

**First Draft: Comments most welcome!**

**Nailing the Pudding to the Wall.  
On the Effectiveness of Soft Regulation in EU Environmental Policies**

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*The paper analyses the evolution of co-regulatory practices between state and business actors in EU policies for combating pollution. More specifically, we seek to identify institutional pre-conditions for the effectiveness of “soft” policy instruments in regulating industrial emissions into water, air and soil. The empirical study draws on a comparative investigation of the application of the Directive on Integrated Pollution Prevention and Control in Southern and Eastern member states. Our analysis reveals that in countries with weak state capacities the application of soft, legally non-binding policy instruments may lead to adverse effects, such as non-compliance, a regulatory race to the bottom or the “hollowing-out” of the permitting procedure. In the medium-term, such developments can undermine the normative power of EC law.*

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## **Introduction**

Recent debates regarding the effectiveness of regulatory policy making focus on the merits of non-hierarchical modes of coordination between public and private actors. The systematic inclusion of all affected interests into policy formulation and implementation and the introduction of decision-making rules that favour policy learning are held as a viable alternative to traditional hierarchical imposition by favouring the articulation of diverse preferences and interests into goal formulation and implementation. Such “new modes of governance” cover a wide range of different policy processes, including the open method of coordination, voluntary accords, standard setting, delegation to regulatory networks and agencies, regulation ‘through information’, benchmarking, peer review, informal agreements, as well as forms of policy experimentation in different economic sectors, where a new mix of public and private goods is sought (Héritier, 2003; Héritier and Rhodes, forthcoming). They are characterized by the principles of voluntarism (non-binding targets, soft law), subsidiarity (the delegation of decision-making competences to member states or private actors), and inclusion (the participation of all relevant actors in the decision-making process) (Héritier 2001: 9).

The bulk of the literature focuses on the driving forces that stimulate the departure from hierarchical to more inclusive and participatory modes of political steering (Jachtenfuchs, 2001; Jordan, Wurzel and Zito, 2005). The emergence of so called new modes of governance is analysed as a response to powerful functional pressures emanating from the complexity of regulatory issues, uncertainty over regulatory goals and desirable outcomes and high levels of interdependence between multiple public and private actors at different levels of regulatory policy making as well as the need to secure flexibility and adaptability that is rarely achieved through traditional legislative processes (Héritier, 2003; Héritier and Rhodes, forthcoming).

However, the capacity of new modes of governance to make regulatory policy-making more effective and efficient is rarely being addressed in a systematic way. Evidence from studies on employment policies, social protection, public health and taxation offer rather moderate appraisals regarding the capacity of non-hierarchical modes of coordination to achieve tangible goals and bring about policy change (Borrás and Greve, 2004; De la Porte and Nanz, 2004; Scott and Trubek, 2002, Kröger, 2008). In the absence of a clearly delineated authority that is able to resort to hierarchical steering as a means of mobilising diverse political actors

to commit their resources and achieve consensual outcomes, inclusive networks tend to operate as forums of debate and exchange of ideas rather than as effective decision-making structures (Héritier and Lehmkuhl, 2008; Börzel, 2009). The same holds for policy instruments employed in implementation. Reliance on non-binding, non-uniform, indicative commitments and targets might be a viable alternative to rigid legal obligations especially in diverse, heterogeneous regulatory regimes such as the EU. However, the effectiveness of soft regulation to foster compliance, especially of those actors that face heavy costs, is still questionable (Mörth, 2004, O'Hagan, 2004).

The paper seeks to assess the effectiveness of soft regulation in EU environmental policy-making. More specifically, we analyse the evolution of co-regulatory practices in the area of pollution prevention and control. This policy area is characterised by a gradual departure from traditional command-and-control instruments based on the setting of uniform, legally binding emission limit values on air, water and land in a wide range of sectoral industrial activities. The Directive on Integrated Pollution Prevention and Control (IPPC), enacted by the EU in 1996,<sup>1</sup> introduced significant innovations into EU environmental legislation. It was the first time that an EU environmental policy substantially moved away from media-specific regulatory approaches to pollution abatement. The IPPC Directive introduced an integrated approach that incorporated a single permit system covering all pollutant activities of industry, in water, air and land. Instead of defining uniformly binding emission limit values (ELVs), BAT-based emissions provide an indicative non-binding reference basis for domestic regulators issuing permits to industry. The definition of BAT is delegated to ad-hoc co-regulatory sectoral and sub-sectoral working groups that comprise the Commission, the member states, enterprise associations, individual firms, environmental organisations, research institutes, universities, national and EU regulatory agencies. These networks operate under the auspices of a European IPPC Bureau (EIPPCB) in Seville (cf. Koutalakis, 2008). Thus, the IPPC Directive has not only a strong procedural component through the delegation of policy formulation to participatory, co-regulatory networks. It also offers a novel substantive regulatory element by relying on soft, non-binding targets and goals regarding the minimisation of negative externalities of industrial activities. These procedural and substantive components of the directive provide an excellent basis for the assessment of the effectiveness of softer regulation in the area of environmental policies as compared to more traditional 'hard' regulatory approaches in the EU. Are these novel non-binding instruments more effective vis-à-vis generally binding law in facilitating compliance of domestic public

and private actors involved in the process of issuing permits to industry? Under which conditions are they capable of achieving the EU objectives of a high level of environmental protection through the diffusion of BAT for pollution reduction?

