

# PARADOXES OF THE EU REGULATORY FRAMEWORK IN WATER MANAGEMENT: DEVELOPING AN ASSESSMENT FRAMEWORK TO PUT THE GOVERNANCE APPROACH TO THE TEST

E J H PLAMBECK

*Utrecht Centre for Water, Oceans and Sustainability Law, Utrecht University<sup>1</sup>*

It has been assumed that the new modes of governance actually contribute to more legitimate and effective policy. The question is whether that is really the case. New modes of governance merely focus on the participation of stakeholders to enhance the acceptance of decisions and, in this way, to achieve the desired results. However, participation alone may not be sufficient to achieve policy goals. It has to be complemented with compliance mechanisms. The shift towards the new modes of governance can be exemplified by EU regulation on water quality as laid down in the Water Framework Directive and its predecessors. Considering the persistent non-achievement of water quality goals, doubts arise as to whether the shift with regard to legitimacy and effectiveness really is an improvement. In this article an assessment framework is developed to assess the legitimacy and effectiveness of new modes of governance that focus strongly on participation. It focuses on one hand on the possibilities for stakeholders to participate and the actual degree of participation and on the other to the theoretical and actual possibilities for stakeholders to ensure compliance. In this way, an answer can be provided to the question of whether the new modes of governance increase the legitimacy and effectiveness of EU policy.

Speaking of new modes of governance presupposes an old mode. The question is whether the new modes of governance are more appropriate in a legal and practical sense than the old mode. To provide an answer to this question an evaluation method has to be developed. This article therefore consists of an analysis of the modes of governance. In the first section, two modes of governance are identified. Each of the two identified approaches has its own characteristics, which are identified in section 2. To assess whether the new modes of governance live up to their claims of enhancing the legitimacy and effectiveness of policies, an assessment framework is developed. This is illustrated by a characterisation of three directives regarding surface water quality and a proposal on how the assessment framework can work out in practice. It is important to note that this article is intended to set out the author's research project and that further research is still to come.

## 1 NEW MODES OF GOVERNANCE

For roughly the last decade, the discourse on how to govern is shifting. After the founding of the European Economic Community, a predecessor of the European Union, the dominant governance approach, or in the words of Scott and Trubek,<sup>2</sup> the 'classic Community

method' (CCM) was characterised by the setting of specific, substantive rules at EU-level by the European legislator. As these rules have to be administered by the public authorities of Member States of the Union, they are the product of a top-down hierarchy. Another characteristic of this approach is that it clearly indicates the level of protection the European Union had adopted for its citizens and how to achieve that level.

According to Scott and Trubek, two distinct categories of new governance can be distinguished apart from the CCM.<sup>3</sup> The first one is a variation on the CCM and is called 'New, Old Governance' (NOG). The other one is not a variation on the CCM but a full alternative. Examples are partnership committees for structural funding, social dialogue and the open method of coordination.<sup>4</sup> Most of the current policy developed by the European institutions, according to the Commission's White Paper on Governance, has to be done by NOG.<sup>5</sup> In this article, the terms government approach for the CCM and governance approach for the NOG are used. This division serves as a starting point. It is important to note that both are the extremes of a wide spectrum of modes of governance.<sup>6</sup>

Why was there a need for a shift from the government approach towards the governance approach? It was argued that this so-called government approach was unable to solve the complex current societal problems, and therefore it was lacking in legitimacy.<sup>7</sup> Another important notion is the existence of the Anglo-Saxon legal culture within the European Union, which could not easily deal with the concept of limit values as one of the typical instruments of the government approach.<sup>8</sup> To enhance the legitimacy of policy it is assumed that participation of stakeholders is an essential prerequisite. According to Howarth, the aim, and also the assumption, of the governance approach is:<sup>9</sup>

3 *ibid.*

4 *ibid.*

5 European Commission *European Governance – A White Paper* COM(2001) 428 final.

6 P Lange and others 'Governing towards sustainability: conceptualizing modes of governance' (2013) 15(3) *Journal of Environmental Policy & Planning* 403–25.

7 See eg Scott and Trubek (n 2); D Aubin, F Varone 'The evolution of European water policy: towards integrated resource management at EU level' in I Kissling-Näf, S Kuks *The Evolution of National Water Regimes in Europe: Transitions in Water Rights and Water Policies* (Kluwer 2004) 49–86; S Smismans 'New modes of governance and the participatory myth' (2008) 31(5) *West European Politics* 874–95.

8 L Krämer 'Thirty years of EC environmental law: perspectives and prospectives' in H Somsen *Yearbook of European Environmental Law, Volume 2* (OUP 2002) 155–82 at 165, 172.

9 W Howarth 'Aspirations and realities under the Water Framework Directive: proceduralisation, participation and practicalities' (2009) 21(3) *Journal of Environmental Law* 391–417 at 398 ff.

1 Ernst Plambeck is a PhD candidate.

2 J Scott, D M Trubek 'Mind the gap: law and new approaches to governance in the European Union' (2002) 8(1) *European Law Journal* 1–18.

- (a) to achieve more legitimate policy-making by involving actors or stakeholders in norm *casu quo* standard-setting and decision-making, and to create greater flexibility by standard-setting at various levels, which allows regional circumstances to be taken into account
- (b) to achieve better compliance with the norms set by the stakeholders and, if necessary, through enforcement by the stakeholders,<sup>10</sup> so as
- (c) to improve the legitimacy of the policies concerned, not only from a procedural point of view but also from a substantive point of view, namely by achieving the objectives.<sup>11</sup>

Apart from the notion that participation will enhance legitimacy and effectiveness, participation in its broadest sense, including disclosure of environmental information and access to justice, has been of even greater importance since the entry into force of the UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, otherwise known as the Aarhus Convention.<sup>12</sup> This Convention has its influence at the national and the EU levels, which also creates a need for more participation to enhance final effectiveness. However, with regard to the chosen directives on water quality, all of them came into force before the approval of the Aarhus Convention by the European Union.<sup>13</sup>

