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PRIVATE CLIMATE ORDERING AND EU'S BIOFUEL GOVERNANCE

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ABSTRACT

The paper examines the role of the private actors in the implementation of the sustainability criteria set in the EU Renewable Energy Directive. The emerging relevance of non-state, private actors in the climate governance domain illustrates the complex nexus between traditional actors and *new governance approach* including new actors and mechanisms. The emphasis in this paper is on the verification of compliance through voluntary certification schemes through which Member States can enforce their responsibility of requiring economic operators to show compliance with the sustainability criteria. The paper makes an effort to analyse the role and function private actors, as well as the concept of certification in the context of environmental governance. It is necessary to challenge the newness of the approach chosen, and make an effort to systemize the roles of the different actors participating in the fulfillment of the directive's legally binding objectives.

INTRODUCTION

Climate change has urged legal scholars to rethink the approach towards the relationship between traditional regulation and *climate governance*. The complex nature of the overarching challenge of climate change requires multiple regulatory frameworks to function on different dimensions of governance. This paper presumes that climate change comes with such an inherent complexity that it cannot be successfully tackled only with traditional approaches. The "old" system where national governments acted as the sole and principal actor imposing formally binding regulation has outlived

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its time – especially in the European context, but also globally. In general, the *modern environmental governance* domain applies governance mechanisms in multidimensional regulatory space. “Governance” involves not just national governments, supranational and international organizations, but also variety of *non-state and private actors* as well as range of *new governance mechanisms* that come along with this nexus of new stakeholders.²

Although the traditional regulatory authority with their regulatory practices is still in place and, of course, governance requires also government. However, new actors and new mechanisms have emerged to complement traditional approaches; and the shift toward governance is taking place. In relation to this shift, we are only now started to set the parameters for the new space we are entering. The meaning and scope of the very concept governance is yet to be clarified.³ It seems that the concept of governance has been taking a full advantage of its loosely defined status; lacking the elements for legal categorization the concept has been used as a catchphrase in all conscience. Climate governance, environmental governance or European environmental governance all share the similar characteristics, but the theory and the methodology are to be defined. Thus, scholarly discussion and debate are required to define the fundamental elements of climate governance.

This paper aims to contribute to this discussion. However, this paper also acknowledges the challenges described above relating to the development of the *governance approach* as such and therefore chooses a more narrow approach. The paper makes an effort to analyse one of the particular features that could be placed within the framework of evolving climate governance, namely the role of the private actors in the implementation of European Union (EU) Renewable Energy Directive’s⁴ legally binding sustainability criteria for biofuels and bioliquids, set in the Article 17 of the said directive. The special emphasis in this paper is on the voluntary certification schemes. These schemes are non-state compliance and control systems certifying sustainability of biofuels and are a central implementation mechanism for the Renewable Energy Directive.

² J. Peel, L. Godden and R.J. Keenan, ‘Climate Change in an Era of Multi-Level Governance’, 1:2 *Transnational Environmental Law* (2012), 245, at 248–251. J. Scott, ‘The Multi-Level Governance of Climate Change’, in: P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, 2011), 805, at 834. I. Rosen-Zvi, ‘Climate Change Governance: Mapping the Terrain’, 2 *Carbon and Climate Law Review* (2012), 234, at 235.

³ F. Biermann and P. Pattberg, Preface, in: F. Biermann and P. Pattberg (eds.), *Global Environmental Governance Reconsidered* (MIT Press Cambridge 2012), at p. 1. D. Curtin and I. Dekker, ‘Governance as a Legal Concept within the European Union: Purpose and Principles’, 4 *International Law Forum du Droit International* (2002), 134, at 134.

⁴ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, [2009] OJ L140/16.

