, deliberative supranationalism applied to Comitology and its deliberative processes may face a problem in preserving the legitimacy of national democracies while at the same time setting limits on the traditional nation state within a supranational context. The structure and exclusiveness of Comitology makes it difficult to provide for a comprehensive deliberative process meeting the democratic legitimacy of the national state. Although Comitology is based on a deliberative process it is hardly viewed as a horizontal democratic process escaping the vertical structure of supranationalism (Shapiro 2001, 373, Weiler 1999, 342 and Ladeur 2004c, 97)[340].

Also, it may be questioned whether the deliberative processes of Comitology root in civil society. Ladeur, being sceptical of such an approach, argues that the relationship between civil society and Comitology is diluted, and instead proposes, as argued by this Thesis, to focus on the "managerial" aspects in building transnational cooperation networks (Ladeur 2004c, 97 and 1999). Also Curtin expresses concern as Comitology represents a delegation model of accountability, which in a democratic sense is inadequate and "only captures part of emerging practice". "A looser conceptual

[340] Shapiro expresses quiet well the concern on the EU Comitology process: "Another paradox created when governance supplants government is that maximizing transparency and participation for the interested minimizes transparency and participation for the disinterested" …… "While virtually every interest group finds a place on the committees, European citizens are generally unaware that the committees even exist" .... "Thus, while the Comitology process is extremely transparent and participatory for those who are actually involved in it, and while many of those inside it are outside government, it remains for the citizen voter a highly opaque and non-participatory process." (Shapiro 2001, 373).

framing, understanding public accountability as a process in which power is checked and balanced by various actors, fits better within a more constitutional perspective on holding EU executive power to account" (Curtin 2007). Civil society involvement and added public accountability based on cooperation networks as proposed by Ladeur, and the looser conceptual framing suggested by Curtin both fall within the transnational deliberative processes of the strategic transnational concept.

In short, deliberative supranationalism differs from the strategic transnational concept in its focus on "supranationalism". In this manner, it represents an attempt to impose deliberative processes within a supranational framework. This is in opposition to the horizontal "deliberative trans-nationalism" as the strategic transnational concept could be labelled.

12.4 Deliberation in EEA Transnational Networking

Now we have addressed the conditions of a structured framework of the EEA in strategic transnational concept. The first set of conditions concerns clarity in mandates and objectives. The second set of conditions relates to the administrative norms safeguarding deliberative processes based on procedural democratisation.

In principle, the realisation of the strategic transnational concept is already possible within the current legal and institutional framework of the EEA. Naturally, several of the observations presented earlier in the text may require legal changes, but the essential parts of the transnational concept are possible to implement. Rather it is a matter of change in conceptual perception at the current supranational and national levels, and at the EEA itself, as it constitutes a radical change of the current organisation. It is a matter of getting started, gaining momentum, gaining experiences, and continuing the development of global administrative law as part of the EU agencification process.

This is not to say that the current EEA legal and institution framework is flawless in terms of supporting the strategic transnational concept. It has already been described that the EEA Regulation is in need of revision of its objectives in order to reflect the

broad transnational scope and potentials. Also, the current control and influence by the Commission risks jeopardising the transnational nature of the Agency. The involvement reflects the TEU institutional balance and the responsibilities of the Commission. Such involvement is a problem that will be "carried" into the strategic transnational concept as long as no legal revision takes place with regard to the TEU institutional balance. In addition, the perhaps most significant concern for the support of the strategic transnational concept relates to the fundamental incompatibility of positioning the transnational EEA within the overall EU supranational framework. Thus, the challenge will be for the transnational EEA to get started, balance and work around the (potential) supranational constraints, and over time consolidate transnational legitimacy based on its strategic autonomy.

The following sections discuss relevant aspects of the current EEA legal and institutional framework in balancing strategic autonomy and deliberative processes in networking. As public legitimacy is central to the strategic transnational concept, the first and second sections address accountability based on public deliberation and access to information. The third section goes beyond public legitimacy in discussing accountability generally in terms of networking itself and balancing participation, influence and control.

12.4.1 EEA and Public Deliberation

Public legitimacy and accountability in terms of deliberation concern the involvement of the general public and interest groups in the deliberative processes. Currently, such involvement is not sufficiently applied within the EEA, as it will be discussed in the following.

In discussing the accountability of the deliberative processes at the EEA, a distinction of institution and function must be applied. The narrow *institutional accountability* concerns the narrow range of stakeholders directly involved in the management of the EEA. The broader range of *functional accountability* relates to the operation and more

diffuse participation in transnational networking. The public legitimacy addressed here relates primarily to functional accountability.

Rather obviously, the EEA Management Board cannot be open for all network participants. Instead, functional accountability is based on participation in deliberation through networking and on the overall confidence in the EEA management. The legitimacy concerns the sound possibility for all network participants to voice opinions and address the Management Board in effective manners. Such lines of dialogue are not fully developed in the current structure of the EEA.

Also, accountability and legitimacy do not necessarily presuppose equality in management, networking and participation as discussed earlier in Chapter 10.2. In principle, this means that public legitimacy may be achieved even if the public has no or little influence on the management of the EEA or the networking.

However, public legitimacy in the strategic transnational concept also relates to *institutional accountability*. Public legitimacy is in need of more direct participation and closer integration into the EEA processes and the formulation of priorities and strategic approaches. Public participation must be comprehensive in terms of input legitimacy, as defined in the sections just above. This requires an early *ex ante*, or *ex priori* involvement instead of the passive or *ex post* involvement currently applied by the EEA based on an access to information and one-way information by the EEA labelled as "publicity", as described below and in the following sections.

A comprehensive involvement of the public also reflects the comprehensive ambitions of the strategic transnational concept in taking advantage of NGOs and similar public interests as part of the overall deliberative transnational processes. Like the inclusion of private governance, the involvement of NGOs reflects the disaggregated breakdown of the private-public sphere.

Therefore, the strategic transnational concept applies a system of "horizontal responsibilities"; a relationship based model of integrating both private and public stakeholders (Vos 2005, 128ss).

Specific suggestions for strengthened public involvement include the direct representation of established NGOs on the EEA Management Board or by other means of public representation[341]. Also, public hearings could be established as part of the EEA decision-making process (Vos 2005, 131s). The annual and multi-annual work programmes could be a subject for such hearings and open for comments from the general public. Other decision-making processes should also be subject to hearings. However, in order to avoid excessive bureaucracy, minimum thresholds must be established in order to exclude insignificant matters.

Public Expectations

The comprehensive involvement of the public in the strategic transnational concept also follows from the relatively high expectations among the public for participation in environmental management. The nature of environmental management has a strong tradition for including the public in decision making, which creates high expectation for the public for an active involvement[342]. In order to meet such expectations in transnational fora, comprehensive public participation must be made an integrated part of the transnational deliberate processes based on procedural democratisation compensating for the lack of democratic legitimacy, which the public expects at the national level.

[341] These issues require further elaboration outside the scope of this Thesis. For instance, it will be necessary to define the legal interest, legal standing, and legitimate representation among the great number of NGOs or other interest groups already influencing the EU decision-making process. It is often difficult to obtain a precise overview of the many interest groups, including their policy objectives and their accountability towards the general public, see also Dewey 1927.

[342] Individuals and NGOs play an important role in providing information so the Commission can "properly fulfil its role as the guardian of the Treaty" (Jans & Vedder 2008, 163s). Wennerås observes that the bulk of TFEU 258 cases are initiated following private complaints. In 2003, 1158 cases were initiated following private complaints and only 253 of these were pursued on the basis of the Commission's own investigations. Further, in 2003 the environmental sector generated by far the highest number of complaints in total to the Commission in all areas (493 out of 1158) representing more than 40% of the "active" complaints (Wennerås 2007, 295 and 304, and Commission 2004, 4).

The public expectations of the EEA transnational deliberation are likely to be influenced by the existing domestic openness and possibilities for access to environmental information and decision making at the national level. The national public applies this standard to national environmental agencies, which often share the same information with the EEA. Thus, these already established expectations at national levels also require a similar openness and access at the EEA transnational level. The EEA transnational deliberation processes will be part of the European wide regulatory process of environmental law and policy and thus, there may be various ways in the system to obtain information and pursue participation – with or without the direct integration of public participation into the EEA transnational networking. However, if the EEA does not meet this expectation for enhanced public participation, it risks losing legitimacy.

This once again illustrates the need for common European procedural norms. The European public may for instance "shop around" for information among national agencies when access may be deemed confidential in country A while accessible in country B.

As already described, such common European norms are being generated as part of global administrative law and the EU agencification process. However, procedural law is to some extent being developed by the EU legislation, for example the rules for access to information to the EEA, as will be addressed later. However, such defined EEA rules are far from sufficient to address European wide networking of national administrations. Also, regulating administrative behaviour by the EEA Regulation by following the rules for the Commission is yet again counterproductive, as the transnational EEA requires a different administrative approach from the supranational Commission. Such aspects will be addressed in the following sections.

The Aarhus Process

The 1995 Aarhus Convention is a significant step in promoting public participation in environmental decision making. In addition to adequate access to participation, the

Convention also requires adequate access to judicial and administrative review mechanisms.

In 1995, the EU signed the UNECE Aarhus Convention and subsequently implemented the requirements of the convention in its own EU institutions (Hedemann-Robertson 2007, 350ss and Wennerås 2007, 295ss). The following paragraphs describe the EU process of implementing the Aarhus requirements to the EEA It is still an incomplete process that once again suffers from the ill-fitted vertical approach of the supranational EU towards the transnational needs of the EEA.

In principle, the Aarhus Convention sustains the public integration heralded by the 1997 EU Treaty of Amsterdam, which introduced a new principle of a right of access to documents of the European Parliament, the Council and the Commission, and a duty for the Commission to consult widely before issuing proposals (Horspool & Humphreys 2010, 556). However, the principle was not further substantiated and the institutions addressed by the new principle did not include the external bodies, such as the EU agencies.

Based on this principle, in 2001, the EU undertook an "internal" reform process addressing access to information, which also includes the EEA[343]. Similarly, in 2002, the Commission argued in favour of such improvements in its recommendations on the framework of EU regulatory agencies (Commission 2002a, 10ss)[344]. Aspects of these

[343] Both the EU Commission and the EEA were subject to the rules on access to information, EC Regulation 1049/2001 regarding Public Access to European Parliament, Council and Commission Documents, OJ L 145, p. 43, 31.5.2001.
In accordance with 2003 EEA Regulation Article 6(2), the EEA Management Board has by Decision of 22 June 2004 adopted Regulation 1049/2001. The EEA Management Board by Decision of 22 June 2004 also adopted *The Code of Good Administrative Behaviour,* formulated by the EU Ombudsman, which were endorsed by a resolution of the European Parliament on 6 September 2001.