## 2 CHARACTERISTICS OF BOTH APPROACHES

The governance approach is characterised by certain elements, which can be identified from literature. This is not the case with regard to the government approach, but its characteristics can be derived *a contrario* from the characteristics of the governance approach. These characteristics are based upon literature concerning different policy domains, whilst the shift from a government approach to a governance approach can be identified within more or less all of the regulation of the European Union.<sup>14</sup> An important aspect of the governance approach is the existence of general, more principle-based rules in the directives.<sup>15</sup> Contrasting to this is the existence of specific rules in the government approach. These rules

will not only be set at the European Union level by the European institutions, but substantive decision-making power is handed over to the Member States and their administrative bodies.<sup>16</sup>

The substantive decision-making power rests with the European level only for the government approach. The handing over of decision-making power towards the Member States itself is the reason that directives are more and more often framework directives, with open norms and more room for Member States to deviate or adapt the general standards set by the directive.<sup>17</sup> *A contrario*, the government approach consists of little room for Member States to deviate or adapt the specific, hard standards laid down in the directive. They are only allowed to take stricter measures as EU water directives contain minimum requirements. Later decision-making with regard to, for instance, standard-setting and concrete decisions, whether explicitly laid down in directives and thus mandatory or not, is done in a participatory way by involving many actors and stakeholders.<sup>18</sup>

From the very beginning, there was no or little participation possible at EU level and later on only by the official representative body, the European Parliament. Whilst the governance approach leaves more room for other levels in norm and standard setting than the European level alone, there is also a shift from substantive rules in the government approach towards procedural rules in the governance approach.<sup>19</sup> The last characteristic is the use of a variety of horizontal non-legal instruments and so-called soft law instruments, in other words arrangements in the governance approach instead of vertically prescribing European norms and standards and a legal licensing system, thus command and control instruments, as commonly undertaken in the government approach.<sup>20</sup>

16 G W Marks, L Hooghe and K Blank 'European integration from the 1980s: state centric vs multi-level governance' (1996) 34(3) *Journal of Common Market Studies* 341-78; L Hooghe, G Marks 'Unraveling the central state, but how? Types of multi-level governance' (2003) 97(2) *The American Political Science Review* 233-43; I Pernice 'Multilevel constitutionalism and the Treaty of Amsterdam: European constitution making revisited?' (1999) 36 *Common Market Law Review* 703-750.

17 D M Curtin, R H van Ooik and T A J A Vandamme 'Overkoepelend deel' (Overarching part) in D M Curtin, R H van Ooik and T A J A Vandamme (eds) *Zoektocht naar de aansluiting tussen het Nederlandse en Europese regelgevensysteem (Search for the Connection Between the Netherlands' and European Regulation System)* (Ministry of Justice 2010) 13-42 at 29. See also M M Bogaart 'The emergence of the Framework Directive in EU environmental policy: an exploration of its function and characteristics' in M G W M Peeters, R Uylenburg (eds) *EU Environmental Legislation: Legal Perspectives on Regulatory Strategies* (Edward Elgar 2014) 48-69.

18 L Krämer 'Better regulation for the EC environment: on the quality of EC environmental legislation' (2007) 34 *Milieu en Recht* 70-74; Scott and Trubek (n 2).

19 Howarth (n 9); Van Trigt (n 11); J Scott 'Flexibility, "proceduralisation", and environmental governance in the EU' in G de Búrca, J Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 261-80.

20 For example the prescription of the use of economic instruments in art 9 of the WFD see P E Lindhout *Cost recovery as a policy instrument to achieve sustainable and equitable water use in Europe and the Netherlands* (Bergambacht 2 vols 2015); A Jolink *Legal Implications of Introducing Economic Instruments in the Field of European and Dutch Water Management* (Science Shop of Law, Economics and Governance 2010). With regard to soft law instruments see U Mörth 'Introduction' in U Mörth (ed) *Soft Law in Governance and Regulation. An Interdisciplinary Analysis* (Edward Elgar 2004) 1-9; L A J Senden *Soft Law in European Community Law* (Hart Publishing 2004).

10 See also B Page, M Kaika 'The EU Water Framework Directive pt 2: policy innovation and the shifting choreography of governance' (2003) 13 *European Environment* 328-43. They added also the component of transparency, which is enhanced by more participation.

11 See also A A van Trigt *Proceduralisering in de Europese milieuwetgeving: een case-study naar de Kaderrichtlijn water (Proceduralisation in European Environmental Legislation: a case study on the Water Framework Directive)* (Master thesis Amsterdam UvA 2007) 7.

12 <http://www.unece.org/env/pp/treatytext.html>.

13 Although the European Union signed the Convention on 25 June 1998, it was only approved on 17 February 2005.

14 For case studies into other policy domains see G de Búrca, J Scott (eds) *Law and New Governance in the EU and the US* (Hart Publishing 2006).

15 H F M W van Rijswijk *Moving Water and the Law: On the Distribution of Water Rights and Water Duties within River Basins in European and Dutch Water Law* (Europa Law Publishing 2008); M Lee, 'Law and governance of water protection policy' in J Scott *Environmental Protection: European Law and Governance* (OUP 2009) 27-55; S E A van Holten, H F M W van Rijswijk 'The governance approach in European Union environmental directives and its consequences for flexibility, effectiveness and legitimacy' in M G W M Peeters, R Uylenburg (eds) *EU Environmental Legislation: Legal Perspectives on Regulatory Strategies* (Edward Elgar 2014) 13-47.

Schematically, the characteristics can be presented as follows:

**Table 1: Characteristics of both approaches**

| <i>Government approach</i>              | <i>Governance approach</i>            |
|---|---------------------------------------|
| Top-down regulation                     | Bottom-up regulation                  |
| Hard standards                          | Open standards                        |
| Rule-based regulation                   | Principle-based regulation            |
| Substantive rules                       | Procedural rules                      |
| Little room for MS to deviate/<br>adapt | Much room for MS to deviate/<br>adapt |
| No or little participation              | Participation is a prerequisite       |
| Command and control<br>instruments      | Arrangements                          |

### 3 ASSESSMENT FRAMEWORK

As mentioned in section 1 the aim of introducing the governance approach is to enhance the legitimacy of policy and in the end to be more effective in gaining the policy goals. Since the Commission's White Paper on Governance, almost 15 years have elapsed, and recently the European Commission has introduced its Better Regulation Package with measures to deliver better rules for better results.<sup>21</sup> So, there is a need to evaluate whether the governance approach is an improvement with regard to its aims. Therefore, it is necessary to define the concepts of legitimacy and effectiveness and also the methods of how to assess whether the purpose is achieved.