Involving the private sector into the implementation of an EU directive adds in certain dynamics as well as definitely innovation, but also makes the implementation framework more complex. Following this introductory section, the second section of the paper systemizes the basic aspects related to the verification of compliance through voluntary certification schemes; how do the private actors participate, and what are their roles and functions in implementing the European Union Renewable Energy Directive's sustainability criteria. The third section discusses the roles of the European Commission (the Commission) as well as the roles and functions of the Member States in this context. The fourth section aims to conceptualize the dispositions presented in the paper. The fifth section follows to discuss the relevance of the inclusion of the private actors; what are the advantages arising from the inclusion of private actors to the implementation framework and also, what are the risks attached thereto? The new governance approach that this paper is hoping to experiment is yet to be fully defined. What is interesting, is the regulatory premise of this approach, and furthermore, what is the approach that serves the European climate governance appropriately.

In addition to the views presented already, this paper would also like to call readers' attention to the more focused theoretical and methodological aspects of the (modern) European governance approach. This approach takes a perspective outside the national state and accepts wider range of actors and regulatory mechanisms than an approach based on formal legal acts imposed through the traditional institutional system. However, the governance approach throws us with a methodological challenge – a challenge of how to actually manage the yet undefined, diverse view of state authority and its exercise.⁵ Particularly in EU legal scholarship, the research on new environmental governance has been rather active, and scholars are also interested of what the concept as such could mean for a European legal method.⁶ If we would deconstruct governance, what elements would we be able to distinguish? Furthermore, what are the research interests that this approach serves the best? What are the risks involved?

ROLE OF PRIVATE ACTORS

The lead objective of the Renewable Energy Directive is to increase in the overall share of renewable energy to 20% of the EU's gross final consumption of energy by 2020. In addition, the

⁵ E. Fisher *et al.*, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', 21:2 *Journal of Environmental Law* (2009), 213, at 235.

⁶ C. Möllers, 'European Governance – meaning and value of a concept', 43:2 *Common Market Law Review* (2006), 313, at 314. R. Cryer *et al.*, *Research Methodologies in EU and International Law* (Hart Publishing Ltd., 2012), at 43. B. Eberlein and D. Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 42:1 *Journal of Common Market Studies* (2004), 121, at 122.

directive sets a fixed target for renewable energy in transport to 10% by 2020. These requirements are enacted in the Article 3 of the directive. *Transport biofuels*⁷ play a central role in the attainment of these ambitious objectives for the introduction of renewable energies in the EU. To say the least, biofuels have been a focal topic both for the EU's internal climate, energy and environmental policies as well as for the European biofuels industry.⁸

As biofuels come with inherent uncertainty as to their full greenhouse gas (GHG) emission reduction capacity, as well as to their environmental, social and other direct and indirect impacts,⁹ a set of sustainability criteria were introduced through the Renewable Energy Directive to ensure the sustainable performance of the biofuels traded in the EU. The sustainability criteria, set forth in the Article 17 of the Renewable Energy Directive, consist of set targets for the reduction of GHG emissions, of requirement that biofuels should not be made from raw material obtained from land with high biodiversity value (such as primary forest) or from land with high carbon stock (such as wetlands or peatlands). In addition, the article also requires particular agro-environmental practices to be ensured in the biofuels cultivation. The Renewable Energy Directive's sustainability criteria are fully harmonised, and thus Member States are not allowed to set additional criteria of their own for the same purposes as those of the Renewable Energy Directive (Article 17 [8]).¹⁰ The sustainability criteria are however failing to facilitate the attainment of the ultimate objective of reducing GHG emissions, and the criteria is to be revised.¹¹

According to the Article 18 of the Renewable Energy Directive, Member States are to require that the economic operators show that the sustainability criteria have been met when the biofuels are to be calculated towards the targets set in the Renewable Energy Directive (Article 17 [1]). Thus, companies importing or producing biofuels have to demonstrate that their biofuels are produced in a sustainable manner. Furthermore, the said article also enables three distinct methods (a national system, voluntary certification schemes, and international agreements) for the compliance

⁷ The term "biofuel" refers to liquid or gaseous fuel for transport manufactured from biomass. Biomass is the biodegradable fraction of products, waste, and residues of biological origin from agriculture, forestry, and related industries.

⁸ EurActiv news on 18.10.2012, "EU calls time on first-generation biofuels", found at: <http://www.euractiv.com/climate-environment/eu-signals-generation-biofuels-news-515496> (30.11.2012).