[344] The early proposals concerned (Commission 2002a, 10ss):
First, the Commission proposed an independent Board of Appeal as an internal part of the organisation of the agency. Such a Board would deal with complaints from third parties over decisions made by the Agency prior to any referral to the Court of First Instance.
Second, the Commission argued in general for strengthening of legislation related to the principles of sound administration, such as reasoning and justification of decisions, right to hearing, transparency, access to information, and the protection of private and confidential data.
Third, the Commission recommended improved administrative supervision in accordance with the then Article 43 of the Charter of Fundamental Rights of the EU, subjecting the agencies to the scrutiny of the EU Ombudsman in accordance with the conditions set out in then TEC Article 195.

recommendations have later been incorporated by the 2003 EEA Regulation and also recently by the Treaty of Lisbon on control and review by the European Ombudsman and the CJEU.

Such administrative improvements were promising. However, the EU administrative norms still paid little attention to the issue of direct public participation in the decision-making process. Instead, the rules concerned the issues of access to information, and administrative review by the EU Ombudsman

It was first in 2006 that the EU institutions, and also the EEA, formally became subject to the Aarhus requirements by Regulation 1367/2006 (The "EU Aarhus Regulation")[345]. The "EU Aarhus Regulation" covers not only the traditional EU institutions, but also bodies, offices or agencies established by or on the basis of the EU Treaties. The EU Aarhus Regulation Article 2(1) litra c defines a Community institution or body as "any public institutions, body, office or agency established by, or on the basis of, the Treaty except when it acts in a judicial or legislative capacity" This was a broader definition than that under the then applicable TEC Article 230(4) since it not only encompasses the Community institutions listed in the then TEC Article 7 (now TEU Article 13), but any public body set up on the basis of the Treaty through secondary legislation or decision, such as the EEA (Wennerås 2007, 231)[346]. The broader formulation has later been incorporated into TFEU Article 263.

The EU institutions and bodies now need to adapt their internal procedures and practices to the provisions of the Regulation covering the "three pillars" of the Aarhus Convention: access to information, public participation and access to justice in environmental matters. The EU institutions and bodies shall provide for public

Fourth, the Commission also called for improved judicial review by either the ECJ, the Court of First Instance or by a specialised tribunal. Access to the courts should be granted any EU institution, Member States and also directly concerned third parties addressing any decision, failure to act and mal-administration performed by the decision-making agency. Finally, this should be linked to a compensation scheme for any damage caused by such acts, where appropriate after judicial confirmation of their liability.

[345] Regulation (EC) N° 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p.13.

[346] Note that Wennerås made this comment on the former TEC Articles 230(4) and 7(1), respectively.

participation in the preparation, modification or review of "plans and programmes relating to the environment" (Wennerås 2007, 231). The EU Aarhus Regulation also enables environmental NGOs meeting certain criteria to request an internal review under environmental law of acts adopted, or omissions, by Community institutions and bodies[347].

One could argue that the EU Aarhus Regulation itself applies a deliberative learning approach, as the Regulation encourages each EU institution to develop its own internal rules and procedures. In fact, the EU Aarhus Regulation adds to and intensifies the EU agencification processes in generating global administrative law. The EU Aarhus Regulation now expands the former agencification process to a genuine EU institutionalisation process, as all EU institutions and bodies are required to participate in the generation of norms.

Just a note on concern: it is perhaps problematic to apply a flexible learning approach in meeting substantive administrative norms set out in a international convention. It is rather unlikely that the EU in a short time span will manage to provide for a unified approach in implementing such rules, as the individual focus of each EU institution and bodies evidently will lead to a differentiated approach. Such a differentiated approach is good for the learning processes, and for the generation of global administrative law. However, whether such a differentiated approach also satisfies the views of the Compliance Committee of the Aarhus Convention is doubtful. These issues shall not be pursued further here[348].

Regardless the approach chosen by the Aarhus Regulation 1367/2006, the restraints of the supranational structures of the EU cast doubt on the sufficiency in ensuring full compliance with the Aarhus Convention, as the public still today is excluded from participation at Community level, and thus, the EU Aarhus Regulation cannot ensure “adequate and effective remedies” as required by the Aarhus Convention Article 9(4). Regulation 1367/2006 ought to be interpreted in conformity with the Aarhus Convention (Wennerås 2007, 321ss).

[347] On the internal review, see http://ec.europa.eu/environment/aarhus/internal_review.htm
[348] The Aarhus Convention Article 15.

Applying the traditional dualistic approach, the EU has predominately focused on ensuring the fulfilment of the Aarhus requirements by addressing the national level and the national institutions separately (Krämer 2007, 468ss)[349]. However, as a signatory to the Aarhus Convention, the EU and its institutions are legally required to implement the Convention. Wennerås finds that dual standards are still employed by the Community in relation to rights and remedies at the national versus the Community level, meaning that the level of compliance with the Aarhus Convention differs accordingly. The Community's effectiveness has "driven inroads into national procedural autonomy has had the consequence that Member States to a large extent are already subject to requirements comparable with the Aarhus Convention" (Wennerås 2007, 320). Such a drive has yet to be seen for the EU institutions, including the EEA.

So the basic problem remains, as the EU continues to apply a dualistic approach by imposing different standards at EU and national level[350]. We have yet to see if the actual implementation of the Aarhus Regulation may alter this approach. Until then, the EU institutions may face the uncertainty of the fragmentised and differentiated administrative systems where participation can take place within various legal systems based on a transnational and inter-institutional learning process.

The EEA Regulation's approach on access to information is further discussed in the next section.

12.4.2 Access to Information

Access to information is a fundamental aspect in safeguarding accountability and the public legitimacy of the EEA. Access to information is directly related to the public participation as an essential precondition for both *ex ante* and *ex post* involvement into the processes, priorities and strategies formulated by the Agency.

[349] Several environmental EU directives have been updated accordingly, such as the EIA, IPPC and the Access to Information Directives.
[350] The Directive 90/313 on access to environmental information applies exclusively to the Member States, whereas the Aarhus Regulation 1367/2005 addresses EU institutions and bodies only.

From the public point of view, direct access to the information at the EEA matters for the following reasons: First of all, the EEA is a non-majoritarian institution distant from the European public. It is the lead transnational institution that coordinates and manages the deliberation processes, which also involve private and public actors. Access to information as part of procedural democratisation is important in order to obtain public legitimacy. Second, the different administrative standards and practises applied by the national administrations emphasises the importance of access for the European public to information from more independent sources and institutions such as the EEA. Third, the EEA may act as an independent and impartial provider of information as national authorities may have vested interests in projects that the request of information concerns. Fourth, allowing an additional institutional source of information will intensify the general comparability of data and information. Fifth, improved access to environmental information may reduce the risk for resources spent on legal and time-consuming actions in order to obtain relevant information. Often decision-making processes do not allow for such delays and information obtained later seems of little relevance.

The first part of the following discussions concerns the direct "active publicity" of the EEA, where the Agency actively is required to inform the public. The second part concerns the "passive" role of the Agency, concerning the right of the public to request information[351].

Direct Public Information

Article 2 (m) of the EEA Regulation states:

> *"For the purposes of achieving the objective set out in Article 1, the tasks of the Agency shall be……. to ensure the broad dissemination of reliable and*

[351] For the same definition, see Louka 2006, 130. Naturally, the issue of "active" and "passive" depends on the subject of action, which here is the EEA. In case the public were the subject, the concepts would be the other way around: the public exercises an "active" access to information by request and are "passive" when relying on information provided by the EEA.

comparable environmental information, in particular on the state of the environment, to the general public and, to this end, to promote the use of new telematics technology for this purpose";

However, EEA Regulation Article 1(2.a), supported by the wording of Preamble paragraph 5, states that the objectives of the Regulation shall be to provide *the Community and the Member States* with information enabling *them* to ensure that the public is properly informed about the state of the environment.

These provisions give reason to question whether the EEA in legal terms is entitled to provide the public directly with information or such a task is in the domain of the Community and the Member States.

A strict interpretation of EEA article 1 would conclude that the task of informing the public exclusively is in the domain of the Community and the Member States. Article 1 sets out the EEA objectives and provides the overall interpretation of the specific articles of the Regulation. Thus, Articles 2 has the purpose of achieving the objectives in Article 1.

However, such a conclusion seems without hold in the underlying intentions of the EEA. A general interpretation of the Regulation and the intentions behind clearly show that the production and publishing of reliable information is a significant part of an independent work of the Agency, and also one of the preconditions for proper assessment of and accounting for environmental measures. Therefore, to prevent the Agency the direct publicity would be inconsistent with the purpose of the Regulation and the establishment of the Agency. As earlier noted, while disagreement may exist on the involvement of the Agency in policy assessments, when it comes to the issue of pure information gathering, processing and disseminating, no conflicts have been observed during this study. This is and should be one of the foremost tasks of the Agency.

Thus, there seems to be little reason for the uncertainty caused by the wording of the current EEA Regulation Article 1 (2a) and the Preamble Paragraph 5. Therefore, they should be revised to reflect the true intention.

Access to Information

The EEA is governed by the same rules of access to information that apply to the EU Institutions based on Regulation 1049/2001 (EEA Regulation Article 6). Also, decisions made by the Agency pursuant to Article 8 of Regulation 1049/2001 may form the subject of a complaint to the European Ombudsman, or of an action before the CJEU, under the conditions laid down in Articles 195 and 230 of the Treaty respectively (EEA Regulation Article 6(2)).

This legal requirement supplements the 2004 decision by the EEA Management Board on the implementation of Regulation 1049/2001[352].

Regulation 1049/2001 may provide the Agency with a set of rules regulating access to information. However, as argued earlier, referring to the rules of the Commission may be counterproductive, as the transnational EEA requires a different administrative approach from the supranational Commission.

The original 1990 EEA Regulation applied a transnational approach in regulating access to information. The prior 2003 Article 6 of the EEA Regulation referred jointly to the rules of the Commission, *and* to the rules of the Member States[353]. Now, the current Article 6 refers only to the supranational EU Regulation 1049/2001 regarding access to the European Parliament, the Council and the Commission. As discussed in Part II, this could be seen as part of the erosion of the earlier transnational nature of the EEA.

[352] Ibid. note 343. See also and http://www.eea.europa.eu/about-us/documents/administrativedocuments/administrativedocuments/implementingrules.html

[353] 1990 EEA Regulation Article 6: "Environmental data supplied to or emanating from the Agency may be published and shall be made accessible to the public, subject to compliance with the rules of the Commission *and the Member States* on the dissemination of information, particularly as regards confidentiality".

Also, it may be criticised that EEA transnational administrative norms are regulated by secondary Community legislation, governed and interpreted subject to the needs and interests of the Council, the European Parliament and the Commission. This has two implications: first, it would contradict the fundamentally independent status of the Agency. Second, applying the same rules of access to information at the EEA and at the other EU institutions cannot meet the different and specific needs of each institution. Hereby, the EU institutions and the EEA may risk losing fundamental public legitimacy. For instance, the EU Commission differs from the Agency in being a predominately political institution subject to the influences of diverse political interests. Thus, the EU Commission might be in need for specific protective norms safeguarding confidentiality when preparing new policies and legislation. Such confidentiality is an essential element in bringing-about a variety of policy inputs and options, and in securing a stable forum for preparation and deliberation. This will allow the EU Commission the necessary opportunity to formulate an early policy position for internal deliberation.