#### 3.1 Legitimacy

In line with Mees, Driessen and Runhaar, legitimacy is 'the acceptance of authority and justification of political power'.<sup>22</sup> Whilst the governance approach originates at the European level, a distinction can be made between input, throughput and output legitimacy.<sup>23</sup> Mees, Driessen and Runhaar define these concepts as follows:

Input legitimacy relates to inclusive interest representation and is gained through the representation of all interests at stake and through the equality of representation . . . Throughput legitimacy relates to the quality of the rules and procedures to reach decisions, and the fairness of the process . . . In case of output legitimacy, acceptance of authority is gained by the extent to which that authority is effective in achieving goals, or has the capacity to solve the policy issue.<sup>24</sup>

In short, legitimacy focuses mainly on participation in norm and standard setting and, in the end, on goal achievement. Therefore, legitimacy and more specifically input legitimacy can be equated with participation.

Within the context of (public) administration, participation refers to the involvement of (private) actors in actual or

expected actions or a policy process of administrative bodies and public entities, ie the government.<sup>25</sup> Involvement has different aspects, depending on the context. Participation is 'the collective name for a wide spectrum of processes'.<sup>26</sup> So it can mean participating in preparatory procedures, influencing decisions or participating in decision-making.<sup>27</sup>

Although the term 'public participation' implies that the initiative rests with the type of participation by the private players it should, however, be noted that the manner and process of participation often lies in the hands of the government. Participation is a comprehensive concept in which various aspects can be distinguished. With regard to the question of who participates, a distinction can be made between public participation and stakeholder participation.<sup>28</sup> Furthermore, a distinction can be made in respect of the strength of participation and the extent to which actual participation is reached. Incidentally, these are associated with one another: every gradation of participation has a different degree of genuine participation. It can be assumed that the higher the strength of participation, the more there is actual participation.

The strength of participation is determined by the width and the depth of participation.<sup>29</sup> The width of participation is the degree to which each member of a community has the opportunity to participate in each phase of the policy process. The depth of participation is the degree to which stakeholders have the opportunity to influence the outcome of the policy process. The width of participation can be answered following the questions: Who can participate? Is there information provided about possibilities for participation with documents relevant for the policy process? How can you participate? How are the stakes weighed? The depth of participation stands for meaningful participation and requires a say for stakeholders in both the analysis of the problem and the search for a solution. The depth of participation can be measured by Arnstein's ladder of participation.<sup>30</sup>

Arnstein distinguishes eight rungs on the ladder of progressive participation. The first two steps, manipulation and therapy, are seen as non-participation. Then follow informing, consultation, placation, partnership, delegated power and citizen control. The last three steps share the administrative decision-making with the public. Her model is based on sharing decision-making with the public and for that reason she considers only partnership, delegated power and citizen control as true forms of participation, which is of course her moral view. Nevertheless, it is useful to examine the rungs to identify the degree of participation that is achieved. Other questions which are necessary to ask in order to come to a sound answer on the depth of participation include: Where can participation occur? What can be participated in? When can

21 European Commission *Better Regulation For Better Results: An EU Agenda* COM(2015) 215 final.

22 H L P Mees, P P J Driessen and H A C Runhaar 'Legitimate adaptive flood risk governance beyond the dikes: the cases of Hamburg, Helsinki and Rotterdam' (2014) 14 *Regional Environ Change* 671–82.

23 Mees, Driessen and Runhaar (n 22); V A Schmidt 'Democracy and legitimacy in the European Union revisited: input, output and "throughput"' (2013) 61 *Political Studies* 2–22, who builds on the work of Scharpf: see F W Scharpf *Governing in Europe: Effective and Democratic?* (OUP 1999).

24 Mees, Driessen and Runhaar (n 22).

25 B Breman and others *Participatie in waterbeheer: Een vak apart (Participation in Water Management: A Special Skill)* (Alterra 2008).

26 *ibid.*

27 M C Burkens and others *Beginselen van de democratische rechtsstaat (Principles of the Democratic Constitutional State)* (Kluwer 2012) 277–78.

28 J Krywkow *A Methodological Framework for Participatory Processes in Water Resources Management* (Wöhrmann 2009) 53.

29 H F M W van Rijswijk and others 'Ten building blocks for sustainable water governance: an integrated method to assess the governance of water' (2014) 39(5) *Water International* 725–42.

30 S R Arnstein 'A ladder of citizen participation' (1969) 35(4) *Journal of the American Institute of Planners* 216–24.

participation take place? How often can participation take place?

It is not enough to have the theoretical possibilities to participate, but also to understand why stakeholders actually want to participate. Therefore, the CLEAR model, developed by Lowndes, Pratchett and Stoker, can be used.<sup>31</sup> This model combines the existing models, which explain the willingness to participate.<sup>32</sup> According to the CLEAR model, participation is most effective when the public: *Can do*; *Like to*; *Enabled to*; *Asked to*; *Responded to*.<sup>33</sup> Under *Can do* is understood that the public has the resources and knowledge to participate. *Like to* focuses on the degree of commitment with the subject, which strengthens participation. The public should also have the opportunity and the means to participate, so they are *Enabled to*. In addition, participation is also effective if the public is *Asked to* participate by the authority. The public must finally see what is done with their insights and therefore need a response, so they are *Responded to*.

