

Manual of European Environmental Policy

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This section is the text of the Manual as published in 2012. It is therefore important to note the following:

- The contents have not been updated since 2012 and no guarantee is given of the accuracy of the contents given potential subsequent developments.
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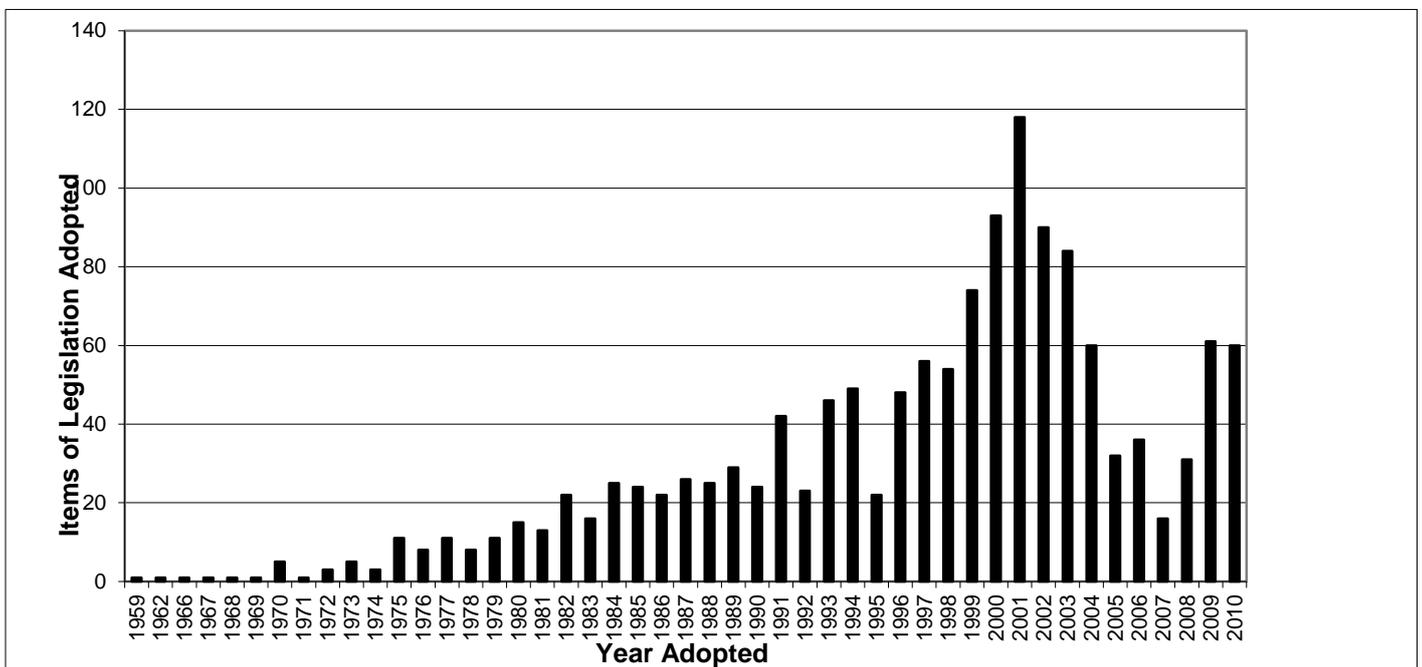
Environmental policy instruments

While this Manual of EU environmental policy is largely focused on EU legislation, it is important to view the law in the context of the full range of policy instruments that the EU has on offer to pursue its Treaty objectives, including those on the environment. Many of these policy instruments depart significantly from the traditional ‘Community Method’ of Regulation and there has been a recent rise in interest (especially among academics) in the so-called ‘new modes of governance’ at the EU and at a national level¹. Where these ‘New Environmental Policy Instruments’ are in place they are also discussed in the Manual, as are strategic ‘soft’ policy instruments which do not involve legislation, for example the policies on [water scarcity and droughts](#).

Despite the emphasis on the use of ‘New Modes of Governance’ indicated in the Commission's White Paper on Governance ([COM\(2001\)428](#)), the Community is still first and foremost a legislator since even the non-regulatory instruments described below are often embodied in some form of legislation. Figure 1 illustrates the sheer volume of legislation which has been adopted by the EU in this field.