Such concerns do not necessarily - or at least not to the same degree - apply to the transnational EEA, which predominately depends on open processes. Thus, the Agency and the EU Commission are in need of different administrative norms. By simply referring to the rules applicable for the EU Commission, the EU decision makers tend to ignore the specific needs and institutional preconditions of the EEA, which extensively concern openness and a high degree of participation, which is arguably higher than in the EU Commission. Applying supranational administrative legal structures to the transnational EEA may jeopardise transparency and the understanding of the underlying fundamental differences between the supranational and transnational nature and needs, and it gives rooms for legal and judicial interference, disturbing the autonomous position of the transnational EEA

Having stated such concerns, there might also be room for optimism. The 2004 EEA decision on rules of access to information is based on the legal requirement of Regulation 1049/2001, but it also signifies that the Agency may be able to develop its own practises and experiences into administrative norms based on the transnational learning and experimental processes argued here; and thus, contribute to the

development of global administrative norms. These processes are even encouraged by the 2006 EU Aarhus Regulation 1367/2006 requiring the EEA to define its own procedures and practises, and as described above.

The EU Ombudsman and the CJEU may address actively the concerns related to legal and judicial interference. When reviewing administrative practises, the Ombudsman and the CJEU must take the differentiated nature and needs of the transnational EEA, vis-à-vis the supranational Commission, into account. Where relevant, the legal or administrative review should explicitly define the administrative aspects, which only apply to the transnational or supranational setting respectively.

Realism may also justify the change in the 2003 EEA Regulation Article 6 abandoning the earlier transnational reference to the rules of the Member States. First, the simple reference by the 1990 EEA Regulation Article 6 to the rules of the Commission and the Member States, resulted in significant uncertainty as it in reality referred to then 16+ administrative systems of the EU Member States and the Commission added the administrative systems of the non-EU third country members of the Agency[354]. Despite the transnational potentials of such a system in generating a true learning process, the immediate application of the former Article 6 raised problems in terms of interpretation. Should the Agency with reference to the various national administrative systems use the lowest or highest common denominator, if this is even possible? In addition, how should the reference to confidentiality be governed? Yes, the earlier approach was truly transnational but without any further visions and guidance provided by the EEA Regulation or found in the preparations for the EEA Regulation. As argued throughout this Thesis, the strategic transnational concept requires clarity in the legal wording. When applied in EU legislation the transnational objectives must be explained, and the transnational linkage to the EU regulatory process should be made clear. In this respect, the earlier EEA Regulation failed. Furthermore, the implementation of the transnational concept is in itself a learning process, which takes time.

[354] Referring to the rules of the Member States as a unit is problematic since the legal systems regulating access to information throughout the Community differ greatly - even after the adoption of Directive 90/313 on the Freedom on Access to Environmental Information (Kimber 2000).

Regulation 1049/2001 provided legal certainty for both the EU Commission and the EEA Regulation. The reference of the EEA Regulation, prior to 2003, to *the rules of the Commission* was problematic as such "rules" until Regulation 1049/2001 simply were based on a policy decision subject to the Commission itself[355]. This would subject the EEA and its independence to internal rule making of the Commission[356].

It may be concluded that until the 2003 EEA Regulation entered into force, the EEA management of access to information was based on uncertainty caused by the reference to 16+ national administrative cultures and internal rules set by the Commission itself. EU Regulation 1049/2001 provided legal clarity, which perhaps has been developed even further by the 2006 EU Aarhus Regulation 1367/2006 encouraging each EU institution to develop its own norms (although this also will lead to different norms applied among the EU Institutions). However, the two EU regulations only refer to the EU institutions without addressing the Member States. Access to information at Member States level is still regulated by the EU Directive 90/313. Therefore, the Community continues to apply the traditional dualistic approach in applying and encouraging different administrative norms for the individual Member States and for EU institutions. By the 2006 EU Aarhus Regulation 1367/2006, the EU even encourages differentiated administrative norms at EU level, as each EU institution is encouraged to develop its own internal administrative norms. As discussed earlier, this creates a multitude of administrative norms applied in Europe and it creates uncertainty.

[355] The Council and the Commission adopted a Code of Conduct in late 1993, Declaration 93/730 on a Code of Conduct concerning public access to Council and Commission documents.
The Declaration was adopted by decisions by the Council and the Commission; Council's Decision 93/731 of 20 December 1993 on public access to Council documents, OJ No L 340, 31.12.93, p.43, and Commission Decision 94/90 of 8 February 1994 on the public access to Commission documents, OJ No L 46, 18.2.94, p.58.

[356] Also, the Agency adopted a Decision on public access to its documents (Decision of 31 March, 1997 on public access to its documents, OJ No C 282, 18.9.97, p.5.).
This EEA stated that these rules would follow closely the rules of the Council and the Commission, although applied on an independent basis, Preamble 4 of 1997 EEA Declaration. This statement and the legal implications may also illustrate the uncertainty of the period before 2003.
In its decision, the Agency argued that having been granted legal personality and legal autonomy, the Agency was not bound by the Code of Conduct of the Council and the Commission and therefore had to adopt its own set of rules, Preamble 4. However, this interpretation seems problematic. The legal status of the Decision was secondary since the 1990 EEA Regulation did not authorise the Agency to deviate from (then) article 6 of the 1990 Regulation: Dissemination of information had to comply with the rules of the Commission and the Member States. Therefore, without any specific delegation in the Regulation, the Decision must merely be regarded as an internal Code of Conduct. Thus, the Agency had to administrate the Decision and conduct its policy on access to information in conformity with the rules of the Commission and the Member States.

The Community is still not able to provide common EU law for administrative norms to be applied by all EU institutions, EU agencies and national administrations. Instead, the Community leaves EU administrative law to be defined by the individual national administration and the individual EU institution.

This differentiated approach justifies the need for the transnational learning processes of cooperative administrative law based on the European agencification processes. It also justifies the relevance of the third level of EU integration based on the strategic transnational concept and transnational law. Transnational law is not only relevant for the generation of European administrative norms as an "internal" law for the European administrations and the EU agencies. As discussed throughout this Thesis, transnational law is relevant for the generation of norms in areas of complexity calling for processes of transnational deliberation, and in areas where the traditional differentiated integration based on supranational law or national law no longer applies.

12.4.3 Networking - Balancing the Interests

This last section will focus on balancing the EEA autonomy and the interests involved in sound deliberation in networking.

The Involvement of Network Participants

The EEA Regulation is not perfect with regard to balancing the integration of participation. Participation is rather limited in scope and encouragement, and far from the wide deliberative processes involving public and private governance as argued in this Thesis. The EEA Regulation may encourage the broad involvement of networking but in reality focuses on the Member States and the Commission with regard to involvement and decision making with very little organised involvement of the "outside world"[357].

The organised involvement of stakeholders takes place in four layers:

[357] Participation of the "outside world" can include a strategic involvement of NGOs reflecting the disaggregated breakdown of the private-public sphere; see the discussions above in this Chapter, section 12.4.1.

1) “Top-management-layer” – which is related to the involvement of the Management Board and the Bureau. In these steering and decision-making bodies, the involvement and influences are based on the Commission, the Member States, the two scientific members chosen by the Parliament, and the third Member States. At this level, all other influence and access is secondary, meaning that it has to go through the representatives or by petition, such as informal contract and access to information.

2) “Mid-technical-layer” – which concerns the technical level of the Scientific Committee, the topic centres and selected research institutions carrying out specifically commissioned studies and analyses for the EEA. The activation of such processes is based on the discretion of the Management Board. The “outer world” of the general scientific community, the industry and the general public have no formal influence at this layer.

3) “Network-layer” – which foremost concerns the main EIONET networking. The designation of the national focal points, and the national deliberation processes are based on the discretion of the Member States. Also here, the “outer world” of the general scientific community, the industry and the general public has no formal influence at this layer

4) “Bottom-layer” – which constitutes the more or less random involvement and networking that takes place by the mandate of the EEA, and by general petition by stakeholders.

The EEA may participate in wider networking in meeting its objectives. This may be actively pursued by the EEA, and may involve private and public interest groups, industries, research institutions, academia, etc. However, such participation is an orchestrated approach that does not necessarily capture all potential relevant inputs from the scientific community and/or the general public. Therefore, the “uninvited outside” interests may, in order to get influence, rely on petitioning directly to the EEA, or to the

EEA national representations. Such participation is passive, as it does not allow the "outside actors" to take a dynamic and active role of their own in EEA networking.

To summarise, the EEA Regulation in itself does very little to stimulate transnational deliberative processes as argued here in this Thesis. Perhaps such an approach may be understood against the Agency background and the interests of the Community and the Member States in remaining in control of the regulatory processes, not allowing for truly widely open deliberative processes involving public and private governance.

Stakeholder Influence and Control

The narrow scope of key stakeholders involved in networking corresponds to the actual influence on the Agency. We have earlier in Part II addressed the influences of the Commission and the European Parliament on the management of the EEA, and the implication for the autonomy of the Agency. In addition, such control and influences may also have an impact on the balance of interests in the deliberative processes involved in networking.

The EEA is subject to various direct and indirect influences and controls by its major stakeholders (Vos 2005, 126ss). The measures arising from the EEA Regulation represent a mix of political and legal mechanisms, such as the influence over the annual budget and the related accounts and auditing[358], the influence over the work programmes[359], the nomination of key personnel, the annual reporting to the stakeholders[360], the influence exercised by the participation in and composition of the Management Board[361], the influence and control of publicity[362], the public access to information[363], and the administrative and judicial review[364]. In principle, the influence

[358] EEA Regulation Articles 11-14. "Budgetary control, internal audits, annual reports by the Court of Auditors, the annual discharge for the execution of the Community budget and the investigations conducted by the European Anti-Fraud Office (OLAF) will make it possible to ensure, in particular, that the resources allocated to the agencies are put to proper use" (Commission 2005, 6).
[359] EEA Regulation Article 8 (4 and 5).
[360] EEA Regulation Article 8 (6).
[361] EEA Regulation Article 8.
[362] EEA Regulation Article 2 (h and m).
[363] EEA Regulation Article 6.
[364] EEA Regulation Articles 6(2) and 18.

by the main stakeholders is even. The Commission, the European Parliament and the Member States are all present on the Management Board. However, as described in Part II, the EU Commission enjoys certain prerogatives over the Member States and the EU Parliament with respect to the influence and control over the work of the Agency[365].

From a deliberative point of view, these aspects may pose a risk for the public legitimacy of the networking processes. Although such influences are aimed at internal processes, they have a potential impact on priority and agenda setting, the appointment of members to the Management Board and the Scientific Committee, and on resource allocation and budget. Such measures risk influencing the actual network management, as prioritisation will not necessarily be based on the convincing arguments of the deliberative process but rather on who has a greater say over the EEA management. This may compromise the public legitimacy.

EEA Discretion

The EEA Regulation sets out the organisational framework and overall objectives leaving the details of prioritisation, agenda setting, work programmes, access to information, etc. to be established by the Management Board. Also, the criteria for selection and evaluation of information are for the Scientific Committee and the Management Board to decide.

