The Regulatory Function of European Private Law

Edited by
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Edward Elgar
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2008939740

PEFC
PEFC/16-33-111
CATG-PEFC-052
www.pefc.org

ISBN 978 1 84720 199 7

Typeset by Cambrian Typesetters, Camberley, Surrey
Printed and bound in Great Britain by the MPG Books Group

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Figures and tables

FIGURES

TABLES

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Acknowledgements

This book is part of a broader project concerning governance and regulation of European private law. Jointly with 'Making European Private Law – Governance Design', it signals the necessity to look more deeply at the institutional framework in which Europeanization is occurring. The project has been carried out within NewGov. The two books could not have been published without the help and professional assistance of Federica Casarosa and Sophie Stalla-Bourdillon, two young researchers committed to innovative scholarship. We would also like to thankfully acknowledge the support and encouragement of Edward Elgar, the publisher, and Nep Elverd for her essential editorial assistance.

Fabrizio Cafaggi and Horatia Muir Watt

Introduction[1]

This volume is designed to take stock and assess the coherence of the diverse regulatory instruments and approaches which, on a European level, have progressively encroached upon the sphere traditionally recognized as the province of private law.[2] This analysis operates in the context of a multilevel system, where competences of the EU are often shared with those of member states and appropriate and effective transposition is a key feature of the new architecture.[3]

New modes of governance are emerging as a complementary or alternative response to legislative harmonization.[4] The book inquires into the relationship between these new modes of governance and the regulatory functions of European private law.[5]

In order to provide as broad a framework as possible, the chapters in this volume provide both a sectoral (environment, product safety and quality, electronic commerce) and a general (all services) perspective, several of them being devoted to the difficult (and often neglected) cross-border dimension of these fields. Shaping relationships between service providers and their customers, between buyers and sellers, producers and users of products, citizens and polluters, with varied forms of economic and social regulation, now largely overshadow the *ex post*, remedial, market-based arrangements charac-

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[1] This book is the second of a two-volume project concerning governance and regulation of European private law under NEWGOV, a 6th framework project. We are grateful to the publisher, Edward Elgar for supporting the project and to Nep Elverd and the editors who have contributed to its implementation. We also acknowledge the valuable editorial assistance of Federica Casarosa and Sophie Stalla-Bourdillon. Responsibility is ours.

[2] Taking stock of the measures and approaches currently used in EC legislation has been largely facilitated by the series of tables drawn up by Hans Micklitz, in 'Regulatory strategies on services contracts in EC law': see Chap. 2 below.

[3] See F. Cafaggi and H. Muir Watt, *The Making of European Private Law. Governance Design* (Edward Elgar, 2008).

[4] See L.M. Salamon, *The Tools of Government: a Guide to New Governance* (OUP, 2002); G. de Burca and J. Scott, *Law and New Governance in the EU and the US* (Hart, 2006); F. Cafaggi, 'Making European Private Law. Governance Design', in Cafaggi and Muir Watt, above n. 3, pp. 289 ff.

[5] See H. Collins, 'The Governance Implications for the European Union of the Changing Character of Private Law', in Cafaggi and Muir Watt, above n. 3, pp. 269 ff.

teristic of private law, which rely primarily upon the courts for their implementation. Indeed, there is little need to emphasize that Community legislation follows a vertical partition in terms of economic sectors, abandoning traditional splits between public/private law. Familiar private law instruments such as tort or contract appear only as a small part of many possible tools harnessed to the pursuit of allocative efficiency or distributive justice, synthetically described as the correction of market failures.[6]

The variety of means available to achieve these goals – which range from traditional public law tools such as state ownership, public franchising or licensing, through the more familiar forms of regulation[7] which rely on semi-private bodies or independent regulatory agencies for standard-making or market controls, to various and still experimental forms of self-regulation by means of voluntary arrangements on the other end of the scale – call for a general framework in order to avoid conflicts, incoherence or redundancy between regulatory approaches.[8] It must be remembered in this respect that the various regulatory tools elaborated by the European institutions are conceived in a Europe-wide context and often take on a cross-border dimension which was not present in these fields until now. To a certain extent, in the wake of traditional public law, regulation seemed to be incompatible with a conflict of laws approach. However, to the extent that regulation and private law instruments are now seriously entwined and no longer territory-specific, it is also time to think about the way in which such tools are implemented in trans-European situations.