This section examines the range of different instruments available to the EU to pursue its environmental policy, including the main focus of this manual, legislation.

Figure 1. Number of items of EU environmental and related legislation adopted each year 1959–2010 as included in the Manual



Types of EU legislation

There are several types of Community ‘legislation’ set out in Article 288 TFEU. They are:

- Regulations.
- Directives.
- Decisions.
- Recommendations.
- Opinions.

The last two have no binding force and should not properly be regarded as legislative instruments. Indeed, the Treaty does not use the word legislation.

A **Regulation** is directly applicable law in the Member States and is mostly used for rather precise purposes such as financial matters and the day-to-day management of the Common Agricultural Policy. It is increasingly also being used for environmental matters. A **Directive** is binding as to the results to be achieved, but leaves to the Member States the choice of form and methods. It is therefore the most appropriate instrument for more general purposes particularly where some flexibility is required to accommodate existing national procedures and, for this reason, is the instrument most commonly used for environmental matters. A **Decision** is binding in its entirety upon those to whom it is addressed. It has been used in the environmental field in connection with international Conventions, with certain procedural matters as well as in cases where secondary legislation delegates to the Commission the power to make legally binding decisions in individual cases, such as with respect to the placing on the market of products containing GMOs (see the section on [Deliberate Use](#)).

With the development by the European Court of Justice (ECJ) of the doctrine of ‘direct effect’ of Directives, provisions of Directives, even where they have not or not accurately been transposed into national law, may have legal effects in the Member States. (This is discussed in section on [EU Institutions](#))

New modes of governance

Traditionally, the EU has approached governance through legislation². However, the Commission and the European Council have acknowledged concerns from the general public over the EU's effectiveness and legitimacy in delivering policies. Therefore, the Commission identified the reform of European governance as one of its strategic objectives in early 2000. The resulting White Paper on Governance (COM(2001)428) proposed a number of measures to revamp and broaden the EU's approach to policy. It was suggested that ‘legislation is often only part of a broader solution combining formal rules with other non-binding tools’ and that legislation should only be considered in cases with a need for uniform application and legal certainty across the Union. As well as changes to the legislative approach itself, there are a number of different ‘non-binding’ tools that the Commission can choose from in search of a broader solution, especially for environmental policy. These include the Open Method of Coordination (OMC); Market-Based Instruments (MBIs); Voluntary Agreements; information tools such as eco-labels; and Environmental Management Systems (EMSs). Both the Fifth and the [Sixth Environmental Action Programmes](#) called for the broadening of the range of environmental policy instruments and the Sixth Environmental Action Programmes placed particular emphasis on the use of MBIs.

Changes in legislative approach

The White Paper suggests that improving the quality, effectiveness and simplicity of regulatory acts is necessary. Highlighting the need for greater flexibility, it is stated that Regulation should only be considered when there is a need for uniform application and legal certainty across the Union. However, it suggests the more frequent use of 'Framework Directives' because they are 'less heavy-handed, offer greater flexibility as to their implementation, and tend to be agreed more quickly by Council and the European Parliament'. In addition, the Commission also urges for more use to be made of 'primary' legislation limited to essential elements (basic rights and obligations, conditions to implement them), leaving the executive to fill in the technical detail via implementing 'secondary' rules. This concern with simplifying and improving legislation has since been pursued through the publication in 2001 of a Communication on *Simplifying and Improving the Regulatory Environment* ([COM\(2001\)726](#)) as well as a more detailed Action Plan in 2002 ([COM\(2002\)278](#)) for improving the quality and effectiveness of Community legislation. In addition, in the same year the Commission published a document on the *Minimum standards of consultation* ([COM\(2002\)277](#)) with stakeholders as well as a system for integrated impact assessment of all major Commission policy proposals ([COM\(2002\)276](#)) (see section on Environmental Policy Integration).

'Better Regulation' and the Lisbon agenda

Though the Governance White Paper was one of the main drivers behind the EU's 'Better Regulation' agenda, another important driver was the so-called 'Lisbon Strategy'. Launched in March 2000 at the European Council in Lisbon, the Lisbon Strategy aims to make the EU the most competitive, knowledge-based economy in the world by 2010, and introduced a number of new mechanisms for policy development aimed at achieving this. The following year, reflecting the [Treaty commitment](#) to sustainable development, an environmental dimension was added to the Lisbon Strategy via the adoption of the EU [Sustainable Development Strategy](#) by EU leaders at their meeting in Gothenburg in June 2001.