Thus, the relative lack of criteria and administrative norms for the Agency increases the margin for administrative and scientific discretion. In other words, the moderately

[365] The Commission even suggested, in its 2005 draft for a operational agency framework, to make these prerogatives explicit (Commission 2005a, 23s):
"The Commission shall exercise control using its prerogatives:
(1) The Commission shall exercise its power of initiative by proposing, where necessary, that the basic act be revised or repealed. The Commission shall also propose to the budgetary authority each year the amount of the subsidy for the agency and the number of staff it considers the agency needs, on the basis of the estimate of expenditure and revenue drawn up by the administrative board.
(2) The Commission shall exercise its executive responsibility:
a) through its representatives on the administrative board;
b) by drawing up a list of candidates for appointing the director and the members of the boards of appeal;
c) by proposing to extend the mandate of the director depending on his evaluation;
d) by delivering opinions on the annual work programme, on the rules of procedure, and on
any working arrangements concluded with the competent authorities of non-Community countries and/or international organizations with similar tasks".

drafted Regulation makes it possible for the Agency to act with a considerably high level of discretion[366]. However, "Agency discretion" must be understood in the correct context, as the EEA in itself has little discretion in autonomous decision making free from the influence and the involvement of the members of the Management Board and/or the Bureau. "Genuine" EEA autonomous discretion, understood as its own integrity as an independent legal person free from potential Member State and Commission influences, may be more significant in the work of the Scientific Committee, as the Committee works at an arms length from the influences of the Management Board. This will be described further in the next sections. However, when referring to the "EEA discretion" in these lines, this refers to the integrity of the EEA itself.

It follows that the EEA enjoys wide legal and institutional structures, which provide operational flexibility and discretion, and which adequately correspond to the strategic autonomous position of the EEA. First of all, because the specialised technical integrity of the EEA somehow, among the stakeholders, leads to the anticipation or expectation that the Agency may formulate such norms and criteria. And secondly, because the rapid development in complicated environmental science calls for delegation to specialised agencies, as such development, and the uncertainty involved, cannot be addressed by law, and as legal updating typically is time-consuming and subject to policy interests. Therefore, the current EEA Regulation provides the basic structures for strategic transnational concept argued here. This is not to diminish the earlier conclusion that the mandates and objectives of the current EEA Regulation need to be revised in order to provide legal clarity. The point here is simply that the EEA may, within the overall objectives of the EEA Regulation, strategically prioritise its activities in the annual work programmes and agendas, and also describe the transnational processes in order to reach these goals.

This discretion also confers responsibility on the EEA in safeguarding the sound deliberative processes in generating criteria and prioritisation among the network

[366] The priority setting follows the wide criteria in article 3(2) of the EEA Regulation and - more specifically - the annual and multi-annual work programmes, which the Management Board adopts after consultation with the scientific committee, EEA Regulation Article 8 (4).

participants, and in safeguarding the public legitimacy in general. For the Agency, this is a matter of balancing autonomy and the interests involved in sound deliberation in networking. For the outside world, it is also a matter of sound control and review of the Agency activities, and ensuring that the Agency operates within the margins of both scientific and administrative "good practice".

Autonomy and Information Management

In general, the Agency is met with expectations beyond its abilities in terms of resources available, expectations that are linked to the autonomous position of the EEA as an independent provider of information. However balancing between expectations, resources and legitimacy may be difficult:

The Agency has from the beginning believed in wide access of providers and information to the networks and to the Agency itself[367]. Information provided by non-official sources is most welcome even though it also demands great capacity to evaluate the incoming data[368]. Thus, a significant task of the Agency, taking into account the limited resources available, is to ensure as wide a networking and information flow as possible and at the same time avoiding an "informational inflation" meaning, not being able to process qualitatively all relevant data.

Thus, in principle the EEA is open to immense amounts of information based on an endless list of networkers/providers, including alternative sources such as NGOs, private parties, academics, etc[369]. Taking into account the present limited capacity of the Agency, and the lack of established criteria for selecting and prioritising, one could fear that the present Agency would not always be capable of guaranteeing the same qualitative examination of all the incoming data, and that potential valuable information might therefore be lost. Also, the discretion of the Agency in its assessment of the

[367] This also follows from the broad networking mandate, EEA Regulation Article 3; the EEA can include all elements enabling it to fulfil its objectives.
[368] House of Lords 1995a, Beltran, evidence, question 7.
[369] House of Lords 1995a, Beltran, evidence, question. 14

incoming data raises some concern in relation to ranking the information after priority and importance - what is the best available information?

The Need for Prioritisation

In this regard, the 2008 EEA efficiency review recommends that the Agency be stricter in setting priorities and in managing user expectations. The evaluation states that in part because the Agency serves many different users, there is still an overall lack of clarity both internally and amongst stakeholders about the real role of the Agency. This lack of clarity makes prioritisation and targeting of work difficult, and this needs to be addressed (Technopolis 2008a, 88).

In addition to the lack of clarity, the 2008 EEA review also warns that the efforts of the Agency to satisfy all its stakeholders results in a lack of focus and an attempt to spread resources too thinly (Technopolis 2008a, 88). This is partly a result of the different requirements and priorities of the stakeholders – the Commission, Parliament and member countries – and partly a reflection of "the desire of the Agency staff to meet al the demands made on them" (Rambøll 2009, Vol. III, 85). The Rambøll Evaluation refers to interviews of several stakeholders addressing the latter issue, stating that the EEA "tends to take on a lot of different tasks for which they do not always have sufficient resources, which sometimes means redirecting resources from other parts of the work programme, or not being able to fully deliver what was promised"; as put by one stakeholder, "there is a gap between willingness and resources".

In addition, several of the interviewed stakeholders also addressed the risk involved "in the EEA moving beyond the assessment and monitoring of current and past trends into more prospective-type analyses. Whereas the assessment and monitoring work of EEA is generally highly regarded by users in terms of quality and reliability, analyses that are more prospective also become more debatable". According to some stakeholders, focusing too much on this type of analysis potentially may have a negative impact on the reputation of the Agency as a supplier of solid, balanced assessments of actual

developments and the current situation (Rambøll 2009, Vol. III, 85)[370]. For the Agency, it is a matter of public legitimacy and preserving credibility also in its work with other institutions. It is generally recommended that the Agency needs to take care, that its visibility is not compromised through joint activities and excessive agendas (Technopolis 2008a, 94)[371]

It is likely that such criticism also may be raised following the strategic transnational concept argued here. An EEA involved in diversity management based on strategies and prioritisation cannot escape criticism from actors with different priorities and different agendas. Although allowing and enhancing different actors, different prioritisation and agendas, the EEAs own prioritisation and strategies cannot fulfil the interest of all. However, in order to minimize criticism, the processes involved and the strategic transnational concept should be made clear in the EEA Regulation. It is a matter of public legitimacy and preserving EEA credibility by the involvement of actors based on sound deliberative processes. Also, it is a matter of managing diversity, allowing different actors for different agendas and different priorities to the extend possible.

The warnings and recommendations expressed by the 2008 EEA and the 2009 Agency reviews related to resources, focus, clarity and expectations are equally relevant for the implementation of the EEA strategic transnational concept, as the visions employed here also require a significant change in priority and resource allocation[372].

As described in the earlier section, already today, the strategic discretion of the Agency is significant for prioritisation within its core areas of information management. On such discretionary powers, the EEA Regulation is rather limited on the execution of the EEA tasks, which leaves the Agency with significant discretion in prioritising, in

[370] Assessments and evaluations may be outsourced to external consultants, which views are not necessarily shared by the EEA. However, being commissioned by the EEA and having significance for the decision-making processes, such policy documents have impact on the reputation of the Agency.
[371] The 2008 EEA efficiency review states that the "Agency needs to be clear that it cannot address all the potential demands on it and ensure that the method of prioritization, linked to specific objectives, is set out transparently in the new strategy. These limitations should also be recognized by the Commission and the Parliament. This may also mean that the Agency has to discontinue some of its current activities that are not so linked to its core activities, or which have achieved their objectives" (Technopolis 2008a, 94).
[372] The strategic transnational concept may also address efficient resource allocation. The strategies may involve practical arrangements concerning the cooperation and sharing of tasks among the agencies and the EEA.

assessing information and also in conducting wider networking. Such discretionary mandates follow the wide criteria and objectives provided by the EEA Regulation's Article 1-3, and in more specific terms provided by the annual and multi-annual work programmes adopted by the Management Board based on consultation of the Scientific Committee and the EU Commission, EEA Regulation Article 8 (4 and 5).

The EEA Regulation does not provide criteria for precise prioritisation or the evaluation of the information. However, the Scientific Committee has from the beginning assisted in establishing guidelines for such evaluation, which are applied by the Agency, by the national authorities and the National Focal Points in their evaluation before the transmission of data/information to the Agency[373]. Such criteria are based on, or at least take into account, the already existing criteria set by international organisations, standardisation bodies, the EU, the members states and other relevant institutions. Furthermore, the EEA plays an active role in promoting and stimulating the development of criteria and the best available techniques (BAT), cf. the tasks of the Agency, EEA Regulation Article 2 (k).

The role of the Scientific Committee is significant. Not only does it provide a central function in the development of technical criteria, guidelines and priority setting, the Scientific Committee is also the core of the strategic autonomy of the EEA. The technical legitimacy of the EEA, that provides the fundamental argument for the independent status of the EEA, is based on the integrity and credibility of the Scientific Committee. In contrast to the political and legal control and influences exerted on the Management Board, the Scientific Committee stands above such influence. The only possible direct influence relates to the appointment of members of the Scientific Committee, EEA Regulation Article 10. Once the members have been appointed, they may act without being subject to any political or legal influence or control. The members are eligible only for two terms of 4 years each, reducing the risk of influence following prospects of re-election.

The positive note on the role of the Scientific Committee is sustained by the

[373] House of Lords 1995a, Recommendation point 34 and 41 and Evidence, Beltran, Questions 8, 11 and 93.

2003 EEA review, that recommends an even further involvement of the Scientific Committee as quality assurance of the Agency's products and services (Commission 2003b, 16)[374].

However, the elevated position of the Scientific Committee may raise concern about accountability and public legitimacy. Although the formal function of the Committee is advisory, its impact may be decisive. As earlier argued concerning the decisive information; also here the recommendations of the Scientific Committee may constitute policy. The question is how to combine the absolute autonomy of the Committee with the deliberative processes? The answer is not easy, but must be found in a combination of the overall public legitimacy of the Agency in providing for such deliberation and in the procedural safeguarding. And such concerns are real, as criticism has been voiced within the EIONET on the prioritisation of criteria and resources, and the type of data being used (Technopolis 2008a, 66 and 91). Also, as discussed in the following sections, the outcome of the Scientific Committee may be subject to review; most likely not a substantive review, but rather an indirect review related to the administrative processes safeguarding the requirements of legitimate and informed decision making.

Network Management

The Agency has from its outset considered the improvement of the network structures as one of its coming major tasks (Jiménez-Beltran 1996a, 8ss). Similarly, the Agency declared early that it would focus especially on the EIONET and the related networks hereof, on the access to the systems and also on the extension of the network in order to minimize the present problem of "variable geometry" referring to the many and often conflicting information systems, standards and networks (Jiménez-Beltran 1996a, 6). Naturally, developing a uniform network system would be of benefit for information

[374] The Commission states: "The Scientific Committee is regarded as an important interface between EEA and the academia. As such, it potentially brings innovation and a degree of scientific quality control to EEA. While the work of the Scientific Committee is widely appreciated, in its current construction it cannot fully deliver on both aspects. There is no clear framework for quality control involving the Scientific Committee in the EEA. Rather, the Committee is involved on ad hoc basis in some products and services, but absent in others. The Scientific Committee's overall role in quality assurance is very limited. This is particularly problematic as quality of its products is vital to EEA's credibility as an information provider and an indispensable element to its users" (Commission 2003b, 16).

gathering, and the comparability and reliability of the provided information. However as described above, the EEA Regulation provides no criteria for such management.