⁹ See further S. Romppanen, 'Regulating Better Biofuels for the European Union', 21 *European Energy and Environmental Law Review* (2012), 12, at 125–126.

¹⁰ The criteria were adopted under Article 114 (formerly Article 95) of the Treaty on the Functioning of the European Union (TFEU), [2010] OJ C83/01. However, the Renewable Energy Directive actually has a dual objective (articles 193 –formerly Article 175 – and 114 together).

¹¹ Proposal for a directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources, COM(2012) 595 final, at 2.

framework for the sustainability criteria. The purpose of the verification of compliance is to ensure that the standards that have been put in place have a concrete impact on the sustainability of the biofuels in the marketplace.

Economic operators can show compliance by using a voluntary scheme that the Commission has recognised for the purpose (Article 18 [4] second paragraph, Article 18 [7]). The voluntary certification schemes are privately operated international bodies bringing together farmers, companies, non-governmental organizations, experts, governments, and inter-governmental agencies concerned with ensuring the sustainability of biofuels production and processing. The biofuels' entire production and supply chain has to be sustainable.¹² To this end, the sustainability of biofuels needs to be checked by Member States or through voluntary schemes which have been approved by the Commission. At the time of writing this paper, the Commission has recognized 13 schemes for the purposes of the Renewable Energy Directive.¹³ A certification scheme can cover all of the sustainability criteria or cover the criteria only partly, and a general rule, schemes are recognised for, at maximum, five years.¹⁴

The voluntary certification schemes are expected to play a prominent role as a verification method in the realm of sustainability criteria.¹⁵ However, the Renewable Energy Directive nor the two communications¹⁶ clarify the roles and functions of the relevant private actors. Firstly, the renewable Energy Directive's provisions on the verification of compliance with the sustainability criteria are framed on a rather general level. Secondly, the communication on voluntary schemes does set out an assessment and recognition process¹⁷ where the Commission elaborates certain requirements, although indirectly, for the certification schemes and gives few examples of ways of showing verifiers' compliance with assessment requirements.¹⁸ However, these few characteristics presented in the communication are far from satisfactory as to clarifying the role and functions of the private actors involved in the implementation of the Renewable Energy Directive. This paper is

¹² The so called *mass balance system*. See Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability scheme [2010] OJ C160/01, at 5.

¹³ See a list of the recognised voluntary certification schemes found at: <http://ec.europa.eu/energy/renewables/biofuels/sustainability_schemes_en.htm> (29.11.2012).

¹⁴ Communication on voluntary schemes, n. 12 above, at 2.

¹⁵ Preamble Recital 79 of the Renewable Energy Directive.

¹⁶ Communication on voluntary schemes, n. 12 above. Communication from the Commission on the practical implementation of the EU biofuels and bioliquids sustainability scheme and on counting rules for biofuels [2010] C160/01.

¹⁷ Communication on voluntary schemes, n. 12 above, at 2.

¹⁸ *Ibid.*, at 3–5.

particularly of this opinion, because the certification schemes are likely to be very central method of showing compliance.

According to Article 18, economic operators have three methods at their disposal for showing Member States that the sustainability criteria have been met. It is mandatory for all Member States to provide for a *national system* that implements the requirements set in the Renewable Energy Directive for the verification of compliance. The economic operators must provide the relevant national authority with data in compliance with the requirements that the Member State has set within the national system. Article 18 (3) lays down an obligation for the Member States to require that economic operators arrange for an adequate standard of independent auditing. Auditing verifies that the systems used by economic operators are accurate, reliable, and protected against fraud. These national systems are already in place in several Member States, and after quick look through the few national systems, the national sustainability systems seem to have chosen a variety of approaches.¹⁹