One of the decisions taken at Lisbon was that the EU's institutions and its Member States should 'set out by 2001 a strategy for further coordinated action to simplify the regulatory environment, including the performance of public administration, at both national and Community levels'. This led to the development of a Communication and Action Plan for simplifying and improving the regulatory environment, as noted above, and the related initiatives on consultation and impact assessment. At this stage, the 'Better Regulation' agenda was focused on the wider considerations highlighted by the European Governance White Paper. Thus, the Commission's Action Plan and its accompanying Communications together made proposals in relation to:

- Improving transparency and public consultation.
- Better integration between policy sectors through *ex ante* impact assessment.
- Improving the transposition and implementation of EU measures in the Member States.
- The use of alternative policy instruments.
- The need to simplify and clarify the corpus of EU legislation (the *acquis communautaire*).

Moreover, work within the Commission was also proceeding on improving the monitoring, reporting and *ex post* evaluation of the actual impacts of EU legislation on the ground – one of the issues highlighted by the Mandelkern Group on Better Regulation (a high-level group of Member State experts which reported in 2001). This broad approach to improving the effectiveness, efficiency and transparency of EU measures was largely un-contentious.

A change in focus came in 2005, however, with the relaunch of the Lisbon Strategy. The aim of what had previously been referred to as ‘the Lisbon Strategy for economic, social and environmental renewal’ became simply ‘Working together for growth and jobs’ ([COM\(2005\)24](#)). As the focus of Lisbon narrowed, so too did the definition of ‘Better Regulation’. Rather than providing a strategic framework for a whole range of significant actions, such as transparency and implementation, it became a key weapon in the battle to secure the growth and jobs that lie at the heart of the EU’s revised Lisbon Strategy. A Commission Communication in March 2005 ([COM\(2005\)97](#)) – spoke of ‘injecting more commitment and urgency into striking the right balance between the policy agenda and the economic costs of regulation’.

The new meaning of Better Regulation was re-emphasized in both the ‘Integrated Guidelines on Growth and Jobs’, which guided the development of National Reform Programmes in the Member States, and in the Community level counterpart – the Community Lisbon Programme ([COM\(2005\)330](#)). Both placed Better Regulation under the objective of ‘Making the EU an attractive place to invest and work’. Improving the regulatory environment was seen as one of the two most important policy levers (the other being completion of the internal market) to attract more inward investment, generate employment and accelerate growth. Improving legislation, it is argued, would provide the right incentives for business, cut ‘unnecessary costs’ and remove obstacles to adaptation and innovation. A number of specific key initiatives have followed, including, *inter alia*:

- The launch of an on-going process to simplify existing legislation ([COM\(2005\)535](#)), including as a first step almost 300 areas of legislation over the period 2005–2008. Among these are 18 Directives and six Regulations relating to [waste](#) and a raft of other measures in environment-related areas such as industrial emissions ([IPPC](#), [large combustion plants](#) and [VOCs](#), agriculture, energy, fisheries and maritime transport.
- The withdrawal of number of legislative proposals pending before the Council and European Parliament ([COM\(2005\)462](#)), and a review of the proposals for Regulations on fluorinated gases and the shipment of waste respectively, for further economic analysis (the latter two proposals, however, were not withdrawn and eventually led to the adoption of new legislation).
- Strengthening the scrutiny of proposals under development within the Commission, including the development of a methodology to assess the administrative burden of proposed legislation.
- The creation, in August 2007, of the ‘High Level Group of Independent Stakeholders on Administrative Burdens’ to provide advice on the implementation of the Action Programme for Reducing Administrative Burden in the EU. The Action Programme is based on the costs incurred by businesses in complying with ‘Information Obligations’ in 13 priority areas, including the environment. Information Obligations are legal obligations placed on businesses to provide information on their action or production based on the EU Standard Cost Model (SCM). The EU SCM only focuses on administrative activities that must be undertaken in order to comply with legislation. The aim of the Action Programme is to reduce administrative burdens on

businesses arising from EU legislation by 25 per cent by 2012. The High Level Group very recently published, in September 2009, its intermediate report on achievements and challenges in reducing administrative burdens³. The report estimates that the proposals already put forward by the Commission amount to total savings to businesses of €40 billion/year. In an attempt to raise the profile of cutting administrative burdens for businesses, in 2009, Commission President Barroso announced that the Better Regulation services within the Commission would be transferred to come under his direct authority.