Such information "variable geometry" also is present within the EEA networking as the Member States play a major role in the function of the EIONET. Each National Focal Point evaluates, selects and prepares the data, which afterwards is transferred to the EEA. This means that all data is evaluated twice - one time at the national authority and one time at the Agency. The various national processes also increase the potential danger of manipulation and incomparability. Early on the Agency recognised these potential problems, arguing that the EEA would work on reducing this danger over the years through guidelines and development of best available technology concerning monitoring and analytical processes. Furthermore, an additional safeguard against "unreliable information will be public scrutiny and openness for all "responsible" bodies for deliverance of information to the Agency"[375].

The role of the EEA in the operation of the EIONET, and now also the SEIS, is a balancing act of autonomy and expectations.

By the 2003 EEA review, the EEA and EIONET relationship were found too distant. First, the EIONET was weakened by the substantial variations found in the organisation and quality of the national networks behind it. Second, the connection between the National Focal Points and the Management Board was found too limited, making the NFPs miss vital policy information sometimes, and vice versa, causing the Board to miss out on important technical information, and third, the contacts between the Topic Centres and the EEA were too loose. Thus, links should be better established in order to ensure the use of the expertise of the EEA, and also in order to ensure strengthening of the national networks and the relationship between the Management Board and the National Focal Points (Commission 2003b, 14s).

In addition, the 2008 Efficiency Review voiced some critical remarks on the actual EEA influence of the EIONET. Although the view of the EEA Management Board itself of

[375] House of Lords 1995a, Beltran, Evidence, Questions 91-93 and Opinion of the Committee p. 40-41

the way the EIONET functioned was very positive, the National Focal Points were rather less positive, especially on the level of influence they have on the allocation of resources against priorities; on which they felt their influence was low to average (Technopolis 2008a, 66). It was also found that "although the Agency in general has a reputation for good quality data, this view is not universally held. There are instances of criticism on the types of data that were less well received by specific users" (Technopolis 2008a, 91).

However, such concerns do not alter the overall favourable view of the EEA in network management. It is even expected that such positive views will be sustained by the EEA involvement in the SEIS (Technopolis 2008a, 91). We have yet to see that the EEA can live up to these expectations. However, there might be reason for some concern in the prioritisation, and thus focus of the EEA, in such involvement. As we have described in Part II, the Commission intends to involve the EEA significantly in the SEIS and the INSPIRE Directive. The fully committed operation will expand the current EEA operations to an extent that some actors may question yet again (i.e. the 2008 EEA efficiency review) the prioritisation and clarity, as the EEA risks serving too many interests. This is not to say that the Agency cannot meet the challenge of prioritisation and clarity, the point is rather that the EEA needs to be aware of these risks[376].

Balancing EEA autonomy, Member States influence and expectations in general may be an even further challenge in the SEIS. Compared to the EIONET, the SEIS is based on an even more horizontal and decentralised system based on local conditions, and by use of decentralised data systems. In order to sustain and facilitate such a network, the task for the EEA is perhaps even greater than for the EIONET, which, comparatively, is more organised and centralised by means of the National Focal Points.

This will require a delicate balancing act by the EEA. In order to make data comparable, some direction and prioritisation is needed and hence, it is not possible to please all

[376] The Agency needs to be aware of the potential impacts and needs of the introduction of SEIS on the network and the Agency itself. The Agency must prioritise the necessary internal actions to address these impacts and needs, including staff training needs, and the maintenance of quality standards (Technopolis 2008a, 88 and 94)

stakeholders in accommodating all wishes, points of views and interests. The strength of the SEIS relates to locally based and locally determined data available for the end-users. Such a system might encourage participation and data availability, which serves many particular needs. However, this type of networking cannot escape the same need for reliable and comparable data on international level based on a structured approach, which requires data assessment and evaluation based on common accepted norms. Data provided by the SEIS might be direct and raw however, it is also in risk of being influenced by locally biased evaluation, processing and prioritisation.

Any EEA "facilitation" of the SEIS network might cause some interference with the stakeholders' perception of the decentralised nature of the SEIS. Thus, in the near future, we might see a similar concern over the EEA influence on the SEIS as mentioned just above in the 2008 Efficiency Review with regard to the National Focal Points of the EIONET. The EEA must take such aspects of differentiations into account when facilitating the "organised" EIONET and the "free decentralised" SEIS.

The EEA facilitation of the decentralised organisation of the SEIS combined with the focus on processes applying and learning from locally based and locally determined data, resembles the characteristics of the strategic transnational concept presented in this Thesis. Like the EIONET, also the SEIS network is transnational in nature and both networks provide the basic structures for the implementation of the strategic transnational concept. But in a transnational context, the EIONET is "passive", as it does not in itself encourage transnational learning processes; these transnational processes are instead based on the dynamics and incentives of networking, as argued in this Thesis. The EIONET network is merely a passive platform, where transnational processes take place. In contrast, the SEIS is processes-oriented "actively". The SEIS adds to the dynamics and incentives of networking, as it positively and intentionally stimulates knowledge and learning generation in applying the differentiations at national level as a learning process.

The SEIS and INSPIRE Directive are not (yet) transnational in the sense of the strategic transnational concept; they do not directly encourage transnational interaction (this is

similar to the flaws in the Water Framework Directive), and the approach is instrumental in use and influenced by the Commission and Comitology. However, despite such discrepancies, the approach applied by the SEIS and the INSPIRE Directive is close to the strategic transnational concept presented by this Thesis as transnational learning processes should be applied by the Community as part of the regulatory process.

This is a promising direction for the EEA. The development and facilitation of the SEIS and INSPIRE Directive would be an integrated part of the EEA strategic transnational concept. However, this also requires a prioritised focus of the Agency, a focus that must be communicated clearly to the stakeholders. Otherwise, there is a risk that the current concerns regarding the lack of focus and prioritisation of the Agency, combined with national expectations, only will increase. The SEIS and the strategic transnational concept require a change in perception in order to bring about the needed legitimacy. In this process, it is important to clearly state the transnational objectives and processes in the work programmes and agendas of the EEA, in the EU legislation, and also in the legal wording of the EEA Regulation.

Reviewable Activities

Now, with such wide discretionary powers, it would be tempting to call on the CJEU and the EU Ombudsman to review the activities of the EEA and safeguard the procedural democratisation needed for sound deliberative processes. Further, the EEA is bound by the 1995 Aarhus Convention, which requires effective public participation linked to adequate access to judicial and administrative review mechanisms.

The CJEU and the EU Ombudsman are competent in performing judicial and administrative review respectively in terms of the administration of the networking and the deliberative processes, EEA Regulation Article 6, and now also regulated by the Treaty of Lisbon, as described in Part II. Also, the CJEU and the EU Ombudsman are important co-players in the development of common global administrative law applicable for the EEA and for the other EU Institutions of both transnational and

supranational character. By EEA Regulation Article 6, the CJEU and the EU Ombudsman may be included in the transnational processes, where one or more networking actors in the networking and/or deliberative process seek legal or administrative conflict resolution. Thus, the transnational generation of global administrative norms within the EU is not only driven by the agencification processes, it is also driven by a further interrelated web of national institution beyond agencies, by EU institutions encouraged by the 2006 EU Aarhus Regulation 1367/2006, and by the CJEU and the EU Ombudsman, which again include the national courts and national Ombudsmen institutions based on preliminary ruling and judicial networking. The transnational process of global administrative law is indeed a truly European project.

Thus, the CJEU and the EU ombudsman may safeguard the procedural approach and the procedural democratisation; but what about the substantive review of the decisions of the Agency? In principle, the answer is no, as the Agency does not undertake binding final decisions. Instead, the EEA provides information for the national regulators and the EU Commission, enabling them to undertake binding and reviewable decisions. However, such a negative answer may be questionable, as the EEA information management in certain situations may constitute decisive policy (Majone 1996 and 1997; Shapiro 1996, 101). In this regard, the EEA, even as a 'pure' information gatherer and provider, has a significant potential influence on the European decision-making processes. It also follows that significant legal and economic interests are concerned and affected by the assessment of information and data. It may not be economical in regard to the EEA, but if the assessment in itself causes a direct significant threat to the market position of an individual economic actor, legal review cannot be denied. An example could be pharmaceutical or chemical companies seeking a declaratory judgement or ruling in defending the “harmless” environmental characteristics of a risk-prone chemical substance. Naturally, such an individual legal action could wait for a marketing ban proposed by a national agency. But this may be too late as the market may react immediately to the evaluation by the Agency. As individuals typically may seek a declaratory judgment after a legal controversy has arisen, but before any damages have occurred, an early legal action against a relevant EEA assessment may prove a useful preventive measure.

Therefore, let us focus on the review of the substantive decisions of the EEA, leaving aside the issue of "binding" or "non-binding". In general, for areas of high specialisation and significant scientific uncertainties, the substantive agency review is typically "restricted" to a review of the processes and set criteria applicable for the assessment process. Thus, also the substantive review is rather procedural in nature. Schepel finds that courts review "not so much whether the final decision can rationally be held to the expression of the will of the central legislator but, rather, whether the administrative process itself has fulfilled the requirements of legitimate and informed decision-making"[377]. Schepel continues that "such deference on substance is compensated for by insisting on procedural safeguarding; that the regulator in its exercise of discretion will clearly state its reasons and "examine carefully and impartially all relevant aspects of the individual case", which in reality for the latter refers to the availability of expertise of the "necessary technical knowledge"(Schepel 2005, 208s and 251s)[378]. Thus, the courts are more likely to overrule an Agency act or activity on such procedural merits[379].

Whether or not the review may be called substantive or procedural, the EEA may face legal action if challenged on its administration of networks, administration of the

[377] See Case C-120/97 *Upjohn* (1999) ECR I-223, paragraph 34 with reference to Case C-127/95 *Norbrook Laboratories* (1998) I-1531, paragraph 90 as quoted by Schepel:
"According to the Court's case law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such case, the Community judicature must restrict itself to examining the accuracy of the findings in fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion".

[378] See Case C-269/90 *Technische Universitat Munchen* (1991) ECR I-5469, paragraph 14 and 22. In paragraph 14, the Court states, as quoted by Schepel: "Where the Community institutions have such a power if appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance".
Such an approach also applies to administrative review ensuring "that a number of procedural safeguards are put in place so that account is taken of the interests of interested parties, and the quality of output" (Commission 2005, 6).