### 3.2 Effectiveness

Effectiveness stands for achieving the objectives. Based upon the notion that it is one of the aims of the governance approach to achieve better compliance with the norms set by the stakeholders and, if necessary, through enforcement by the stakeholders,<sup>34</sup> effectiveness also forms part of legitimacy. Whilst (input) legitimacy can be equated with participation, and the achievement of the norms and targets set by the government and the stakeholders together relies also on compliance by the stakeholders, it can be justified to equate output legitimacy, effectiveness and compliance. Also from a legal point of view, it is necessary to have mechanisms to strive for compliance and enforcement. According to the OECD effective governance requires:

- (1) a clear allocation and discharge of responsibilities which are based on the rule of law
- (2) enforcement of the responsibilities by public and private parties politically and before courts
- (3) legislation that provides for a minimum level of protection and
- (4) legal instruments which are designed to enforce the responsibilities.<sup>35</sup>

As is clear from academic legal literature, compliance starts with the norms setting.<sup>36</sup> Based on the principles of good regulation,<sup>37</sup> norm setting has to be clear, precise,

foreseeable, predictable and enforceable.<sup>38</sup> After the stage of norm setting with its legislative requirements, the phase of possible use of compliance mechanisms begins. For this phase it is necessary to have at first instruments, secondly appropriate instruments, and thirdly the possibility of using the instruments.

As is also the case with participation, it is not enough to have only the theoretical and practical possibilities to strive for compliance, but also to understand why stakeholders and government are willing to strive for compliance in order to realise effectiveness. The aforementioned CLEAR model can be useful in an adapted manner. Under *Can do*: are there ways to force compliance; if so, how? Is there a distinction between the various stakeholders? Is it easier, for instance, to force compliance of one offender than another one, and why? *Like to*: to what extent is a stakeholder committed to strive for compliance? *Enabled to*: do the stakeholders have sufficient means and resources (time, money, expertise) to strive for compliance? *Asked to*: are there any barriers with regard to the provision of information, the procedures themselves and so on. *Responded to*: to what extent is the use of a compliance mechanism of practical use and has a positive outcome?

## 4 HOW TO APPLY THE GENERAL THEORETICAL FRAMEWORK TO THE TEST IN WATER QUALITY DIRECTIVES

With regard to water policy in the European Union, it is common to separate it into three succeeding tranches, each of which incorporates its predecessor.<sup>39</sup> In each of the tranches a more or less similar method of governing is used. The most exemplifying directives with regard to surface water quality are for the first tranche, the Dangerous Substances Directive,<sup>40</sup> for the second tranche the Nitrates Directive<sup>41</sup> and for the third and last tranche the Water Framework Directive (WFD).<sup>42</sup> It is said that the Dangerous Substances Directive consists of a more government approach and that the Water Framework Directive, whilst incorporating previous directives and including regulation on ecological quality, is a good

Minister of State for Business and Enterprise, *Regulator's Code* (April 2014); M Bravenboer *Fiscaal overgangsbeleid (Fiscal transition policy)* (Kluwer 2009); J A E van der Jagt *Milieuconvenanten gehandhaafd (The Enforcement of Voluntary Environmental Agreements)* (Boom Juridische uitgevers 2006).

<sup>38</sup> Van den Broek (n 36) 48.

<sup>39</sup> H Blöch 'European water policy and the Water Framework Directive: an overview' (2004) 3 *JEEPL* 170-78; D Grimeaud 'Reforming EU water law: towards sustainability?' (2001) 2 *European Environmental Law Review* 41-51; see also [http://ec.europa.eu/environment/water/water-framework/info/intro\\_en.htm](http://ec.europa.eu/environment/water/water-framework/info/intro_en.htm).

<sup>40</sup> Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community OJ 2006 L64, which is a codified version of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community OJ 1976 L129 and its amendments.

<sup>41</sup> Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources OJ 1991 L375.

<sup>42</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy OJ 2000 L327.

<sup>31</sup> V Lowndes, L Pratchett and G Stoker 'Diagnosing and remedying the failings of official participation schemes: the CLEAR framework' (2006) 5(2) *Social Policy and Society* 281-91.

<sup>32</sup> For the former models and their shortcomings see C J Pattie, P Seyd and P F Whiteley 'Citizenship and civic engagement: attitudes and behaviour in Britain' (2003) 51 *Political Studies* 443-68.

<sup>33</sup> Lowndes, Pratchett and Stoker (n 31) 286.

<sup>34</sup> Howarth (n 9).

<sup>35</sup> OECD *Water Governance in the Netherlands: Fit for the Future?* (OECD Publishing 2014) 94.

<sup>36</sup> M van den Broek *Preventing Money Laundering: A Legal Study on the Effectiveness of Supervision in the European Union* (Eleven International Publishing 2015); F C M A Michiels *Houdbaar handhavingsrecht (Sustainable Regulation on Enforcement)* (Kluwer 2006); L A J Spaans *Milieukwaliteitsnormstelling (Environmental Quality Standard Setting)* (Boom Juridische uitgevers 2002).

<sup>37</sup> These principles are legal certainty, legal equality, enforceability and practicability; see OECD *Recommendation of the Council on Improving the Quality of Government Regulation* (9 March 1995) C(95) 21 final; UK's

example of a mixed governance approach.<sup>43</sup> The Nitrates Directive is one of the first directives to be based upon voluntary compliance of a programme within a Member State and does not prescribe a licensing system. In this section, each directive is analysed to see the extent to which it can be considered as belonging to the government or the governance approach.

For concluding whether the governance approach provides a more legitimate and effective manner to reach a higher level of water quality, the variables have to be comparable. It is important to note that every tranche consists of a specific kind of polluting substance, which is being regulated by the directive. The first tranche focuses on priority substances, the second one with regard to the Nitrates Directive on a specific substance which is nitrate, and the last tranche, providing a global approach, incorporates not only chemical quality, but also ecological quality, which consists of (1) biological elements, (2) hydromorphological elements supporting the biological elements, and (3) chemical and physico-chemical elements supporting the biological elements.<sup>44</sup> Therefore, the focus is on three different kinds of substances, which are comparable in the sense that they were all chemical substances, respectively the priority substances, nitrate, and the chemical elements which support the biological elements.

Based upon the characteristics identified in section 2, the directives are discussed along the notions following on from the assessment framework of compliance and participation. With regard to compliance, a distinction is made between norm or standard setting and instruments. It is important to note that the texts of the directives themselves only are discussed; no attention is paid to the ECJ's judgments on the explanation and implementation of the directives.<sup>45</sup>

#### 4.1 Dangerous Substances Directive

The Dangerous Substances Directive<sup>46</sup> had the implicit aim to ensure effective protection of the aquatic environment of the Community. This aquatic environment consisted of inland surface waters, territorial waters, internal coastal waters and ground waters.<sup>47</sup> Ensuring effective protection had to be achieved by general and simultane-

ous action by the Member States against pollution caused by certain persistent, toxic and bio-accumulable substances. A distinction was made between List I, or priority substances and List II, or dangerous substances, which complicated the norm setting. Although the aim was implicit, it was a clear and specific aim.