This paper argues that in the absence of credible domestic institutions that possess a minimum degree of state capacity, soft regulation might not only fail to achieve its goals but even produce some negative effects. In cases where both state and industrial actors face considerable capacity shortcomings, the application of soft regulation might lead to profound regulatory gaps undermining the legitimacy of EU regulatory authority in the long run. In order to identify the conditions under which soft policy instruments might be more effective than traditional command-and-control regulation, we investigate the implementation of the IPPC Directive in Southern and Central Eastern Europe (CEE). Those countries share a regulatory tradition characterised by the preponderance of legalistic and hierarchical approaches to environmental policy. At the same time, their administrative and cognitive resources to adopt and enforce environmental legislation are limited. So are the capacities to engage with industry and environmental groups in order to compensate their weak capacities.

The paper proceeds in four steps. The first section explores the link between soft regulation and state capacity as the most pertinent explanatory factor that accounts for compliance with the IPPC Directive at the domestic level. We argue that administrative and political capacities are necessary to make soft policy instruments work. Material and cognitive resources of domestic regulators as well as their capacity to mobilise the knowledge and expertise of non-state actors are crucial determinants of effective responses to single permit requirements of the directive. Section two provides a brief overview of the main procedural and substantial characteristics of the IPPC Directive with the aim at identifying the core institutional conditions and requirements for the effective implementation of and compliance with the directive. We maintain that soft, non-binding, indicative targets for minimizing negative industrial externalities facilitate flexible responses to heterogeneous, socio-economic and environmental conditions across the EU. Yet, their practical application is largely contingent upon the capacities of private and public actors to internalise and absorb those requirements into their domestic legal and policy traditions. Section three offers empirical insights from a comparative investigation of the application of the IPPC Directive in Southern and Eastern member states of the EU whose capacities to effectively adopt the directive are severely limited. Moreover, the analysis reveals that in low-capacity member states the application of

soft policy instruments may have adverse effects, such as wide spread non-compliance, a regulatory race to the bottom or the “hollowing-out” of the permitting procedure. The final section revisits our theoretical argument in the light of recent proposals of the European Commission regarding the IPPC Directive to phase-out the indicative, non-binding nature of BAT-based emission limit values for domestic regulators.

### **The Rise of Soft Regulation in European Governance**

In recent years, much of the debate on increasing effectiveness and legitimacy of EU policies focus on the introduction of novel, less coercive modes of policy-making. Under conditions of uncertainty, complexity and heterogeneity of regulatory problems, soft instruments are to offer clear benefits over binding regulation that arises from treaties, regulations and directives. (Snyder, 1994, Trubek and Trubek, 2002). First, their high levels of flexibility help lower transaction costs in negotiations between interested parties, especially in highly complex and uncertain regulatory areas. Second, they can be modified more easily avoiding lengthy parliamentary procedures. Third, soft instruments can better cope with diversity of economic, cultural, geographic and institutional factors that affect regulatory outcomes. Finally, their low degree of uniformity and obligation facilitates learning and persuasion that is essential for lowering compliance costs where needed (Sheldon, 2000 Abbott and Snidal, 2000).

Since the White Paper on Governance, which provides considerable leverage on the application of soft policy instruments and participatory modes of governance, scholars have attempted to assess their effectiveness *vis-à-vis* traditional command-and-control regulatory approaches. Literature focuses on novel areas of EU involvement where the EU has limited potential or simply no mandate to apply the Community method such as fiscal coordination, tax, social protection and employment policy (for a literature reviews see (Kröger, 2008; Börzel, 2009b). These studies focus overwhelmingly on the institutional conditions that enable or hinder the emerge of novel structures, processes and modes of coordination facilitating the systematic inclusion of non-state or non-executive actors into policy formulation (Hodson and Maher, 2001; Armstrong, 2003; Lavenex, 2007; Büchs, 2007). However, little attention has been draws on the conditions that render the application of novel policy instruments more efficient and effective *vis-à-vis* hard law.