The legal basis for the sustainability criteria is Article 114 (formerly Article 95) of TFEU. The Commission's rationale for the choice of the legal basis is that the Renewable Energy Directive aims for *complete harmonisation* of biofuel sustainability criteria in order to ensure that no criteria adopted individually by Member States may constitute an obstacle to trade between Member States.²⁰ Furthermore, the Renewable Energy Directive sees that the chosen legal basis also facilitates trade between Member States.²¹ According to Article 18 (4)'s second paragraph, "[t]he Commission may decide that voluntary national or international schemes setting standards for the production of biomass products contain accurate data for the purposes of Article 17 (2) or demonstrate that consignments of biofuel comply with the sustainability criteria set out in Article 17 (3) to (5)." Thus biofuels verified through the voluntary certification schemes recognized by the Commission are considered to be in compliance with the sustainability criteria, and the economic operator holding a certificate from these recognized certification schemes can show compliance with the sustainability criteria regardless of the Member State. However, the Renewable Energy Directive does not clarify whether the biofuels verified through a national system are to be *mutually*

¹⁹ See, for example, Swedish lag (2010:598) om hållbarhetskriterier för biodrivmedel och flytande biobränslen (Swedish act on sustainability criteria for biofuels and bioliquids) and Swedish Energy Agency (Energimyndigheten) found at: < <http://www.energimyndigheten.se/en/Sustainability/Sustainability-criteria-for-biofuels-and-bioliquids/>> (30.11.2012) and UK Renewable Transport Fuel Obligation (UK RTFO), The Renewable Transport Fuel Obligations Order 2007 No. 3072, found at: < <https://www.gov.uk/renewable-transport-fuels-obligation>> (30.11.2012).

²⁰ Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, COM(2008) 30 final.

²¹ Preamble Recital 94 of the Renewable Energy Directive.

recognized by other Member States. Thus, the economic operators most likely would opt for the system of voluntary certification schemes recognized by the Commission; a system that provides the operator with “EU wide” certification. Also, the variation between the practices of different national systems makes the EU system probably more appealing to economic operators.

The private sector participates in the implementation of the Renewable Energy through the mechanism of verification of compliance through the voluntary certification schemes. As the previous chapter showed, the voluntary certification schemes would potentially be very central for the attainment of EU biofuel sustainability objectives. The legislative and implementation framework does not however say much on the roles and functions of the private actors involved.

[Continue: Who are the private actors on the member state level; verifiers within national system. What are their functions, and how and where their roles and tasks are regulated?]

ROLE OF THE PUBLIC AUTHORITY

Public authority refers here to both Commission and the Member State; to Commission as the official institution of the EU imposing the legislative harmonisation measure on the Member States and Member States as the obliged authority to incorporate the union legislative measures into national judicial systems.

In the context of voluntary certification schemes, it is the task of the Commission to recognize the voluntary certification schemes through which economic operators can certify sustainable biofuels. As *Lin* notes, a careful process of benchmarking and evaluation performed before a certification scheme is recognised as the qualifying standard could serve an effective *gate-keeping function* and ensure that only certification schemes that are in line with the Commission’s requirements would be recognised. However, this depends upon *how stringent* the Commission and the Committee are in their selection process.²² However, neither the Renewable Energy Directive nor the two communications provide adequate information on the actual process of recognition utilised by the Commission: the process wherein the standards introduced in the scheme are benchmarked against the sustainability criteria. Thus, if we are unable to scrutinise the process by which voluntary certification schemes are assessed or what the standards are through which the schemes are

²² J. Lin, ‘The environmental regulation of biofuels: limits of the meta-standard approach’, 1 *Carbon & Climate Law Review* (2011), 34, at 41.

assessed, we are also unable to evaluate the “stringency” of the evaluation process. Thus we are also left with uncertainty as to the performance of the schemes passing the assessment procedure.²³

The main functions of the Member States are to set in place the national system to implement the requirements of the Renewable Energy Directive. The national systems will legislate on the functions of the public authority.

[Continue: guidelines within national systems for economic operators and verifiers, CEN/TC 383 – Sustainably produced biomass for energy applications]

CONCEPTUALIZATION: WHERE DO THE VOLUNTARY BIOFUEL CERTIFICATION SCHEMES FIT IN THE CLIMATE GOVERNANCE DOMAIN?

Voluntary certification schemes are an example of the various private regulatory mechanisms that have gained ground within environmental governance, and more recently also on the European climate governance domain.²⁴ The aim of this section is to make an effort to reflect the aspects of the voluntary certification systems against the already established modes of thought in order to conceptualize their relevance.