[379] In this relation cf. case 212/91 *Angelopharm* 1994 ECR I, p. 171ff. Based on a procedural review, the ECJ invalidated the Commission's prohibition of a cosmetic substance as the Commission failed to consult the specific Scientific Committee for Cosmetology, whose consultation is mandatory. The Court did not examine the validation of the prohibition on substantive basis, and the plaintiff did not plead for such a substantive evaluation but only argued on the procedural aspect, see also Bergström 2005, 30s.

deliberative processes, or even on its assessment of information where such, in rare cases, constitute a reviewable decision.

13 Conclusion

A Brief Overview: The EEA and the Strategic Transnational Concept

This Thesis has defined a revitalisation of the transnational EEA based on technical strategic autonomy. This autonomy bypasses the deadlocked EU constitutional discussions caused by the *Meroni Doctrine* on the legal autonomy of the EU Agencies. Instead, the autonomous position of the EEA is based on the specialised technical and scientific characteristics of the Agency.

The Thesis has defined the legal and institutional structures of the autonomous EEA as part of a new concept: the strategic transnational concept, which is an innovative approach to the EU integration process based on the recent trends of EU and global transnational governance and law. It is an approach that embraces the EU agencification processes as it encourages further transgovernmental interactions among national European agencies. Such transgovernmental processes bring about an increasingly distinct "disaggregated" transnational legitimacy, or autonomy, of the individual national agency in the European integration process and also *vis-à-vis* the domestic political agenda.

The strategic transnational concept recognises that law can no longer predict and regulate areas of complexity and uncertainty. As a response, the strategic transnational concept suggests an approach based on learning. It is an approach based on the generation of knowledge and factual cognitive norms as a result of ongoing deliberative processes among national administrations and involving private and public governance. Such cooperative processes generate transnational law as administrative "internal law" or "global administrative law" (GAL) addressing the increasing need for common procedural structures in the transnational European setting. Also, the cooperative

processes facilitate transnational law as cognitive substantive norms for the regulation of complex areas.

The approach is strategic as it concerns planned activities, which serve constructively to the development of norms, policy, etc. Strategy refers to diversity management serving as a framework of reference, as priorities, organisation, goals and objectives increasingly are "moving targets" reflecting the complexity, risk and uncertainty involved in environmental governance. In addressing such "moving targets", the framework must provide the structures needed for "orchestrating" diversity management. Therefore, the strategic transnational concept must be based on clear legal and institutional structures that safeguard the strategic autonomous position of the EEA and also safeguard the sound and fair processes of deliberation.

The strategic transnational concept is an innovative attempt to address the current crisis of democratic legitimacy in the EU. It supplements the traditional Community Method advancing EU integration. The strategic transnational concept is an attempt to meet the expectations of the European population and the Member States in achieving a greater, but differentiated, say in the European integration process. It is an attempt to escape the supranational vertical approach used by the Commission, an approach inherently associated with the crisis of legitimacy. It is also an attempt to escape the consequential response: the recent fragmentised European approach based on loosely transnational cooperation among national regulators, a cooperation seen in the institutionalisation of the European telecommunication sector (by the BEREC), and in the management of the Water Framework Directive (by the CIS).

The strategic transnational concept represents a third level of EU integration neither supranational nor a loose cooperation among national agencies. It is an attempt to keep the EU as the leader of the European integration process because Europe needs a coordinated integration process – regardless of whether the process follows the EU objectives or includes wider European agendas. This requires a central role of the EU in coordinating and taking advantage of the transnational potentials for the further EU and

European integration process. It also requires a flexible process that allows experimental learning and generation of knowledge and norms.

EU coordination in a truly transnational and horizontal environment calls for an EU transnational institution, an institution which itself is transnational in operation and organisation. An EU transnational institution that may facilitate and coordinate transnational processes based on fair and balanced deliberation. An EU transnational institution that enjoys an independent status concerning its technical integrity, distant from policy influence and other biased interests. And also, an EU transnational institution that may link the transnational concept to the overall EU integration processes.

As argued in this Thesis, the EEA is this transitional institution and should be the lead EU transnational environmental institution. Not only is the EEA the only EU environmental institution that is transnational in its organisation, it is also already involved in the increasing European agencification processes; processes that provide the foundation for the cooperative dynamics of the strategic transnational concept. In managing the strategic transnational concept, the EEA may underscore the overall legitimacy attributed to EU independent agencies; as they provide a "useful ambiguity in which is encompassed technocratic legitimacy of rule by experts, Member States guardianship of national interests, and dedication to the general interest of the Union" (Shapiro 2011, 119).

The strategic transnational concept and the non-majoritarian EEA seek accountability and democratic legitimacy through comprehensive deliberation processes involving private and public stakeholders. Democratic legitimacy is based on democratic proceduralisation safeguarding sound and fair participation. The challenge will be to balance the strategic autonomy of the EEA and, at the same time, safeguard the sound and fair deliberative processes that allow the network participants to fulfil their own interests and strategies.

The strategic transnational concept achieves more than addressing the crisis related to EU legitimacy and the Community Method. In broader terms, the strategic transnational concept is also a constructive response to the current crisis of environmental decision making at intergovernmental level, as seen in the failure of the UN climate negotiation at the COP 15. Transnational processes may bring needed knowledge and norms about, which is illustrated already by the C40 and R20 global climate initiatives.

In addition, the strategic transnational concept is also a constructive response to the consequences of the globalisation processes and the uneven impact on the individual national state. The strategic transnational concept redefines the role of state, or rather the "disaggregated" administration, as transgovernmental relations functional in managing the myriads of sites of governance characteristic for globalisation. The strategic transnational concept is also a potential approach for managing legal pluralism and managing inequality, in terms of legal and institutional capacity, caused by the economic globalisation. In general terms, the cooperative processes of transnational networking may provide capacity to the fragile institutional and legal framework of the developing world in allowing access to knowledge and information, and providing a strengthened autonomy of the individual environmental agency on the domestic scene in withstanding the political and economic influences and pressures arising from the domestic and international political agenda.

Accordingly, the state continues to play a significant role in a globalised world; as the state agency represents a vital focal point in combining and interacting the transgovernmental networking with the regulatory and institutional processes at national level. Therefore, the issue addressed here is not whether the state matters in an increasingly globalised world, but rather how to define the "disaggregated" repositioning of the national agencies in terms of the strategic transnational concept. Therefore, instead of focusing upon the traditional unity of state, or upon the uniformity and homogeneity in networking, the strategic transnational concept applies actively diffusion and diversity. The target is management rather than uniformity. This also means that the repositioning of the state agency shall take place within such diversity management beyond the traditional unity of the state. Thus, the redefined role of the

disaggregated national agency positions it "within and without" the traditional national regulatory agenda and institutional order.

Concluding this brief overview with some overall perspectives, the strategic transnational concept may reach far and has implications for the formulation and implementation of policies and law at supranational and national levels. The concept is based on cooperative law and constitutes a new third EU integration approach that "squeezes" itself in between the national and supranational orders. The realisation of the concept depends on factors of both a legal and a conceptual nature, including a change in political attitude, as the visions calls for a change of organisational culture and self-understanding. Due to the typical self-preserving attitude of most organisations, these adjustments might prove to be the most difficult aspects of the concept to implement.

The strategic transnational concept and the focus on the strategic autonomy of the EEA may attract interest amongst EU and national stakeholders as it may shift the focus away from the stalemated quarrel on legal autonomy of the EU agencies in general. Such interest also relates to the possibilities for the Commission and Member States alike in involving the EEA in order to strengthen their own legitimacy in terms of position and in terms of credible policy output. Naturally, the challenge for the autonomous EEA will be to manage the instrumental use by the Commission and other interests. In principle, there is nothing wrong with an instrumental use of the EEA, either by the Commission or the Member States, in advancing their own agendas, as long as such use does not compromise the strategic autonomous position of the EEA and the autonomous integrity of the assessments made. It follows that the Community and the Member States may "strategically" use the strategic autonomous position of the EEA in advancing their own agenda.

The Strategic Transnational Concept

The rationale of the strategic transnational concept relates to the productive approach in managing the significant uncertainty and complexities involved in modern environmental management. As a non-regulatory agency, the EEA may not produce

strict legal norms *per se* but rather, facilitate cognitive norms, research and analysis based on targeted transnational networking processes involving deliberation among national administrations and private and public governance. This allows for a strategic approach within such transnational networking, targeting the needs and demands among actors for complex environmental management and implementation of regulatory policies and legislation.

The strategic transnational concept is a pluralistic approach to diversity management; the concept recognises that complex environmental management can no longer be based on prior fixed and clear normative goals, clear definition of needs in terms of input and information needed, or clear comprehensive regulatory approaches taking all aspects into account.

Therefore, the strategic transnational concept implies that prioritisation, organisational means and goals, orientation and objectives are "moving targets". The strategic transnational concept employs diversity based on frames of references providing a structured process of deliberation. It is a concept of risk management based on precaution, learning, knowledge and deliberative processes involving private and public actors. It is based on diversity enhanced through transnational networking, which is not necessarily aimed at uniformity and heterogeneity. Therefore, the strategic transnational concept is a move away from static goals and objectives.

Through such an approach, transnational networking allows different priorities for different actors. It allows fragmentation in organisation, goals setting and fact finding. It allows a strategic cognitive process, acknowledging the rationality in choice in stimulating the information needed in meeting the strategic goals set, and at the same time recognising the risk, uncertainty and incompleteness related to the process itself (Simon 1997, 72ss). Rather than explicitly formulated normative goals and information, such procedural rationality focuses on the entangled process of informational fact-finding and orientation of goals in meeting the set strategy.

This means that the strategic transnational concept is a pluralistic approach of diversity management. The point in diversity management is not to abolish diversity but rather to employ it in a structured manner. Or, in other words, the strategic transnational concept provides, to use the term of Abbott & Snidal, an "orchestration" of diversity (Abbott & Snidal 2009 and 2010)

The strategic transnational concept allows a deliberate learning process for the Community, for the Member States and for other participating actors alike, in obtaining and distributing useful knowledge and information, a process which in itself may consolidate into factual norms. Eventually, such knowledge and information may be directed back into the EU regulatory process, which then could evolve into new EU legislation

Thus, the strategic transnational concept has two dimensions. First, the strategic transnational concept is based on the generation of knowledge and factual norms, which in itself may constitute cooperative law based on processes of deliberation. Second, the strategic transnational concept, and the cooperative processes may be applied deliberately by the Community as a learning phase in the EU regulatory process for the later development of EU law. Both dimensions concern a third level of EU integration.

A Third Level of EU Integration – Transnational Cooperative Law

The strategic transnational concept represents a third level of EU integration that is neither supranational nor loose cooperation among national agencies. It is in conformity with the EU Treaty and represents a new approach, or supplement to the traditional positive and negative integration based on the Community Method.

It is positive integration, as the EU transnational framework directives actively must employ the transnational deliberation and learning process, allowing the EEA the coordinating role, and ensuring feedback into the EU regulatory process. It resembles negative integration in addressing the need for European norms to fill out the void left by the need for EU harmonisation. However, in contrast to negative harmonisation, the

strategic transnational concept is not left for judicial activism, as it is based on the transnational dynamics among participants and the development of cooperative law.