From the 1970s onwards, there has been considerable experimentation with new policy instruments in the area of EU environmental policies (cf. Jordan et al., 2003; Knill and Lenschow, 2000)., Already before the Single European Act, environmental policy was strongly linked to the imperatives of establishing a single market across the EU (McCormick, 2001). Harmonization of product standards and production processes was an essential step towards the abolition of competitive (dis)advantages to industry stemming from environmental legislation. Towards the end of the 1980s, however, this command-and-control approach to environmental regulation became increasingly challenged. Successive enlargements of the EU significantly increased the divergences of the member states with regard to their administrative capacities, regulatory traditions, environmental conditions and economic constraints to effectively incorporate the *acquis communautaire* into their domestic regulatory regimes. Moreover, the persisting compliance problems of certain member states with EU environmental legislation generated scepticism regarding the effectiveness of harmonization, calling for the introduction of more flexible regulatory approaches that allow member states to adapt EU laws to their specific national and/or sub-national conditions. The EU responded to these regulatory challenges with the increasing use of so called “new”, less coercive, market-based policy instruments and procedural directives that provide significant leverage to domestic regulators in the implementation process (cf. Holzinger and Knoepfel, 2000; Holzinger, Knill and Schäfer, 2006; Homeyer, Carius and Bär, 2000). More recent studies, however, cast some serious doubts about the (greater) effectiveness of soft policy instruments, particularly with regard to fostering member state compliance, pointing to the need for hard regulation to make soft regulation work (Héritier and Rhodes, forthcoming; Börzel, 2009a).

The capacity of the state to adopt and enforce legally binding regulation features prominently in the implementation and compliance literature (Chayes and Chayes, 1993; Haas, 1998; Jänicke, Weidner and Jörgens, 1997). We can distinguish two aspects of state capacity (cf. Pedersen, 2005). The first focuses on *intra-state* relations, i.e. the internal coherence within the state that can enable the administrative apparatus to formulate and implement sound policies (Börzel et al., 2011). The second aspect concerns “*state-society*” relations, e.g. linkages between non-state and state actors (Migdal, 1988). Both crucially influence the preferences of domestic actors in favour of compliance. On the one hand, the capacity of the state to commit essential material or cognitive resources for compliance is a crucial determinant of successful application of EU law at the domestic level. Those resources allow

the member states to take autonomous action and cope with political and economic costs inherent in law enforcement to third parties. On the other hand, the capacity of the state to extract essential resources from the society is a crucial complementary property that contributes to regulatory effectiveness, particularly if the state lacks knowledge and expertise. Technically complex issues characterised by uncertainty often require frequently changing cognitive and material resources for effective regulation, which state actors often do not have and lay with industry as the primary rule target. As a result, the capacity of state actors to resort to hierarchical regulation is considerably impaired and depends on private actors' incentives to commit their resources to regulatory policy making.

In exchange for their resources, private actors may gain influence on regulatory policy outcomes, reduce compliance costs, increase their control over other actors' compliance behaviour, and may gain competitive advantages. These benefits, however, do not always outweigh the costs of getting involved in public policy-making. Lobbying and informal contacts may be less resource intensive and more beneficial for industry. Moreover, information asymmetries may create disincentives to industry to share regulatory information that would not be otherwise accessible to competitors and regulatory authorities. Finally, firms may face difficulties in justifying the commitment of resources to their investors unless they can demonstrate tangible effects on their overall corporate performance.

In sum, state capacity plays a crucial role in private actors' preference formation in favour or against the compliance with legal requirements. On the one hand, through their administrative capacities, such as qualified personnel, effective enforcement mechanisms and funding, public regulators can mitigate compliance costs and compensate veto players in order to gain support for effective law enforcement. On the other hand, turning soft policy instruments into precise licensing conditions for local operators largely depends upon their capacity to attract crucial regulatory resources from industry related to technical issues apt to BAT-based emission levels in their locality.

Our empirical analysis of the implementation of the IPPC Directive in Southern and Eastern member states of the EU demonstrates that both administrative and political capacities of the state are not only necessary to ensure compliance with the directive; they are also key for striking a balance between flexibility and effectiveness in the application of the directive at local level.

## **Best Available Technologies (BAT) and Emissions control: Towards more flexibility?**

Being largely modelled on the UK's Pollution Prevention and Control (PPC) regulatory regime (Jordan, 2004), the IPPC Directive is pivotal in the EU's turn towards the use soft law in environmental regulations. Instead of prescribing harmonised emission limit values (ELVs), it provides for co-regulatory processes to identify and disseminate best practices and techniques, taking into account local environmental, technical and economic circumstances. Single permits are based on BATs defined at sectoral and sub-sectoral levels. The permit system applies to new installations from October 1999, and from October 2007 for existing plants (Entec UK Limited, 2007).