- The creation of a High Level Group on Competitiveness, Energy and Environment, to examine the links between industrial, energy and environmental legislation and advise on measures to ensure the coherence of individual initiatives.
- The creation of a group of ‘high-level national regulatory experts’ to advise on the EU-level simplification strategy and to facilitate the development of Better Regulation measures at both the national and EU level.

The ‘simplification rolling programme’, which was drawn up in 2005, has been updated each year with new initiatives, and progressively extended to all policy areas. At the moment it consists of 185 initiatives, 132 of which have already been adopted by the Commission ([COM\(2009\)17](#))⁴.

In its approach to simplification, the Commission has been moving towards a more integrated process, where the aim is to examine the entire body of legislation that affects a policy area to identify overlaps, gaps, inconsistencies, obsolete measures, and the potential for reducing regulatory burdens. This process began with the second strategic review of Better Regulation ([COM\(2008\)33](#)) in which the Commission made a commitment to complete a comprehensive screening of the acquis by the end of its mandate. This work prepared the ground for simplification activities beyond 2009. It identified some 81 actions that the next Commission could take in future simplification activities.

As far as the withdrawal of proposals which are no longer relevant is concerned, the Commission has carried out an annual exercise since 2005. A total of 128 proposals have been withdrawn, including 20 in 2009.

A series of developments in early 2010 led to further changes in the Better Regulation agenda. Firstly, in March the European Commission published its follow-up to the Lisbon Strategy; the Europe 2020 Strategy ([COM\(2010\)2020](#)). The Strategy introduced the ‘Smart Regulation Principles’, arguing that ‘pressing ahead with the Smart Regulation agenda, including considering the wider use of regulations rather than directives, launching ex-post evaluation of existing legislation, pursuing market monitoring, [and] reducing administrative burdens’ would help tackle the bottlenecks of the single market. Secondly, in April 2010 the Commission launched an [internet consultation](#) open to all stakeholders on smart regulation. The consultation was divided into two sections, the first focusing on ways of improving current legislation and the second on ways of improving new initiatives. This is a similar division to that used under the Better Regulation agenda. The consultation lists three possible ways of improving current legislation:

- Cutting red tape for business.
- Evaluation of all major existing policy instruments, whether expenditure programmes or regulatory measures, on a regular basis.

- Complementing regular ex-post evaluation by more comprehensive action in policy sectors with a complex and fragmented regulatory framework.

In October 2010, the European Commission published its Communication on Smart Regulation ([COM\(2010\)543](#)) based on a public consultation, the [European Auditors' report on Impact Assessment](#) and the [report of the Impact Assessment Board](#). It places emphasis on the importance of the quality of legislation and sets a more balanced approach for measures required to achieve this. The Communication also suggests a better ex-post evaluation of the impacts of existing legislation. To achieve this, the Commission aims to complement the evaluation of individual pieces of legislation with more comprehensive policy evaluations. These 'fitness checks' will assess if the regulatory framework for a policy area is fit for purpose. The Communication also proposes greater co-operation between Member States in developing and evaluating legislation, thus echoing the views of the European Court of Auditors. As part of strengthening the voice of citizens and stakeholders the Commission will increase the public consultation period for new policy proposals to 12 weeks, starting from 2012. A new EUR-Lex portal is also being developed with other EU institutions to improve the electronic access to the full body of EU legislation with Member States being encouraged to link information about transposition to national legislation to it. The Commission will report on progress in implementing the Smart Regulation agenda in the second half of 2012.