I. THE STRUCTURE OF THE BOOK AND SOME POLICY QUESTIONS

The book is divided into four parts concerning services, environment, product safety and electronic commerce. Each section is made up of three contributions: one focusing on the private law dimension, one on the regulatory choices, the third on private international law. The aim is to show that a

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[6] See A. Ogus, 'The Regulation of Services and the Public-Private Divide', Chap. 1 below.

[7] See A. Ogus's useful classification of 'traditional' and 'less-traditional' modes of regulation.

[8] Hans Micklitz puts us on guard, however, against systemization in the form of general principles, which was indeed emblematic of private law. See too H. Collins, 'The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone' (2006) 2 *European Review of Contract Law* 213.

coordinated if not integrated approach is needed to devise legal instruments at European level to pursue specific policy objectives. The multilevel dimension of European private law rests on the use of combined instruments that operate through choice of law by parties and through harmonized legislation. Within this combination different regulatory strategies have to be employed to perform simultaneously the design of an integrated European market and to provide the responses to its failures. Such an approach should not only be endorsed in academic circles, bridging disciplinary divides among the different approaches, but also and more importantly should be adopted by European institutions to address consistently policy objectives such as consumer protection and market competitiveness.

The endorsement of a coordinated approach does not eliminate the differences between *ex ante* and *ex post* models or between public and private enforcement. But given the changes which have occurred in regulatory theory and practice, it contributes to redesigning the boundaries between the two. The distinction between private and public law can be maintained and perform a useful function only if it becomes a way to describe the difference between two regulatory strategies aimed at designing European and local markets.

Basically, then, three sets of questions arise in connection with the regulatory strategies now practised in the traditional field of private law. The first set calls for analysis of the strategies which lead to the choice of a particular tool or combination of tools within the regulatory arsenal, in order to further a particular economic or social regulatory policy in a given economic sector. Clearly, such a choice, which requires the balancing of diverse and sometimes contradictory values, is no more neutral than is an initial preference for a regulatory approach over recourse to traditional private law instruments. In other words, there may well be a strong need for a coherent strategy of (regulatory) strategies.

The second set of questions concerns the way in which traditional private law arrangements fit into this regulatory picture. No doubt, regulation gains ground wherever private law proves impotent to steer markets, by ensuring adequate competitiveness or by pursuing wider distributive concerns. Recent Community legislation promoting regulatory instruments accredits the idea that private law and regulation are two distinct provinces, which apply 'without prejudice' to one another, the one being content to ensure commutative justice *ex post* in individual situations, while the other, purposive, vertical, sectoral and reliant upon specific remedial arrangements, furthers wider social welfare or economic goals.[9] However, such a partition is questionable, not

[9] See the analysis of Article 3.2 of the Unfair Commercial Practices Directive 2005/29/EC, by Collins, above n. 8, p. 214.

only because private law itself has progressively been invested with a regulatory function, creating a risk of overlap, but also because it frequently appears as a complementary tool which allows fine-tuning of specifically regulatory approaches.

Thirdly, a topic frequently neglected in debates on regulation is that of the impact and functional transformation of private international law in various economic sectors.[10] Yet the novel regulatory role and content with which private international law is beginning to be invested by recent Community legislation is potentially most instructive, in that it calls not only for rethinking the public/private partition, but also requires defining the relationship between the conflict of laws and various regulatory instruments linked to the construction of the internal market – most obviously, the country of origin principle. To a certain extent, these contributions provide the link to the twin volume of essays on governance,[11] since private international law has equally been transformed into an instrument of multilevel governance in the sphere of European private law.