##### 4.1.1 Compliance: norm setting

In general, the directive had a non-deterioration provision by the measures taken on the basis of the directive. With regard to the priority substances, the Council on a Commission proposal set emission limit values (ELV). Article 6 of the directive consists of the criteria taken into account. The same procedure applied to environmental quality standards (EQSs). The Council only adopted some directives for a limited amount of priority substances.<sup>48</sup> After the coming into force of the WFD environmental quality standards for 33 priority substances were at first laid down in Decision 2455/2001, later to become Annex X of the WFD. Currently, it is replaced by the Directive on Environmental Quality Standards.<sup>49</sup>

With regard to dangerous substances, there were no substantive rules set at EU level, therefore the norm setting was more procedural as laid down in the directive. To reduce pollution by these substances, Member States had to establish programmes with EQSs. These programmes might also include specific provisions that relate to the composition and use of substances and products. The programme should also take into account the latest technical developments, which are economically feasible. A deadline for the implementation of the programme should also be included. Importantly, in case there were no EQSs set at EU level for priority substances, these substances should be treated as a dangerous substance, and therefore EQSs and ELVs should be established by the Member States. With regard to priority substances, it was only possible to strengthen the established EQSs and ELVs at EU level. With regard to dangerous substances, it was up to the Member States to establish both the EQSs and ELVs. The same applied to those priority substances that did not have EQSs and ELVs established at EU level.

##### 4.1.2 Instruments

For all discharges of priority and dangerous substances prior authorisation was needed. Each authorisation contained emission standards, which were put in place in case dangerous substances were derived from the environmental quality standards. The emission standard consisted

43 H F M W van Rijswijk, H K Gilissen and J J H van Kempen 'The need for international and regional transboundary cooperation in European river basin management as a result of new approaches in EC water law' (2010) 11 *ERA Forum* 129-57; Howarth (n 9); M Lee 'Law and governance of water protection policy' in J Scott *Environmental Protection. European Law and Governance* (OUP 2009) 27-55; J Scott, J Holder 'Law and new environmental governance in the European Union' in G de Búrca, J Scott (eds) *Law and New Governance in the EU and the US* (Hart Publishing 2006); Aubin and Varone (n 7). A good example of a full governance approach based directive is the Floods Directive; see van Rijswijk, Gilissen and van Kempen (ibid).

44 CIS *Guidance Document No 13: Overall Approach to the Classification of Ecological Status and Ecological Potential* (2003) 28.

45 Part of the author's research project will also be a study into the interpretation by the ECJ, and how it can be rated in terms of legitimacy and effectiveness.

46 Since the coming into force of the WFD the Dangerous Substances Directive has been integrated into the WFD and expired on 22 December 2013.

47 With the coming into force of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances OJ 1980, L20 ground waters are no longer subject to the Dangerous Substances Directive.

48 These directives are: Council Directive 82/176/EEC on limit values and quality objectives for mercury discharges by the chlor-alkali electrolysis industry OJ 1982 L81/29; Council Directive 83/513/EEC on limit values and quality objectives for cadmium discharges OJ 1983 L291/1; Council Directive 84/156/EEC on limit values and quality objectives for mercury discharges by sectors other than the chlor-alkali electrolysis industry OJ 1984 L074/49; Council Directive 84/491/EEC on limit values and quality objectives for the discharges of hexachlorocyclohexane OJ 1984 L74/11; Council Directive 86/280/EEC as amended by 88/347/EEC and 90/415/EEC on limit values and quality objectives for discharges of certain dangerous substances included in List I of the Annex to Directive 76/464/EEC OJ 1986 L181/16 (amended OJ 1988 L158/35 and OJ 1990 L219/49).

49 Directive 2008/105/EC of the European Parliament and the Council on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC OJ 2008 L348.

of the maximum available concentration of a substance per discharge and the maximum quantity of a substance permissible in a discharge during one or more specified periods of time. Taking into account the toxicity, persistence and bioaccumulation of the substance concerned in the environment into which it is discharged, a Member State might impose more stringent emission standards in an authorisation. Furthermore, if a discharger was not able to comply with the emission standards, the authorisation had to be refused. In case, a discharger did not comply with the emission standards in practice, a Member State had to enforce the standards, ultimately by prohibiting the discharge.

Since the coming into force of the Standardised Reporting Directive,<sup>50</sup> the Dangerous Substances Directive has consisted of a monitoring obligation. Beforehand, there was only the obligation to communicate summaries of the programmes for dangerous substances and the results of the implementation of the programmes to the Commission. Based on this information, the Commission was able to compare and, if necessary, could submit proposals for adapting the directive. According to Article 11, every three years a Member State had to inform the Commission on the implementation of the directive, based on a questionnaire drafted by the Commission.

#### 4.1.3 Participation

The Dangerous Substances Directive did not consist of any provisions with regard to participation by the adoption of the programmes, nor of permitting or refusing an authorisation. With regard to the adoption of the directive itself, the official procedure was followed, which at that time was as follows. First, a proposal for the directive was adopted by the Commission and handed over to the Council to be established. According to Article 235 of the EC Treaty, consultation of the European Parliament was required. Secondly, the European Parliament, without any amendment, approved the proposal. In addition, the European Economic and Social Committee had advisory competence and made use of it. Finally, the European Council would then adopt the directive. With regard to participation, it is of importance to note that only through the process of the adoption of the directive did participation take place at EU level by the official institutions of the then European Community.

## 4.2 Nitrates Directive

The Nitrates Directive has the explicit aim, as laid down in its Article 1, to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent further such pollution.