The section starts by clarifying the two underlying concepts, regulation and governance, for the purposes of this paper. Firstly, this paper understands regulation as retaining, in addition to the traditional “command and control” regulation, also the hybrid forms of regulation such as combinations of hard and soft law regulatory mechanisms, such as for example co-regulation that is discussed later in this paper.²⁵ Secondly, governance is a much wider concept holding not only the definition of regulation and traditional state institutions, but also a range of non-state institutions and actors. Thus, for the purposes of this paper, the concept governance also includes the private non-state actors such as the voluntary certification schemes.²⁶ These actors take action for

²³ See further discussion on the assessment procedure from S. Romppanen, n. 31 above.

²⁴ O. Perez, ‘Between Soft Law and Greenwash: the Compliance Dynamic of Civil Forms of Environmental Regulation’, in: D. Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Ltd. 2011), 347, at 347. K. Bäckstrand, ‘Accountability of Networked Climate Governance: The Rise of Transnational Climate Partnerships’, 8:3 *Global Environmental Politics* (2008), 74, at 77.

²⁵ N. Gunningham, ‘Environment Law, Regulation and Governance: Shifting Architectures’, 21:2 *Journal of Environmental Law* (2009), 179, at 181 and 206–207. See also, N. Gunningham, ‘Enforcing Environmental Regulation’, 23:3 *Journal of Environmental Law* (2011), 169, at 172–173.

²⁶ More on the concept of governance, see F. Biermann and P. Pattberg, n. 3 above, at 1–3. See also D. Curtin and I. Dekker, n. 3 above, at 139.

governance purposes; they take part to the setting and implementation of norms and rules for the provision of goods and services that are considered as binding by members of the community.²⁷

The increased participation of non-state actors has given impetus to new modes of *norm-setting* and *norm-implementing* mechanisms.²⁸ Implementing the EU Renewable Energy Directive's sustainability criteria through the mechanisms set up by private actors is a new type of governance construct. It deploys both public actors as the "norm-setters" as well as private actors as the "norm-implementers". Demonstrating compliance with the Renewable Energy Directive's sustainability criteria through voluntary certification schemes exploits a system of *meta-standard approach*.²⁹ In the practical context of the Renewable Energy Directive, the sustainability criteria is the meta-standard that is used as a *benchmark* against which the already existing standards of the voluntary certification schemes are evaluated. For biofuels, the benchmarking takes place through an *assessment procedure* carried out by the Commission when it is recognising schemes for the purposes of Article 18 (4). The compliance with the sustainability criteria is achieved through standards in the voluntary certification schemes instead of through directly complying with the norms set in the directive.³⁰ Of course, for the sustainability criteria to be effectively implemented, they need to be consistently and precisely "transposed" through the voluntary certification schemes. The function of the benchmark is to ensure that the standard applied provides sufficient coverage of the sustainability criteria; thus the benchmarking as such is a centrally important step in the fulfilment of the biofuels sustainability.³¹

Within the biofuels "meta-standard regulatory architecture", as described by *Lin*, the Commission has outsourced verification responsibilities to certification schemes that need to qualify themselves through assuring that their standards meet the meta-standards set in the directive.³² "Non-hierarchical" forms of regulation could take place in the "shadow of hierarchy", meaning that a given regulatory input from authoritative decision-making by a traditional (here, EU) institution is

²⁷ T. Börzel and T. Risse, 'Public-Private Partnerships: Effective and Legitimate Tools of International Governance?', in: E. Grande and L. Pauly (eds.), *Complex Sovereignty: On the Reconstitution of Political Authority in the 21st Century* (University of Toronto Press 2005), 195, at 200–201.

²⁸ F. Biermann and P. Pattberg, n. 3 above, at 9.

²⁹ For more on the meta-standard approach in the context of the Renewable Energy Directive and biofuels certification, see J. Lin, n. 22 above, at 34.

³⁰ T. Bartley, 'Certification as mode of social regulation', in: D. Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Ltd. 2011), 441, at 442.