II. A STRATEGY OF REGULATORY STRATEGIES?

The available tools for correcting market failures range across the public–private divide.[12] The choice of approach may vary according to the regulatory goal being pursued and is generally hybrid. Thus, as analysed by Anthony Ogus, regulation qualified as 'economic', which is designed to correct insufficient competitiveness in the supply of a service, may take on different forms according to the type of market in which it is called upon to operate. Ordinary competitive markets usually give rise to administrative enforcement of competition law, sometimes completed by private enforcement.[13] More rarely, price control can be justified when competition has proved ineffective, for instance in cases of regulatory capture. Natural monopolies, the object of public ownership in the past, may on the other hand be regulated through authorities or agencies, with a variable role for judicial review, or again through public franchising. Here contractual techniques prevail, although the extent to which they

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[10] However, see M. Audit, H. Muir Watt, E Patatut, *Régulation et Droit International Privé*, LGDJ 2008, Collection Droit & Economie.

[11] See Cafaggi and Muir Watt, above n. 3.

[12] A. Ogus, 'The regulation of services and the public–private divide'; Chap. 1 below.

[13] See Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165, 2.4.2008; W. Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) *World Competition* 335.

are governed by the ordinary rules of private law of contract is variable. Private law may however have a role to play in cases of 'situational monopolies', when the implementation of public competition law is not enough to ensure sufficient competitiveness and regulation through contract is necessary.[14]

As explained by the same author, 'economic' regulation likewise designed to ensure allocative efficiency, must also deal with externalities and informational asymmetries. The array of available public regulatory tools is extremely varied, including prohibition, licensing or prior authorization, quality standards, mandatory disclosure, all potentially accompanied by criminal or administrative sanctions. Private law provides complementary remedies in individual situations through contract law, particularly consumer law in the case of information problems, while tort law tackles the effects of externalities suffered by third parties. Collective redress may complement traditional private law techniques with new remedies which emphasize the regulatory function.[15]

'Social' regulation is linked to distributive justice, whose concerns may be the insufficient resources of part of the population prevented thereby from acceding to essential services, the greater bargaining power of the service provider, or the insufficient financial and educational endowment of consumers to best assess their preferences. Here, public ownership models based on tax-financed subsidies have usually been superseded by privatized models, in which the incumbent supplier may be contractually bound by a universal service obligation or at the least an obligation to ensure that vulnerable groups may enjoy the service at a lower tariff. Regulation may also apply to information, advertising, the provision of cooling-off periods, or consumer rights to withdraw. Tort law may also provide *ex post* situational remedies, in case one party has been seriously disadvantaged.[16]

The array of available regulatory approaches appears however to be ever-widening, to the extent that 'less traditional' methods seem to be given increasing importance. As Hans Micklitz points out, such methods also signal the appearance of new actors, in the form of 'less traditional' regulators, which tend to oust the more established administrative agencies and indeed the courts

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[14] See F. Cafaggi, 'Il diritto dei contratti nei mercati regolati' (2008) *Rivista Trimestrale di Diritto e Procedura Civile* p. 95.

[15] See F. Cafaggi and H.W. Micklitz, 'Collective enforcement of consumer law: a framework for a comparative assessment' (2008) 3 *ERPL* 391; C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems: a New Framework for Collective Redress in Europe* (Hart, 2008).

[16] See M. Faure, 'Regulatory strategies in environmental liability', Chap. 5 below.

themselves, increasingly bypassed even when private remedies are available through out-of-court settlement procedures.[17] Thus, a clear trend appears towards co-regulation and self-regulation, both as a general rule across the board in the field of services and in specific areas such as environmental protection.[18] Here, as Javier de Cendra de Larragán explains, the use of comitology and groups of experts appears at the same time as new regulatory principles and instruments emerge, such as the precautionary principle, prescriptive standards, risk assessment, impact assessment, emissions trading, subsidies and other financial solutions, voluntary agreements and standardization, eco-labelling, eco-management and not forgetting environmental liability.[19]

The new methods emerge as a (partial response) to different problems, partly implementation fallacies, partly competence deficit, partly burdensome legislative techniques.[20] Self- and co-regulation have been identified as alternatives to legislation,[21] although they should be seen more as complements both at EU and national level.[22]

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[17] H. Micklitz, 'Regulatory strategies on services contracts in EC law'; Chap. 2 below.