### 4.2.1 Compliance: norm setting

The Nitrates Directive consists of one substantive norm in the compulsory measures, which have to be included in the action programme. For each farm or livestock unit, the maximum amount of livestock manure applied to the land is 170 kg of nitrogen per hectare per year. For the first four year action programme, the farm or livestock unit may

have a maximum amount of 210 kg of nitrogen. Also, it is possible to fix a different maximum amount, but this amount must not prejudice the objectives of the directive. Such a decision has to be justified on the basis of objective criteria, of which the directive consists of some examples. The Commission should be informed of such a decision to examine the justification.

The substantive norm only applies in case of the existence of an action programme. The directive has the following implementation route, which consists of procedural guarantees. At first, Member States are obliged to identify waters which are affected or could be affected by pollution, for instance surface freshwaters containing or that could contain – if no action is taken to reverse the trend – a concentration of more than 50 mg/l of nitrogen. After the identification of such waters, areas of land that drain into the identified waters and which contribute to pollution have to be designated by the Member States as ‘nitrate vulnerable zones’ (NVZs); alternatively, a Member State has the option to apply action programmes to the whole territory. The Commission has to be notified about the initial designation and also of any revision of the list of NVZs, which must be notified at least every four years.<sup>51</sup>

### 4.2.2 Instruments

The Nitrates Directive consists of three instruments. The first one is the code of good agricultural practice, which should be implemented by farmers on a voluntary basis. Such a code must include some provisions on specific items, including the use of fertilisers and the length of time they were applied, the conditions of the ground and procedures of their application, including the rate and uniformity of spreading. The code must also include provisions on the capacity and construction of storage vessels for livestock manure, including measures to prevent water pollution by run-off and seepage. It is also possible to include optional items, as mentioned in Annex II of the directive, such as land use management, maintenance of a minimum quantity of vegetation cover, the establishment of fertiliser plans and the keeping of records on fertiliser use, as well as the prevention of water pollution from run-off and the downward water movement in irrigation systems.

The second instrument is an action programme. Measures which are included in an action programme have to be implemented by farmers within NVZs on a compulsory basis. Such an action programme consists of the measures as already included in the code of good agricultural practice, although they become mandatory in NVZs. Furthermore, Annex III consists of some items which have to be regulated, amongst which are periods when the use of a fertiliser is prohibited, the minimum capacity of storage vessels, limitation of the use of fertilisers, taking into account specific characteristics of the NVZ and based on a nitrogen balance. It is importance to note here that this also applies to Member States applying an action programme to their whole territory. Only a minority of EU Member States, amongst which are Germany and the Netherlands, have chosen to apply measures to the whole

50 Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain directives relating to the environment OJ 1991 L377.

51 See also A M Keessen and others ‘The need for flexibility and differentiation in the protection of vulnerable areas in EU environmental law: the implementation of the Nitrates Directive in the Netherlands’ (2011) 8(2) *JEEPL* 141–64.

country and the majority of Member States, including France and the United Kingdom, have designated NVZs.<sup>52</sup>

The final instrument is the obligation to monitor and report. Every four years Member States are required to report on the nitrogen concentrations in their waters, the eutrophication of surface waters, the impact or effectiveness of action programmes on water quality and agricultural practices, the revision of NVZs and action programmes and to provide an estimation of future trends in water quality. Not every monitoring obligation is clear and precise enough.<sup>53</sup> Therefore, there have been differences between approaches of how to measure the effectiveness of action programmes. The Commission has attempted to provide guidelines for monitoring purposes, but these guidelines have not as yet been adopted; however, even when and if they will be adopted, their provisions will not be legally binding.<sup>54</sup>

#### 4.2.3 Participation

In contrast to the Dangerous Substances Directive, there is ongoing concern for participation by the establishment of the code for good agricultural practices. Article 4 of the directive lays down that a code must include provisions concerning training and information for farmers, in order to promote the application of a code. It is also clear that farmers can participate, because of their voluntary compliance with the code. However, that is not the case when a Member State applies an action programme for the whole country. Participation in that case relies on national provisions for participation.

With regard to the adoption of the directive itself, the official procedure was to be followed, which at that time was as follows. A proposal for the directive was adopted by the Commission and handed over to the Council to be established on the basis of Article 130S of the EEC Treaty, thus by unanimity. According to Article 235 of the EC Treaty, consultation of the European Parliament was required. The European Parliament approved the proposal, but with some amendments and after commitments to it were given. The amendments made explicit that it might be necessary for the Commission to ensure the protection of the environment within the Community, that Member States must pursue close cooperation between water management and agriculture, particularly through information and advice to farmers involved and that the Commission, if necessary, could independently exercise control over community waters.

The amendments also added that the yields should be recorded per hectare and that farmers might be compensated financially by Member States to make continuation of farming in existing locations possible. In addition the European Economic and Social Committee had advisory competence and made use of it. The European Council then definitively adopted the directive. With regard to participation, it is important to note that, with the adoption of the directive, participation had taken place at the EU

level by the official institutions of the then European Community, and that implicitly participation was required by the establishment of a code.

### 4.3 Water Framework Directive

The WFD is 'a complex and particularly elaborate measure which is unusually difficult to understand'.<sup>55</sup> Its aim and its scope of application are difficult to identify, whilst it consists of many different goals which are mostly inter-linked.<sup>56</sup> The general aim of the WFD is laid down in Article 1, namely the establishment of a framework for protection of water. This framework is needed to realise underlying goals and further underlying goals.<sup>57</sup> With regard to water quality, Article 4 consists of specific environmental objectives, which can be considered as obligations.<sup>58</sup>

#### 4.3.1 Compliance: norm setting

The obligations of Article 4 are the framework for the norms and standards to be set. Compared with the situation before entering into force of the WFD, no deterioration should occur, except for temporary deterioration (paragraph 6), physical modification or new sustainable activities (paragraph 7) or permanent exclusion or compromise of the achievement of the objectives of the WFD in other bodies of water (paragraph 8). In addition, the level of protection in comparison with the hitherto existing but now repealed directives should be the same, as basic measures have to be included in the programme of measures, including the obligation to adopt measures for some of the – until then (the time of the coming into force of the WFD) – existing directives.

Focusing on surface waters, they have to be protected, enhanced and restored, with the aim of achieving 'good' surface water status by 22 December 2015. A good surface water status is achieved when both its ecological status and its chemical status are at least 'good'. A good ecological status is the status of a body of surface water as classified in accordance with Annex V. A good surface water chemical status means that in a body of surface water the concentrations of pollutants do not exceed the environmental quality standards established on the basis of the WFD or other relevant directives.