³¹ S. Romppanen, 'The EU's biofuels: Certified as sustainable?', *Journal of Renewable Energy Law and Policy* (2012, upcoming).

³² J. Lin, 'Governing Biofuels: A Principal-Agent Analysis of the European Union Biofuels Certification regime and the Clean Development Mechanism', *24:1 Journal of Environmental Law* (2011), 43, at 57.

an inseparable part of the presumed outcome of the interaction between public and private actors.³³ Thus, certification as a type of hybrid public/private regulatory mechanism requires *delegation of public* authority to private actors.³⁴ As such, delegation could also raise the status of non-state actors to equal and legitimate actors, complementing the action taken by the public actor.

In EU, the use of alternative instruments to complement traditional regulation has increased over the last decade.³⁵ The alternatives include for example benchmarking and co-regulation. In the following, the paper analyses whether co-regulation as a mode of governance can be applied to conceptualize the features of the implementation mechanism set forth in the Renewable Energy Directive. Are voluntary certification schemes a mode of co-regulation?

The European governance white paper defines co-regulation as follows: “[C]o-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise.”³⁶ The interinstitutional agreement on better law-making continues that co-regulation refers to a “mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).”³⁷ Co-regulation is to achieve wider ownership of the policy in question by those who are actually affected by the rules to be implemented and to achieve better compliance. The mechanism of co-regulation can be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, and so also to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned.³⁸

In the context of EU biofuels, the legislative framework is the Renewable Energy Directive’s sustainability criteria. The definitions of co-regulation explicitly require that the basis for the co-regulation is a legislative act given by the union legislative institution. Furthermore, also the discussion on the meta-standard approach and delegation of public power to private actors seem to

³³ T. Börzel and T. Risse, n. 14 above, at 200.

³⁴ C. Donnelly, *Delegation of Governmental Power to Private Parties. A Comparative Perspective* (Oxford University Press 2007), at 3. J. Lin, n. 18 above, at 50.

³⁵ European Governance, White Paper, COM(2001) 428 final. Communication from the Commission, Action plan “Simplifying and improving the regulatory environment”, COM(2002) 278 final. European Parliament, Council, Commission Interinstitutional agreement on better law-making [2003] OJ C321/01.

³⁶ European Governance, White Paper, n. 23 above, at 21.

³⁷ Commission Interinstitutional agreement on better law-making, n. 23 above, 18. paragraph.

³⁸ *Ibid.*

endorse this view. Meta-standard approach is about placing responsibility on the regulates themselves to submit their plans to the regulator for approval; the approval here referring to the assessment procedure carried out by the Commission to recognize voluntary certification schemes for the purposes of the Renewable Energy Directive. Co-regulation also involves an aspect of delegation of public authority to a private actor; “public authority” here being either the Commission or the Member State (within the national sustainability systems) and the “private actor” referring to the certification schemes.

In the context of EU, co-regulation is not so much about “regulating together”; the private actors do not set the legally applicable criteria and the private actors do not, in this sense, act as a “norm-setters”. As it is also in relation to the voluntary certification schemes, co-regulation is to be regarded as an implementing mechanism where the action taken by the private actors actually presuppose the prior adoption of an EU legislative act.³⁹ Voluntary certification schemes are thus a norm-implementing mechanism to the Renewable Energy Directive, harnessed to ensure greater legitimacy and effectiveness in the attainment of the legally binding objectives set in the directive. Furthermore, voluntary certification schemes, as one of the three alternative implementation mechanisms for the sustainability criteria *complement* the implementation framework set up to verify sustainable biofuels.

Lastly to note however, *environmental governance regimes*, as Fisher *et al.* note, are faced with “an embarrassment of riches when it comes to scholarly methodologies”.⁴⁰ Thus the multidimensional continuously evolving space of *governance*, seems to offer a range of opportunities for discussion over the conceptions that are best suited to systemize the approach. Möllers notes that we really cannot call something new or old, when everything is in flux and thus both new and old.⁴¹ This idea supports also the views presented in this paper; certification as such is not a new phenomena, neither is the use of the meta-standard approach, delegating public authority nor co-regulation. However, the phenomena that we are regulating, renewable energy and sustainable use of biofuels to mitigate dangerous climate change yet constitutes a new type of challenge and brings out the need for new mechanisms. Thus we are now reflecting the traditional mechanisms against new phenomena, to create an appropriate approach. Certification as a mode of co-regulation, and as a

³⁹ See also L. Senden, ‘Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?’, 9:1 *Electronic Journal of Comparative Law* (2005), at 13.