Open method of coordination

Arguably, the best example of a new mode of governance is the 'OMC'. The concept originates from the European Employment Strategy as laid down in the Amsterdam Treaty (1997), but it was the Lisbon European Council (March 2000) which coined the expression. The essence of the OMC is not to establish a single common framework, but rather share experience and to encourage the spread of best practice. OMC seeks to initiate an iterative process of mutual learning on the basis of diverse national experiences. Guidelines and timetables for achieving goals at the EU level policies are fixed and sometimes backed up by national action plans. National performance is constantly monitored and evaluated through peer review and benchmarking mechanisms, which act as 'soft-law' catalysts for greater convergence towards European 'best practice'. This clearly contrasts with traditional top-down and command and control type Regulation backed by 'hard-law' sanctions⁵. OMC has been applied more in the economic and social fields, areas with lesser Community legislative competence, than in the environmental field, where there is greater Community competence. However, the Lisbon process, an example of OMC par excellence, has implications for environmental policy in its relationship with the EU's Sustainable Development Strategy and the subsequent inclusion of an environmental dimension in its Spring Review. Another example of the use of OMC, though not necessarily specifically defined in those terms, is the Environmental Technologies Action Plan (ETAP) which attempts to encourage the development and uptake of clean technologies through 'technology platforms'. The experience with OMC is mixed. Some still view OMC as little more than a talking shop with participants lacking the same level of commitment as they would with mandatory measures, while others have seen OMC as a means of learning and addressing issues which could otherwise not be addressed at the EU level for political reasons.

Market-based instruments

MBIs 'affect estimates of costs of alternative actions open to economic agents'⁶. They make greater use of the market to internalize the hidden costs of polluting activities and resource

depletion in a more cost-effective manner. The EEA in a recent report on MBIs in the EU⁷ (to which IEEP was the main contributor) distinguished between five types of instruments:

1. Tradable permits designed to achieve reductions in pollution (such as emissions of CO₂) or the use of resources (such as fish quotas) in the most effective way through the provision of market incentives to trade.
2. Environmental taxes designed to change the prices and thus the behaviour of producers and consumers.
3. Environmental charges that have been designed to cover (in part or in full) the costs of environmental services and abatement measures.
4. Environmental subsidies and incentives that have been designed to stimulate development of new technologies to help create new markets for environmental goods and services, to encourage changes in consumer behaviour through green purchasing schemes.
5. Liability and compensation schemes that aim at ensuring adequate compensation for damage resulting from activities dangerous to the environment and provide for means of prevention and reinstatement.

In general, this type of policy instrument remains underdeveloped by the EU because Member States continue to resist the Commission's attempts to develop competences over matters of tax (the most obviously useful market instrument) mainly for domestic political reasons. This has been facilitated by the continued requirement for unanimous voting in the Council for 'green' taxes. However, rather more use of MBI's has been made at the Member State level especially within Scandinavian countries and the Netherlands, which were early runners on environmental tax reform, but Germany and the United Kingdom have also made progress in the late 1990s. At the EU level, one notable exception to the sparse use of MBIs is the start in 2005 of the EU's Emissions Trading System ([ETS](#)), the largest in the world, for carbon dioxide emissions. It is perhaps too early to evaluate the success of the EU ETS, but there have been reported positive reactions in financial markets. In addition, EU subsidies provided through the Structural and Cohesion Funds (see [Structural Funds and Cohesion Funds](#)) have financed environmental projects which contribute to regional economic development by helping to build the infrastructure for environmental services such as water supply, waste water treatment plants etc. The EU also has an environmental liability scheme instituted by a Directive on environmental liability (see [Environmental Liability](#)).

Voluntary agreements

In an early Communication on Voluntary Agreements ([COM\(96\)561](#)) the Commission adopted the following generic definition: 'agreements between industry and public authorities on the achievement of environmental objectives'. Public voluntary schemes are established by public bodies, which define certain performance criteria and other conditions of membership. Individual companies are free to decide whether or not to join, although the membership criteria are normally agreed in advance, often through a business association or standard setting authority. A more recent Commission Communication on Voluntary Agreements ([COM\(2002\)412](#)), which follows the 'Better Regulation' drive, emphasizes that Voluntary Agreements can be initiated and negotiated between industry or private actors themselves without significant input from the Commission. The best-known examples of environmental agreements at Community level are the agreements of the European, Japanese and Korean carmaker associations on the reduction of CO₂ emissions from passenger cars. These were acknowledged through Commission Recommendations and supplemented by a

Decision of the European Parliament and of the Council establishing a scheme to monitor the average specific emissions of CO₂ from new passenger cars (see section on [CO₂ emissions from vehicles](#)). A further example was seen in the case of [detergents](#), though the agreement ended and further action is being taken forward through a Regulation. However, agreements of this kind depend upon the existence of a cohesive industrial sector comprising few companies, and strong industry associations – conditions which apply in only a limited number of cases.