[18] See on these questions, F. Cafaggi (ed.), *Reframing Self-regulation in European Private Law* (Kluwer, 2006); F. Cafaggi, 'Self-regulation in European contract law' (2007) *European Journal of Legal Studies* 1, available at www.ejls.eu; and C. M. Donnelly, *Delegation of Governmental Power to Private Parties. A Comparative Perspective* (OUP, 2007).

[19] J. de Cendra de Lagarrán, 'Regulatory dilemmas in EC environmental law: the ongoing conflicts between competitiveness and the environment'; Chap. 4 below.

[20] Emphasis on transposition problems is given by the European Parliament, especially in the Levai Report on Better Regulation in the European Union (2007/2095 (INI) A6-0273/2007), the Gargani Report on the Strategy for the Simplification of the Regulatory Environment (2007/2096 (INI) A6-0271/2007 final), and by the Commission itself. See European Parliament Resolution on Better Lawmaking 2005, 4.9.2007 (2007/2095(INI), Points 48 and 49. The Parliament 'encourages authorities in the Member States to draw up formal transposition strategies, in order to clearly define the roles and responsibilities of the regional and national governments for better and faster transposition [...] Encourages the Commission to publish, where possible, the transposition Guidelines for directives at the same time as the directives themselves, in order to allow national and regional governments to take them into account before starting the transposition process.'

[21] See Commission staff working document, 'Instruments for a modernized single market', SEC (2007) 1518, (hereinafter 'Instruments for a modernized single market') annexed to the Communication, 'A Single Market for the XXI Century'.

[22] See the Gargani Report, above n. 20 and the European Parliament resolution on simplification at p. 11 after reiterating 'that traditional legislative instruments should continue to be used as a general rule in order to attain the objectives laid down in the Treaty; considers that co-regulation and self-regulation could usefully supplement or replace legislative measures where these methods make improvements of equivalent

The number and variety of methods are not without difficulties. As Hans Micklitz's study shows, standardization is subject to regulatory capture;[23] stake-holders tend to be excluded from co-regulatory arrangements. The increasing rule-making power of private regulators is not paralleled by the growth of accountability mechanisms.[24] Furthermore, the policy considerations which underlie a given choice of instrument are not always transparent.

The Commission has however attempted an interesting, though perhaps in practice not entirely successful, response to this problem through the 2002 'better lawmaking package'.[25] Its aim was to simplify the regulatory environment, to promote dialogue and systematize impact assessment.[26] Impact assessment is promoted to decide among different legislative alternatives and various regulatory strategies, often with similar instruments.[27]

The growing role of impact assessment shows the need for the availability of an accountable method to decide among ever-increasing regulatory alternatives. At the same time there is strong dissatisfaction with current impact assessment especially when it comes to decisions concerning the use of hard and soft law, and those between legislation and self-regulation. The debate about the different weight of these alternatives and the criteria to be used has had strong institutional echoes with different views expressed by the Commission and the Parliament.

In relation to regulation, the use of regulatory impact assessment (RIA) is driven by the awareness of burdensome and often ineffective regulatory strategies. Basically, this means inviting regulators to engage in a balanced

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broader scope than legislation can provide; stresses that any use of alternative regulatory arrangements should be in compliance with the Inter-institutional Agreement on better lawmaking; points out that the Commission has to lay down the conditions and limits which the parties must observe when employing such methods, and that these should in any event be used under Commission supervision and without prejudice to Parliament's right to object to their use'.

[23] See Chapter 2, this volume. See too, within the scope of the World Trade Organization, P. Marquez, 'Standardization and Capture: The Rise of Standardization in International Industrial Regulation and Global Administrative Law' (2007) 7 *Global Jurist* Article 5.

[24] See Cafaggi, 'Self-regulation in European contract law', above n. 18.