⁴⁰ E. Fisher *et al.*, n. 5 above, at 237.

⁴¹ C. Möllers, n. 6 above, at 313.

regulatory form could also receive support from alternative approaches – such as “regulation by information”.⁴²

THE PROS & CONS: CONCLUSION

Implementation of a legally binding EU instrument takes place based on the interaction between public and private actors. Thus, the greatest advantage from the inclusion of the private actors comes with the definition of co-regulation; through voluntary certification

There are a range of innovative ways to involve private sector/private actors in the efforts to mitigate climate change already available. In order to tackle the challenge of climate change we need to include participation from wide range of actors – including private actors. Inclusion of the private sector is justified not only because they do play a major role as emitters of GHG emissions, but also because they possess resources, such as know-how and funds that are appealing to the public sector. Of course, the private sector can have different kind of roles – participating in implementation is just one role the private sector could play.⁴³

The underlying motivation for the EU to widen its regulatory selection to the alternative mechanisms such as co-regulation, is increasing *effectiveness* and *legitimacy* of EU actions. Co-regulation brings public authority and private actors together in particular stages of regulation process.⁴⁴ However, the objective and functions of co-regulation should be set out in detail, if EU aspires to strengthen the legitimacy of its climate governance in the context of renewable energy policies and sustainable biofuels.⁴⁵

Also caution should be exercised, since the new mechanisms are not effective by definition. They could also be used as to create an illusion of progress as to attaining the objectives. “Greenwash” “Smokescreen”

The features of EU environmental governance have diversified over last decade or so, and today we could also see the EU as setting the playground and the safe boundaries for the subjects of

⁴² T. Bartley, n. 18 above, at 442. See also discussion on “EU’s evolving regulatory space” from M. Groenleer, ‘Regulatory Governance in the European Union: the political struggle over committees, agencies and networks’, in: D. Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar Publishing Ltd. 2011), 548, at

⁴³ See also K. Kulovesi, ‘The Private Sector and the Implementation of the Kyoto Protocol: Experiences, Challenges and Prospects’, 16:2 *Review of European Community & International Environmental Law* (2007), 145, at 157.

⁴⁴ P. Verbruggen, ‘Does Co-Regulation Strengthen EU Legitimacy?’, 15:4 *European Law Journal* (2009), 425, at 425.

⁴⁵ See also P. Verbruggen, n. 30 above, at 426.

governance to choose from. This type of “broad harmonisation” leaves more room for “peculiarities” in relation to how these objectives are to be implemented and applied.⁴⁶ In addition, it opens the door for more collaborative governance. Voluntary biofuels certification schemes are usually the result of collaborative initiatives among nongovernmental organizations (NGOs), businesses, government and intergovernmental organizations.

Are the voluntary certification systems an effective and legitimate complement to climate governance?

Do private actors necessarily possess legitimacy?

What are the roles and functions of the private sector; is their action going to be based solely on guidelines + other forms of non-legally binding guidance?

Why are the private actors and voluntary measures, these regulatory/governance hybrids becoming more and more relevant for (global) climate governance? What are the incentives driving this development?

Need for new legitimacy structures?

One interesting aspect that requires further research is the meaning and scope of the introduction of these new actors and mechanisms for the mechanisms of for legitimacy. For example, how to ascertain the fulfillment of the common principles of constitutional state (such as legal certainty, and legal predictability)? Or is it possible that the participation of the private actors causes legal problems in the context of general principles of European administrative law? Thus, what are the “legitimacy options” for these new forms of climate governance?

⁴⁶ These two definitions are originally adopted from J. Jans conference presentation given at the Third Annual Colloquium on Environmental Scholarship, Vermont Law School, Vermont, USA on October 12 of 2012.