The third level of EU integration relates to transgovernmental networking between European agencies and is part of the dynamics of the EU agencification process and the global trends of emerging cooperative law. The strategic transnational concept adds a structured approach to these cooperative dynamics. The concept addresses the complexity involved in environmental regulation and the development of cognitive factual norms based on processes of deliberation among the European environmental agencies and the inclusion of private and public governance.

In addition to harmonisation of environmental norms, the transnational dynamics also add to the formulation of European administrative law and global administrative law (GAL) based on a flexible cooperative legal approach. In generating sound and fair transnational deliberation, the EEA and the European agencies are in need of such commonly accepted administrative norms or "internal law".

The rationale of the strategic transnational concept is based on the open-ended processes of transnational deliberation, which involve a variety of public and private actors. With this focus, the strategic transnational concept distances itself from the related, yet different, deliberative supranational approach of Comitology. As argued in this Thesis, Comitology resembles and conforms to the vertical EU supranational organisation, does little in safeguarding democratic legitimacy, and is primarily focused on results, i.e. decision making and norm setting. In contrast, the strategic transnational concept is horizontal in nature, focuses on learning processes and sound deliberation of public and private interests, and productively encourages structured differentiation in networking. In short, diversity and processes matter - norms may develop as an outcome.

The strategic transnational concept also distances itself from the related, yet different, supranational approach of Subsidiarity. The strategic transnational concept and the principle of Subsidiarity recognise and utilise the specifics of national characteristics, and both allow Member States to fulfil own norms and standards. However, they serve

different objectives: The Subsidiarity principle conforms to the vertical approach by allowing the individual Member State under certain circumstances to apply own national regulation outside the domain of EU law. The strategic transnational concept applies a horizontal approach, which encourages for national norms to be developed by transnational interaction, which again shall lead to further consolidation of EU legislation. Besides, the strategic transnational concept aims further than the Subsidiarity principle in specifying the regulatory model, based upon transnational and horizontal interaction. The Subsidiarity principle does not concern the chosen mode of regulation; it does only refer to the overall relationship between the EU and the national Member State level.

EU Experimental Governance – Further Development

The strategic transnational concept and the third level of EU harmonisation are part of the EU experimental governance approach, notably the open method of coordination (OMC), which has been employed since the late 1990s. However, the strategic transnational concept brings the concept of EU experimental governance a step further, addressing the criticism of the looser OMC concept that has too wide margins for Member State performance, and has too little coordination for the EU integration process, which leads to fragmentation instead of harmonisation.

The strategic transnational concept applies the same concept of experimental governance however, in a structured transnational process facilitated and coordinated by the EU transnational lead institution, the EEA. The EU transnational lead institution must in addition to the facilitation and coordination of the transnational networking itself also ensure the links and feed-back into the EU regulatory processes.

Clarity in Legal and Institutional Framework

The structured transnational process must be based on a clear legal and institutional framework to set the structures for the objectives and the processes applied. The framework defines the strategic autonomy of the lead transnational institution, and it

also defines the legal framework for safeguarding a sound deliberation process. Such a transnational legal and institutional framework should be provided by the EEA Regulation, the individual EU secondary legislation that employs the strategic transnational concept, and also by the European administrative norms to be developed by the cooperative dynamics. Clarity in legal and institutional structures enhances the accountability and the public democratic legitimacy of the transnational regime, as the incentives for the network participants depends on clarity in goals, objectives, institutional mandates and authority, and sound deliberative processes.

The legal and institutional framework must balance two fundamental aspects. First, it must ensure the strategic autonomy of the lead transnational institution. Second, it must also safeguard the sound and fair deliberative processes allowing the network participants to fulfil their own interests and strategies.

The EEA already enjoys strategic autonomy based on technical integrity. The EEA Regulation ensures that this autonomy is preserved. This is for instance illustrated by the significant discretion allocated the EEA by the current EEA Regulation.

However, the current legal and institutional framework of the EEA reveals some uncertainties in providing the necessary clarity and accountability needed to undertake the strategic transnational concept as outlined in this Thesis.

The EEA Mandates and Objectives

Chapter 12 argues that the current mandates and objectives of the EEA are restricted in terms of meeting the requirements of the strategic transnational concept.

The mandates and objectives of the EEA Regulation should provide for the flexibility involved the strategic transnational concept. The current EEA Regulation fails in providing such strategic flexibility, as it is based primarily on normative goals and objectives. As argued, such fixed EEA objectives are not necessarily a hindrance to the EEA in engaging the transnational approach, but the fixed formulated objectives may

contradict the full potential of the strategic transnational concept. This may hamper the flexibility needed for diversity management and the orchestration of "moving targets".

Also, the current EEA Regulation focuses narrowly on the fulfilment of EU environmental objectives, leaving only little incentive to pursue national environmental objectives, or to involve private or public environmental regimes with objectives of their own. This is not only a potential obstacle for the individual EU Member State, but also critical in terms of developing a productive strategic transnational concept with third countries and other transnational private and public regimes, such as the climate regimes of C40 and R20.

The EEA Global Mandate

The mandates and objectives of the EEA should also reflect the global potentials of the strategic transnational concept. It is argued in Chapter 11 that the EEA has an important role to play in the expansive global political and economic ambitions of the EU. The transnational EEA will be able to participate in, and take advantage of, the emerging transnational tendencies within global environmental and climate governance. This development includes emerging private and public transnational governance as a response to the failures seen at the intergovernmental climate negotiation, such as the UN COP 15. Such a global role of the EEA could be beneficial for the continuing development of EU law and policy, and also for the consolidation of the EU as a world-leading power.

The global position of the EEA is not just linked to the immediate benefits for the development of EU law and policy. Chapter 11 has defined the strategic transnational concept as a potential approach in managing legal pluralism and in managing inequality in terms of legal and institutional capacity caused by the economic globalisation. Thus, consolidation of the EU also concerns the potential of a global EEA as a global leading transnational environmental institution, facilitating transnational environmental regimes worldwide; even regimes with little or no direct attachment to the EU.

The EEA and Climate Management

The wording of the current EEA Regulation refers to environmental objectives only. This may be a consequence of the terminology of the 1990s. However, in order to reflect the true actives, and the strategic potentials of the EEA, the EEA Regulation should directly in its wording make reference to the broad range of its activities; for instance by referring to its already active role in EU climate management.

The reference to the popular climate management is important for the legitimacy of the EEA. Politically speaking, the traditional environmental agenda is in decline; a decline that also risks affecting negatively the public understanding of the objectives and functions of the EEA.

Deliberation – Balancing Discretion and Interests

The EEA Regulation provides few criteria for the deliberation processes in terms of input-based participation and in terms of assessing information and formulating strategies, priorities, agendas and work programmes. Currently, the legal structures for participation in the deliberation processes are limited and only key stakeholders are involved directly and actively. Basically, aside from the participation of the Commission and the Member States, other active involvement and participation is based on Agency discretion. In the strategic transnational concept, the Agency needs to encourage participation of a broader public and private character. Thus, the EEA Regulation should provide for clear criteria ensuring broader participation and deliberation.

The relatively little impact of participation allows the EEA significant discretion. Despite being subject to the control and the influence of the Commission, the EEA enjoys considerable discretion in assessing information and in formulating agendas, work programmes, prioritisation, recommendations, etc. Especially the Scientific Committee enjoys discretion, as it is truly out of reach of daily influences of the EEA Management Board and few criteria exist for the setting of prioritisation and agenda.

Such discretion has raised some criticism. Although the current work of the EEA enjoys relatively high legitimacy, the latest 2008 efficiency evaluation of the Agency voices some critical comments from among the Member States on the prioritisation of the Agency. Such, perhaps minor, remarks of today may become real issues of legitimacy in the future, as the instrumental use of the EEA is likely to intensify as a result of the ambition of the Commission to include the EEA further in the work of the SEIS and the INSPIRE. If so, legitimacy may be jeopardised by an increased instrumental use but also may be jeopardised by the risk of stretching the current capacities of the EEA too far – a comment also made clear in the 2008 evaluation of the Agency. In this regard, the evaluation recommends that the Agency must be stricter in setting priorities and in managing user expectations. The evaluation states that partly because the Agency serves many different users, there is still an overall lack of clarity, both internally and amongst stakeholders, about the real role of the Agency. This lack of clarity makes prioritisation and targeting of work difficult and this needs to be addressed (Technopolis 2008a, 88).

The discretion of the EEA may be justified as safeguarding the autonomous position of the Agency. However, this must be balanced by comprehensive participation based on democratic deliberation. The EEA Regulation provides few structures for deliberation processes in terms of participation beyond the Commission and the Member States.

Procedural Democratisation

As described in Chapter 12, the Community and the EEA have made attempts to define procedural framework in terms of access to information. Today, the EEA is required to follow the rules of the Commission concerning access to information based on EU Regulation 1049/2001, which illustrates the ill-fitted dualistic approach of matching rules for the supranational Commission with the needs of a transnational EEA.

Nevertheless, in addition to these rules, the 2006 EU Aarhus Regulation 1367/2006, implementing the UNECE Aarhus Convention, requires the EU institutions, and also the EEA, to develop its own rules in order to meet the requirements of public participation,

access to information, and to ensure adequate review functions. This may in itself be a productive starting point for a learning process and for the exchange of experiences among the EU institutions, which resemble the transnational concept argued here. However, as the EU Aarhus Regulation does not envisage the transnational process (or rather trans-EU institutional process), the implementation of the Regulation is in risk of leading to further diversity, instead of to administrative unity. Without a clear indication of processes and goals, each EU institution, as part of its institutional prerogative, may refer to and maintain its own practises and interpretation of public participation and the related access to information.

Even so, the EU approach to implementing the UNECE Aarhus Convention may be promising. But until we have seen the results hereof, the EEA is caught between being obliged following the rules for the Commission, and at the same time searching and developing its own practise.

Procedural democratisation addresses the important aspects of safeguarding accountability and democratic legitimacy of the non-majoritarian EEA. As argued in Chapter 12, such democratisation requires sound deliberation processes based on clear structures constituting procedural democratisation, also referred to as administration constitution. The deliberation involved is comprehensive, referring to processes allowing for both input and output based legitimacy.

This safeguarding of EEA procedural democratisation is emphasised by the distant position of the Agency *vis-à-vis* the national democratic control and institution; a distance caused by the "multi-level delegation" from Member States to the Commission and then again to independent EU agencies. Despite the discussions on the significance of the independent status of the EEA, the Agency enjoys a rather sovereign institutional position distant from the truly democratic control of the Member States; a lack of democratic control which cannot be compensated by the influences and involvement by the Member States, the Commission, or the EU Parliament. In fact, the separate positioning of the EEA as a technically specialised institution makes it tempting to focus on the Agency as a technocratic institution, and thus, allow for technocratic

accountability based solely on output legitimacy. However, as difficult is may be, there is no alternative to democratic institutions. Allowing for non-democratic EU institutions would jeopardise the ongoing EU integration process and the overall democratic legitimacy of the EU.

Thus, the democratic legitimacy of the EEA should be based on democratic processes involving fair and sound deliberation. In this respect, the EEA itself has from the beginning praised openness, broad participation, involvement of private and public actors, etc. Also, the EEA enjoys a relatively high public legitimacy, which perhaps to some degree takes advantage of the already positive public esteem attributed to European environmental policy and regulation. However, such public esteem is also followed by greater expectations by the European public and civil societies for a high degree of participation in European environmental policy and regulatory processes; a higher degree of participation than seen in other EU policy areas.