However, for artificial and heavily modified bodies of water, the objectives to be achieved are lower. Restoring is not necessary and with regard to the water status a good chemical status and a good ecological potential instead of status have to be achieved. Although there are criteria for

55 Conclusion of AG Jääskinen of 23 October 2014 in Case C-461/13 (*BUND v Germany*) no 4.

56 J J H van Kempen *Europees waterbeheer: eerlijk zullen we alles delen? (European Water Management: Fair Sharing for All?)* (Boom Juridische uitgevers 2012).

57 See *ibid* 122 for van Kempen's graphic on the mutual but still muddled and unclear relationship between the various objectives of the WFD.

58 J J H van Kempen 'Countering the obscurity of obligation in European environmental law: an analysis of Article 4 of the European Water Framework Directive' (2012) 24(3) *Journal of Environmental Law* 499-533, based upon the explanation by the different Member States; see Y Uitenboogaart and others (eds) *Dealing with Complexity and Policy Discretion* (Sdu Uitgevers 2009), who made a distinction between obligations of result and obligations of best efforts. In Case C-461/13 (*BUND v Germany*) the Court avoided these terms and created a new kind of obligation.

52 See FATE map <http://fate-gis.jrc.ec.europa.eu/geohub/MapView.aspx?id=2#>.

53 B A Beijen, H F M W van Rijswijk and H Tegner Anker 'The importance of monitoring for the effectiveness of environmental directives: a comparison of monitoring obligations in European environmental directives' (2014) 10(2) *Utrecht Law Review* 126-35 at 128 ff.

54 *ibid* 129.

identifying those water bodies and the use of exemptions by the Member States, and the Common Implementation Strategy to unify the process and outcomes,<sup>59</sup> there are still important differences between the Member States.<sup>60</sup> The time limits for achieving the objectives can be extended until 2021, if the criteria laid down in Article 4(4) are met.

As mentioned in section 4.1.1, the norm setting with regard to priority substances is still unchanged under the WFD. With regard to norm setting to achieve a good status of ecological quality, in this article the focus is on the chemical elements that support the biological elements. For the different surface water body types, Annex V consists of the different parameters. With regard to the chemical elements it is laid down that the concentrations must not exceed the standards set by the procedure set out in section 1(2)(6) of Annex V. That section only gives the procedure from which the Member States have to derive and set the standards. Only in the case of cooperation to set standards within an international river basin district does the Commission have a task in the inter-calibration exercise to ensure the aims of the WFD.<sup>61</sup>

#### 4.3.2 Instruments

The WFD is based on a river basin management approach.<sup>62</sup> All Member States, after identifying river basins, have to produce a river basin management plan (RBMP), following the analysis of the characteristics of that river basin district (RBD), the environmental effects of human activities on that RBD and an economic analysis of water use within the RBD based on Article 5 of the WFD in accordance with the technical requirements as laid down in Annexes II and III. Together with the RBMP, a programme of measures (PoM) has to be established, with basic measures as laid down in Article 11(3), together with supplementary measures. The basis measures are, amongst others, prior regulation for point source discharges and controls for discharges from diffuse sources. Instead of the authorisation or licence needed under the Dangerous Substances Directive, it is possible to make use of other forms of regulation or controls. This is explicitly mentioned in Article 10. With regard to water use, including polluting, the economic instrument of water pricing was introduced.<sup>63</sup>

The WFD also consists of a monitoring programme with detailed monitoring requirements, as laid down in Annex V. These requirements are more comprehensive and detailed, compared with the monitoring obligation under the Nitrates Directive.<sup>64</sup> The monitoring results have to be reported to the Commission in order to make it possible to report on the status of the WFD implementation

for the whole EU.<sup>65</sup> On the basis of the monitoring report, a Member State is obliged to take the necessary measure to achieve the objectives and adapt the PoM. With regard to monitoring the chemical substances, Commission Directive 2009/90/EC provides for further detailed requirements.<sup>66</sup>

#### 4.3.3 Participation

The WFD is a participation-driven directive, and its Article 14 contains an explicit provision on participation. The first paragraph states that the Member States must encourage active involvement of all interested parties in the implementation of the WFD. In particular, this applies to the establishment, review and updating RBMPs. For this, there are a number of documents to be published in advance, which are available for comments. Thus, a minimum period of time has to be taken into account. The public must also have at least six months to submit written comments on the available documents to allow active involvement and consultation. In addition, the preamble consists of the notion that the success of the directive relies on close cooperation and coherent action at various levels within the European Union, as well as on public participation. With regard to the standard setting for the chemical elements supporting the biological elements, the procedure requires that the EQS shall be subject to peer review and public consultation.

Furthermore, to enhance a common understanding and approach of the WFD the Common Implementation Strategy (CIS) is to be carried out.<sup>67</sup> Within the CIS, water directors of the Member State issued guidance documents setting out requirements and best practices. The legal status and use of these guidance documents is still unclear.<sup>68</sup> In the CIS itself, participation by stakeholders, NGOs and civil society may be involved.<sup>69</sup> The Commission also established multi-stakeholder consultative *fora* and expert advisory *fora* to provide input to the CIS.<sup>70</sup>

#### 4.4 Characterisation

For characterisation of the three directives, the starting points are the characteristics of the governance approach, as identified in section 2. In the table below, the scores of each directive are set out. It is important to note that the scoring is based upon the difference in substances, as identified in section 4. It is evident that the Dangerous Substances Directive is based upon a government approach, whilst the Water Framework Directive is more or less based upon a governance approach. If it is taken into account that the WFD also consists of the 'old' Dangerous Substances Directive, the WFD has a mix of

59 For instance see CIS *Guidance Document No 4* 'Identification and designation of heavily modified and artificial water bodies' (2003).

60 Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC) *River Basin Management Plans* COM(2012) 670 final; A M Keessen and others 'European river basin districts: are they swimming in the same implementation pool?' (2010) 22(2) *Journal of Environmental Law* 197–221; Uitenboogaart and others (n 58).