[25] Composed of four communications designed to improve and clarify regulatory techniques: see J. de Cendra de Larragán, 'Regulatory dilemmas in EC environmental law', Chap. 4 below.

[26] See 'Inter-institutional Agreement on Better Lawmaking', 16.12.2003, OJ C 321, 31.12.2003, p. 1, and 'A Strategic Review of Better Regulation in the European Union' (COM (2006) final 689); and 'Second Strategic Review of Better Regulation in the European Union' (COM (2008) 32 final).

[27] See Commission Guidelines on Impact Assessment and draft revised version 27.05.2008, available at http://ec.europa.eu/governance/impact/consultation/docs/ia_guidelines_draft_text_final_en.pdf.

appraisal of the various available policy instruments. Interests are defined and balanced by experts or high-ranking officials and not by Parliament. Another difficulty attendant upon regulation is precisely the conflicts of values that need to be balanced, on a case-by-case basis but according to general principles compliant with the rule of law. The conflict between competitiveness and environmental protection, analysed by Javier de Cendra de Larragán, is a significant illustration.[28]

(a) The Institutional Debate and its Consequences on European Private Law

The European Parliament has taken stock of these issues with a series of Reports and Resolutions published in 2007.[29] It examines the better lawmaking/better regulation strategy, emphasizing the need for more intense partnership among European institutions and between them and the national ones.[30] The European Parliament (EP) shares the view that impact assessment is a key instrument for evaluating legislative alternatives.[31] It expresses

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[28] For a general overview see S. Weatherill (ed.), *Better regulation, Studies of the Oxford Institute of European and Comparative Law* (Hart, 2007). In this volume in particular, see J. de Cendra de Larragán, 'Regulatory Dilemmas in EC Environmental Law', Chap. 4 below, showing that stringent regulation may create a brand function/ first mover advantage (the 'Porter hypothesis'). But there is a clear need to reduce costs and make use of more imaginative regulatory approaches.

[29] See the Levai Report followed by the European Parliament Resolution on Better Lawmaking, the Gargani Report, followed by the European Parliament Resolution on the Strategy for the Simplification of the Regulatory Environment and the Medina Report on Institutional and Legal Implications of the Use of Soft Law Instruments' (2007/2008 (INI) A6-0259/2007), followed by the European Parliament Resolution on Institutional and Legal Implications of the Use of 'Soft Law' Instruments (2007/2028(INI).

[30] See the Levai Report and EP Resolution on Better Lawmaking: 'G. Whereas better regulation is not exclusively about cutting red tape, reducing the administrative burden, simplifying existing legislation or deregulation but also involves ensuring that the legislative process is engaged with by all relevant governmental and non-governmental actors at all levels and that a close partnership is established between the European institutions and the national, regional and local authorities in order to deliver high-quality regulation.'

[31] See the Levai Report and EP Resolution on Better Lawmaking, where the EP states that it '5. Agrees with the Commission that better lawmaking cannot be achieved without an overall picture of the economic, social, environmental, health and international impact of each legislative proposal; fully supports, therefore, the setting-up within the Commission of an Impact Assessment Board under the authority of the Commission's President in order to monitor the application of these principles in the drafting of impact assessments by the responsible staff of the Commission; 6. Stresses, nevertheless, that, in order to guarantee a minimum level of independent scrutiny in the

concerns about the current practices and it suggests important changes.[32] Furthermore it subscribes to the view that principle-based legislation should be preferred to detailed legislation.[33]

The European Parliament supports the better lawmaking choices but underlines the need for broader involvement of stakeholders and stronger accountability mechanisms.[34] It suggests that while the use of alternatives to

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drafting of impact assessments, an independent panel of experts should be set up to monitor, by means of spot checks, the quality of opinions delivered by the Impact Assessment Board, and that representatives of interested parties should also be allowed to assist in conducting them; 7. Considers it necessary that the Impact Assessment Board should guarantee the application of a common methodology for all impact assessments, so as to avoid contradictory approaches and to facilitate comparability.'