However, such intentions and expectations may be the Achilles' heel of the good intentions of the EEA with regard to sustaining the public legitimacy. Despite the intentions expressed by the EEA, the current structures for deliberation at the EEA are, as described above, rather limited and little procedural democratisation exists. Today, the EEA Regulation focuses only on output legitimacy in terms of access to information. Chapter 12 recommends that the EEA improve input legitimacy such as structured public deliberation in terms of public hearing processes and in terms of closer involvement in transnational networking.

The implementation of the EEA strategic transnational concept depends on a democratic reform of the EEA in terms of comprehensive deliberative processes based on input and output legitimacy. Such deliberative processes must be safeguarded by procedural democratisation based on clear procedural structures set out in the EEA Regulation, in other EU legislation, and/or by administrative norms developed by the EU agencification processes. The 2006 EU Aarhus Regulation requires that the EEA provide processes safeguarding public participation, which eventually may emphasise

input legitimacy. This may be promising, but the result of such processes must yet be seen before making any conclusions.

However, the concern related to the public legitimacy of the EEA is not only a problem related to enhanced transnational activities, as proposed by this Thesis. Even today, the role of the EEA in "pure" information management based on limited deliberation, and based primarily on output legitimacy, cannot in the long run meet the increasing expectations of the European private and civil societies for sound and comprehensive participation in environmental decision making. The European public has high expectations for sound participation also at EU level, which is sustained legally by the UNECE Aarhus Convention and also by the EU Aarhus Regulation. If no democratic reform of the EEA takes place, there is a risk that the current public legitimacy will fade.

In relation to this concern, also the overall public legitimacy of the third level of EU integration depends on such comprehensive input and output based deliberative processes. If public legitimacy cannot be met, the third level of EU integration may still be an attractive approach in advancing knowledge and norm generation in environmental regulation, but it will fail in providing for a true alternative to the traditional Community Method in terms of securing the needed public support for further EU integration.

It follows, that the EEA of today cannot enjoy democratic legitimacy, as it cannot be considered a democratic institution. Today, the Agency appears as a technocratic output based organisation, rather than a democratic institution based on deliberative processes of input and output legitimacy. A democratic reform of the EEA is greatly needed.

The Fundamental Problem – The Conflict of Transnational Governance and Supranational Frameworks

Despite the described shortcomings arising from the EEA Regulation, the EEA could start applying the basics of the strategic transnational concept today within the current

legal and institutional framework. Procedural norms would evolve as part of the dynamic cooperative processes.

Perhaps the greatest obstacle in providing a clear legal and institutional framework for a truly transnational EEA concerns the dualistic foundation of applying a horizontal transnational structure within the overall vertical and supranational EU framework. It is not only a matter of legal and institutional wording; it is a matter of perception and organisational culture and self-understanding.

This concerns a conflict of a fundamental character. The EEA represents a new horizontal and transnational approach in line with current integrated environmental management. However, the Community establishing and supporting the Agency is placed within the traditional EU vertical and supranational framework emphasising separate national and international levels of European environmental management and different norms at both levels. Therefore, for the transnational model to succeed, a new organisational attitude must emerge. Supranational or international institutions participating in transnational networking must themselves become part of the horizontal interaction with the participating national and even sub-national levels. Such a horizontal approach must be inserted into the transnational legal and institutional framework, and will perhaps also require reform within the supranational and international organisations themselves. As argued in Chapter 12, such reforms may prove difficult, and at least time consuming, taking into account the perception, organisational culture, organisational self-understanding, and institutional prerogatives typically enjoyed by such organisations.

This dualistic approach leads to a confusing mix of supranational influence and transnational intentions. It is a combination that does little to encourage clarity, accountability and public legitimacy. As illustrated in Part II, the supranational vertical "interference" has increased over the transnational EEA, especially by the changes to the EEA Regulation in 1999 and 2003. The period 1999 and onwards represents a turning point from the earlier visionary days of the 1990s. A change in the expectations for and perception of the EEA went from rather visionary ideas of future regulatory

tasks to more modest and instrumental views. As the Commission instrumentally has regained more control over the EEA Management Board and the EEA Bureau, it has also been clear that the Community has no intention of equipping the EU agencies, and the EEA, with full independency or regulatory powers. The 2007 Treaty of Lisbon provides no further clarification of the constitutional status of the EU agencies, and which in fact maintains the responsibility of the Commission over agency activities. Also, the change from a transnational to a vertical administrative approach took place in 2003 by narrowing down the legal scope of access to information. Now, the EEA is subject to the rules of access to information at the Commission level only, and is no longer subject to the rules of the Member States. Perhaps a practical approach, but this is also a decline in the prior transnational character.

Hence, the problem is not only a matter of a conflict between two different approaches. The problem also concerns the disproportions. The functioning of a horizontal and transnational EEA may be subdued by the overwhelming and surrounding vertical structures characteristic of the EU framework. Further, the horizontal EEA is supposed to work within this vertical system and link its operations to substantive EU environmental law also predominately based on the vertical approach. Two such incomparable approaches will not work together unless the differences of this dual approach are well understood and approached in a systematic and a productive manner.

A Hybrid Solution

When such a dual approach is well understood and productively employed, as argued by the Thesis, the close links to the regulatory EU Commission would provide a productive setting for a "soft" EEA within a "stronger" EU. Thus, a hybrid function like this of the EEA would serve as a focal point, anchoring EU transnational management within the EU regulatory process. This would secure legitimacy of the EU in general, as it allows for efficient EU operation in both transnational regimes and in the traditional supranational setting. It provides legitimacy for both the EEA and the Commission by having close, although separate institutional ties, and the Commission gains legitimacy by obtaining knowledge by employing the transnational EEA, and at the same time,

refraining from interfering in truly transnational interactions. If applied in such a hybrid manner, the dualistic approach may prove productive.

The strategic transnational concept combined with the hybrid solution would designate the EEA as the EU lead transnational institution in environmental regulation.

The Overall Need for an EU Constitutional Reform

The ongoing issue of safeguarding public and democratic legitimacy of non-majoritarian agencies may be addressed partly by improved, balanced and fair procedural mechanisms ensuring deliberation, participation and access to networks, information and decision making. However, the issue of safeguarding democratic legitimacy of EU non-majoritarian institutions has now been subject for discussions for decades, and despite the potentials of a process based on cooperative law and EU agencification, it may lead to fragmentation as basically every agency is encouraged to develop its own administrative approach. Thus, clarity and certainty have still not materialised and certainly not to the extent that would satisfy the discontent of the European populations. The increasing number of EU agencies even adds to this problem. If we faced the problem in the 1990s with only a handful of EU agencies, the problem today is more troublesome, as we now have 35+ EU agencies – and as of yet, no sustainable solutions. In this respect, it is remarkable that we had to wait until the 2006 EU Aarhus Regulation, and the 2007 Treaty of Lisbon, before the Community partly, but still rather vaguely, addressed the important aspect of administrative norms for the agencies. The implementation and direct implication for the transnational EU agencies is yet to be seen. Also, the possible impact on the Europeanisation of administrative law is yet to be seen. Finally, the influence on the public and on the democratic legitimacy of the EU agencies and the EU in general also remains to be observed.

Also, the unclear constitutional legal meaning and status of the "independent" EU agencies risks jeopardising the overall legitimacy of the EU. After almost 20 years of attempts by the Commission and the European Parliament, the EU has still not been

able to agree on any legal and clear definition of the EU agencies. The process is ongoing, now delegated to an Inter-institutional working group between the Commission, the Council and the Parliament. And, the outcome is yet to be seen. As a consequence, the constitutional position is still based on interpretation of the TEU institutional balance, referring to case law from the early days of the Community. It may be argued that the (then) political circumstances were suitable for a restricted approach to TEU institutional balance. Today, in comparison with the earlier limited economic tasks, it could be argued that the present EU is in need of a new and more flexible approach, taking into account the proven stability of the EU institutions and the expanded EU agenda. Also, the issue was perhaps less urgent in the earlier days, from a practical point of view as the number of satellite bodies were relatively low. Today, with more than 35+ satellite bodies, i.e. EU agencies, the matter is pressing. Therefore, the EU is in need of a more flexible institutional framework and a redefinition of the scope of TEU institutional balance providing a clear definition of the status of the EU agencies.

In allowing for an increasing number of non-democratic EU institutions based on an uncertain constitutional framework, the EU risks jeopardising its overall democratic legitimacy. It may endanger further EU integration and the enlargement processes, especially in a region of new fragile democracies. The EU should do better and live up to its own criteria for democratic institutions set out for candidate states, i.e. the Copenhagen Criteria.

Therefore, constitutional reforms are needed in order to gain legal clarity and democratic legitimacy. However, it would be wrong to seek such reforms only through judicial activism by the CJEU. Rather, the matter is political, and the needed institutional reform should take place within the frame of a revised EU Treaty. In this regard, it is notable that the European policy-makers in the latest 2007 Treaty of Lisbon have ignored such institutional reforms. It could be questioned whether this is an opportunity lost, or rather, the result of an intended policy choice. The fruitless ongoing efforts undertaken by the Commission and the EU Parliament in providing for such

definitions only sustains the uncertainty, indicating that certainty is needed, and that certainty can only be provided by a Treaty reform. It is time to step up.

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Abbreviations applied for the Bibliography:

AJIL	The American Journal of International Law
AM. U. INT'L L. REV.	American University International Law Review
CJEL	Columbia Journal of European Law
CJTL	Columbia Journal of Transnational Law
CLPE	Comparative Research in Law & Political Economy
CMLR	Common Market Law Review
EELR	European Environmental Law Review
EIPA	European Institute of Public Administration
EJIL	European Journal of International Law
ELJ	European Law Journal
ELR	European Law Review
Env.Pol.	Environmental Politics
EPIN	European Policy Institutes Network
EPL	European Public Law
EPaL	European Policy and Law
EUI	European University Institute
FA	Foreign Affairs
G&O	Government and Opposition
Harv.Env.LR	Harvard Environmental Law Review
IEEP	Institute for European Environmental Policy
IJGLS	Indiana Journal of Global Legal Studies
Int. Org	International Organization
JCMS	Journal of Common Market Studies
JEPP	Journal of European Public Policy
JEL	Journal of Environmental Law
JPP	Journal of Public Policy
KSG	John F. Kennedy School of Governance
LCP	Law and Contemporary Problems

LSE	London School of Economics and Political Science
MIT	Massachusetts Institute of Technology
NRF	Natural Resources Forum
NuR	Natur und Recht
PA	Public Administration
REAL	Review of European Administrative Law
RSC	Robert Schuman Centre, EUI
RECIEL	Review of European Community & International Environmental Law
Rev Int Organ	Review of International Organizations
SLS	Social & Legal Studies
SPS	Scandinavian Political Studies
VJTL	Vanderbilt Journal of Transnational Law
WEP	West European Politics
WP	Working Paper
WPol	World Politics
WU	Wirtschaftsuniversität Wien
YEL	Yearbook of European Law
YLJ	Yale Law Journal

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