61 Keessen and others (n 60).

62 Van Rijswijk, Gilissen and van Kempen (n 43).

63 Lindhout (n 20); P E Lindhout 'A wider notion of the scope of water services in EU water law: boosting payment for water-related ecosystem services to ensure sustainable water management?' (2012) 8(3) *Utrecht Law Review* 86–101.

64 Beijen, van Rijswijk and Tegner Anker (n 53).

65 Until now there have been four implementation reports provided by the Commission, see [http://ec.europa.eu/environment/water/water-framework/impl\\_reports.htm](http://ec.europa.eu/environment/water/water-framework/impl_reports.htm).

66 Commission Directive 2009/90/EC of 31 July 2009 laying down, pursuant to Directive 2000/60/EC of the European Parliament and of the Council, technical specifications for chemical analysis and monitoring of water status OJ 2009 L201.

67 CIS *Strategic Document* (2 May 2001) <http://ec.europa.eu/environment/water/water-framework/objectives/pdf/strategy.pdf>.

68 B A Beijen 'The role of guidance documents in European water and environmental law', Paper presented at the 22nd International Conference of Europeanists on 'Contradictions: envisioning European futures' held in Paris (8–10 July 2015).

69 CIS (n 67) 14–15.

70 *ibid* 6.



the government and governance approaches, but with strong governance elements. The Nitrates Directive also has a mixture, but with more government elements.

**Table 2: Scoring of the directives based upon the differences in substances**

| <i>Characteristics</i>            | <i>Dangerous Substances Directive</i> | <i>Nitrates Directive</i> | <i>Water Framework Directive</i> |
|-----------------------------------|---------------------------------------|---------------------------|----------------------------------|
| Bottom-up regulation              | –                                     | +/-                       | +                                |
| Open standards                    | –                                     | +/-                       | +                                |
| Principle-based regulation        | –                                     | –                         | ++                               |
| Procedural rules                  | –                                     | +                         | ++                               |
| Much room for MS to deviate/adapt | –                                     | +                         | ++                               |
| Participation is a prerequisite   | –                                     | +/-                       | ++                               |
| Arrangements                      | –                                     | +/-                       | ++                               |

## 5 CONCLUSION

The identification of the characteristics of the government and governance approaches and their application to the Dangerous Substances Directive, the Nitrates Directive and the WFD, leads to the conclusion that it is indeed a correct presumption that the WFD places a stronger focus on a governance approach, whilst the Dangerous Substances Directive is a good example of the government approach. To assess whether the governance approach is more able to tackle the lack of legitimacy and effectiveness than the government approach, an assessment framework is developed. This framework is based upon participation on the one hand and the possibilities to strive for compliance on the other hand. Participation will be evaluated on the strength of the criteria, which consists of the width and the depth of participation and the actual participation itself. Compliance will be evaluated from the theoretical possibilities, based on the quality of norm setting and the compliance instruments, and by the actual possibilities to strive for compliance.

Whilst 'the quality of European legislation is not manifest until it is implemented in national law', which 'partly depends on the national implementing legislation',<sup>71</sup> before the next step it is necessary to carry out representative case studies.<sup>72</sup> First, the general framework with regard to participation and compliance must be explained. For instance, in the Netherlands there is the General Administrative Law Act, which consists of various provisions on both assessment criteria. Thereafter, by identifying the problematic substances in each of the three categories identified (see section 4), the legal framework has to be described. By starting from the chosen problematic substances to be researched it is assumed that the different stakeholders are committed to participate and to strive for compliance.

Consequently, it is much easier to assess which approach leads to a more legitimate and effective way of governing and therefore a more solid evidence-based mode of governance can be chosen. Semi-structured interviews with stakeholders have to be carried out to provide an answer to the question of how actual participation and striving for compliance are completed in practice. Only stakeholders known to the authorities will be interviewed. Clearly, the risk of the usual suspects exists,<sup>73</sup> although this can be covered by taking into account whether every principal stakeholder is represented. The main stakeholders are the public interest (in this research project, sustainable water management) of citizens, agriculture, nature, industries and tourism. Every stakeholder identified in advance can be asked whether, in his opinion, there are other stakeholders missing.

Despite the supposed advantages of taking a governance approach focusing on participation, there are some indications that it has not led to the improvement of water quality, or at least not to effective compliance of the norms set or the achievement of goals.<sup>74</sup> Part of the author's research will be to assess the norms actually set in the different Member States and the water quality actually achieved with regard to the substances chosen.<sup>75</sup> Hopefully, the current legal framework and its application in practice will be sufficient to contribute to a legitimate and effective water quality management.

71 E M H Hirsch Ballin 'Reflections on co-actorship in the development of European law-making' in E M H Hirsch Ballin, L A J Senden *Co-actorship in the Development of European Law-making* (TMC Asser Press 2004) 1–23 at 12.

72 In line with the criteria set by Uitenboogaart and others (n 58) 28 ff, a RBD in the UK, respectively the Netherlands could be representative case studies.

73 M Lee, C Abbot 'The usual suspects? Public participation under the Aarhus Convention' (2003) 66(1) *The Modern Law Review* 80–108.

74 For example see S Wuijts, J F M Versteegh *Bescherming drinkwaterbronnen in het nationaal beleid (Protection of Drinking Water Sources in National Policy)* (RIVM 2013); RIWA-Maas *Jaarrapport 2011, 2012 and 2013*; Howarth (n 9). For maps and reports on the development of water quality in the EU, based upon the WISE WFD database see <http://www.eea.europa.eu/data-and-maps/>. With regard to the legitimacy and effectiveness of policies on fresh water supply in the Netherlands see E J H Plambeck *Legitimiteit en effectiviteit in het Nederlandse zoetwaterbeleid: het stakeholders' perspectief. De governance benadering getoetst (Legitimacy and effectiveness in Dutch fresh water supply policy: the stakeholders' perspective: the governance approach evaluated)* (Masters thesis Utrecht 2012).

75 Although a slightly different assessment framework is used, see Plambeck (n 74) who, based upon interviews with stakeholders, provided insights in the actual situation concerning participation and compliance with regard to fresh water supply policies in the Netherlands, which can be transferred to water quality policy.