Eco-labels

Eco-labels mainly rely on moral suasion by providing consumers with more information about the environmental impact of particular products and services⁸. The OECD differentiates between three subtypes: externally verified multi-issue schemes; unverified self-declaratory schemes and single issues schemes. Eco-labels simply provide information to consumers in a standardized manner, allowing them to make more informed purchasing decisions⁹. Widely recognized and supported eco-labels may influence producers in a similar manner to traditional regulatory standards in markets where green consumerism is very strong. However, in markets which are characterized by a low degree of environmental awareness, producers will have much more choice as to whether or not to seek a label. Eco-label schemes have mainly taken off at a national level most notably in Germany and the Nordic Member States, but the EU eco-label scheme established in 1992 has awarded over 800 licenses for several hundred products¹⁰. At the EU level, eco-labels, although in principle a non-legislative voluntary policy tool, have required a legislative framework to ensure their uniform application (see section on [Ecolabelling](#)).

Environmental Management Systems

EMSs such as the EU Eco-management and Audit Scheme ([EMAS](#)) and the international ISO 14001 are designed to encourage industry to behave in a more environmentally responsible manner. Although the precise characteristics of these two systems differ, both require companies to audit the environmental impact of their activities, establish internal management systems to monitor and where possible reduce these impacts, and provide stakeholders with a regular statement of their activities. In exchange, the business is granted an official confirmation (or logo) by a national competent authority (as in the case of EMAS) or the International Standards Organisation (ISO) (as in the case of ISO 14001), which they are entitled to use in their environmental statements. Although participation in both schemes is voluntary, firms are often driven to participate by pressure from their stakeholders, their competitors or other firms in their supply chain. Again, although EMSs in principle are a voluntary non-legislative policy tool, at the EU level, there is a legislative framework to ensure their uniform application.

Although the Commission's White Paper on Governance has expressed an interest in moving towards more flexible policy instruments in the future, this must be viewed as a broadening of approach rather than a rejection of Regulation as a policy instrument. Indeed, an examination of recently adopted legislation, and that currently being considered for adoption, shows that traditional Regulation and use of the primary legal instruments is still the core focus of EU environmental policy. The backbone of EU (environmental) policy remains, and looks likely to remain legislation, which forms the focus of this manual.

References

- 1 Jordan, A, Wurzel, R and Zito, A (2003) Has governance eclipsed government? Patterns of environmental instrument selection and use in eight states and the EU, *CSERGE Working Paper*, EDM 03-15.
- 2 Majone, G (1996) *Regulating Europe*. Routledge, London.
- 3 *Intermediate Report of the High Level Group of Independent Stakeholders on Administrative Burdens-Achievements and Challenges*, Adopted at the meeting of the HLG on 17 September 2009 in Brussels, http://ec.europa.eu/enterprise/policies/better-regulation/files/180909_hlg_ab_intermediate_report_incl_annexes_en.pdf, Accessed 17.09.2009
- 4 For regular updates see also;
http://ec.europa.eu/governance/better_regulation/simplification_en.htm
- 5 Eberlein, B and Kerwer, D (2002) Theorising new modes of European governance, *European Integration Papers*, Vol 6, No 5, <http://eiop.or.at/eiop/texte/2002-005a.htm>, Accessed 20.02.06
- 6 IEEP and Ecologic (2005) *Exploration of Options for the Implementation of the Open Method of Coordination (OMC) for Environmental Policy*. IEEP, Brussels.
- 7 OECD (1994) *Managing the Environment: The Role of Economic Instruments*. OECD, Paris.
- 8 EEA (2005) Market based instruments for environmental policy in Europe, *EEA Technical Report 8/2005*, EEA, Copenhagen.
- 9 OECD (1999) *Voluntary Approaches for Environmental Policy*. OECD, Paris.
- 10 European Commission (2009) *Eco-Label: Facts and Figures*, http://ec.europa.eu/environment/ecolabel/about_ecolabel/facts_and_figures_en.htm#evolution, Accessed 26.02.10