[32] See EP Resolution on Better Lawmaking where the EP states: '43. Supports the conclusion resulting from the study entitled 'Simplifying EU Environmental Policy' that impact assessments can play an essential role in ensuring better regulation and that the quality of some assessments needs to be improved; urges the Commission to ensure:

- that adequate time and financial resources are allocated for these assessments;
- that impact assessments consider economic, social, environmental and health aspects on an equal footing, in both the short term and the longer term;
- that impact assessments consider not only the costs of measures but also the costs of not addressing the environmental, public health or food issues;
- transparency and input of all relevant stakeholders;
- that the impact assessments are broad enough in scope and that they take into account the different national circumstances in the Member States;
- recognition that impact assessments could also play an essential role in the case of amendments proposed by the European Parliament or the Council having potentially significant impacts . . .'

[33] See the Levai Report and EP Resolution on Better Lawmaking: '17. Is in favour of promoting principles-based legislation and focusing on quality rather than quantity; sees the better regulation debate as an occasion to reflect on legislation as a process designed to achieve clearly defined policy goals by committing all stakeholders to all phases of the process, from preparation to enforcement, and involving them therein.'

[34] See the Levai Report, p. I, and the EP Resolution on Better Lawmaking. The EP in its Resolution states that it: '1. Strongly supports the process of Better Regulation with a view to strengthening the effectiveness, efficiency, coherence, accountability and transparency of EU law; stresses, however, that such a process needs to be based on a number of preconditions:

(i) full and joint involvement of the Council, the Commission and the European Parliament;
(ii) wide and transparent consultation of all relevant stakeholders, including non-governmental organizations;

legislation, namely self-regulation and co-regulation, should be carefully considered by the Commission, democratic scrutiny and respect of the rule of law principle can still be maintained.[35]

After recalling that the contract law project is based on soft law,[36] important concerns were expressed about the use of soft law as a means to circumvent lawmaking power allocation among European institutions.[37] The EP underlines its weak position and that of the ECJ in relation to soft law and

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(iii) strengthening of the accountability of Community bodies for the regulatory process, and of the general transparency of that process, in particular by opening Council meetings to public scrutiny when the Council is acting in its legislative capacity;

(iv) any assessment aimed at simplification must consider economic, social, environmental and health aspects on an equal footing and should not be limited to short-term considerations;

(v) the simplification process must under no circumstance entail lowering the standards contained in current legislation.'

[35] See the EP Resolution on Better Regulation, p. 36. The Parliament 'Encourages the Commission to investigate alternatives to legislation with a view to improving the functioning of the internal market, including self-regulation and the mutual recognition of national rules, while stressing that this should not impede democratic scrutiny by the European Parliament and by Member States' parliaments; underlines that Community regulation must be seen in the context of international competition and global markets . . .' See also EP Resolution on Soft Law, point 12: the EP 'Is of the opinion that standardization and codes of conduct are important elements of self-regulation; considers, however, that standardization must not lead to overregulation and hence constitute an additional burden for small and medium-sized enterprises in particular; believes, therefore, that the legal bases concerned should incorporate built-in safeguards against overregulation.'

[36] See EP Resolution on Soft Law, above n. 29. 'W. Whereas, in addition, the European contract law project remains still in the nature of soft law,' and then the EP points out that, '13. Whereas it is legitimate for the Commission to make use of pre-legislative instruments, the pre-legislative process should not be abused nor unduly protracted; considers that, in areas such as the contract-law project, a point must come where the Commission decides whether or not to use its right of initiative and on what legal basis.'

[37] See the EP Resolution on Soft Law, above n. 29. 'X. Whereas, where the Community has legislative competence but there seems to be a lack of political will to introduce legislation, the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality under Article 5 of the EC Treaty, and may result in the Commission's acting *ultra vires*. Z. Whereas the better regulation agenda should not be subverted in order to allow the Community executive effectively to legislate by means of soft law instruments, thereby potentially undermining the Community legal order, avoiding the involvement of the democratically elected Parliament and the legal review by the Court of Justice and depriving citizens of legal remedies.'