The definition of BAT is delegated to ad-hoc regulatory sectoral and sub-sectoral Technical Working Groups (TWGs). The directive also provides for an Information Exchange Forum (IEF) comprising representatives from member states, large associations and the Commission. The IEF takes an overview of the process, especially in relation to the potential impact of the Directive on industrial competitiveness and employment. It also agrees on the themes to be covered by TWGs. TWGs comprise a large number of actors, including representatives from the Commission, member state governments, industry associations, individual firms, environmental organisations, research institutes, universities, and national and EU environmental agencies. These networks operate under the auspices of the European IPPC Bureau (EIPPCB) in Seville that serves as the network coordinator. They facilitate the dissemination of information on BAT based on the benchmarking of best practices described in regularly updated BAT Reference Documents (BREFs). BREFs have no binding character. Instead, they provide an indicative basis for the adoption of ELVs to be incorporated into single permits issued by the relevant national authorities for each industrial installation covered by the Directive. This decentralised system of permissions allows considerable leverage for domestic authorities to interpret BAT and define ELVs according to local environmental and geographical circumstances, as well as reflecting the technical features of the installation. The technical nature of BREFs and the lack of technical expertise on the part of the Commission to evaluate the compatibility of BAT-based ELVs with broad environmental objectives illuminate the considerable policy relevance of the TWGs as regulatory networks (Bohne, 2008; Lange, 2008).

The formulation of soft, non-binding measures is supposed to increase flexibility of domestic regulators to adjust the precise permitting requirements for individual facilities to local economic and environmental conditions. For instance, national permit authorities have considerable discretion in translating indicative BAT-based ELVs into specific, legally binding environmental standards according to the environmental, economic and technological conditions of industrial plants applying for IPPC permits. However, the lack of precision and clarity of BAT requirements requires considerable cognitive and administrative capacities of domestic regulators, such as information regarding the emission performance of individual plants, their technologies and the absorption capacity of local ecosystems. The accuracy of these data often depends on the cooperation of permit authorities with individual industrial operators and representatives of sectoral organizations. The same holds for the application of the single permit that requires merging numerous environmental permits for industrial emissions on air, water, soil into one. Finally, in member states with no prior attempts to simplify permit procedures, permit authorities have to be capable of coordinating a large number of administrative units from different levels of government. Our empirical analysis will reveal that state capacity is the single most influential factor that accounts for the effective application of the IPPC Directive.

### **Supply Side: Weak Administrative Capacity**

Complying with the demanding requirements of the IPPC Directive has been a huge challenge for domestic regulators and public administration in Southern and Eastern member states. It requires not only immense financial, technical and human resources but also horizontal integration of administrative management and coordination systems in order to meet the cross-sectoral management tasks of the directive. Adding to the institutional requirements, the regulatory approach had to become more open towards involvement of business actors in the permitting process. Finally, implementation presupposed an equally challenging vertical integration across national, regional and local levels of environmental administration in order to guarantee the consistent usage of the new permitting requirements.

While highly industrialized Western European countries had already established more integrated structures for the regulation of industrial pollution in the 1980s (see Bohne 2006),

the Southern and Eastern European member states were late-comers in this respect. In Central and Eastern Europe, it was only the push through the IPPC requirements that triggered this development (Buzogany, 2009a; Buzogany, 2009b; Guttenbrunner, 2009). In Spain, Portugal and Greece, legalism and a legacy of ineffective administrative apparatus plagued with clientelism created an unfavourable institutional environment for the enforcement of strict regulatory standards emanating from the EU (Fernández and Font, 2009; Font and Fernandez, 2009; Koutalakis, 2009). The obligations of the IPPC Directive were underestimated and public authorities responded with considerable delay and typically with a serious lack of financial, technical and human resources. Understaffing and weak inter-institutional standing of the coordination units within the Ministries of Environment hindered the timely onset of policy planning, which was crucial to raise awareness for the coming regulation both within other branches of government and even more importantly, among the affected industrial actors. In Greece, the responsible department in the Ministry of Environment was seriously understaffed with only 12 full time employees (Koutalakis, 2009). In Hungary, the IPPC Office was first located at the non-executive Institute for Environmental Management and without an adequate reach on the ranks of political decision-making. Waves of intra-institutional administrative restructurings lead to further delays in setting up the institutions necessary for implementing the IPPC Directive (Buzogany, 2009a). In Romania, neither the national nor the regional environmental structures did consolidate until the country's EU accession and remained weak in terms of staffing and expertise even afterwards (European Commission, 2005). Adding to this, often unclear and frequently changing legislation, lacking guidelines for technical implementation and undeveloped monitoring systems on the regional level made the introduction of integrated permitting even more difficult.<sup>2</sup>

A further problem was related to the weak coordination capacities of the different ministries involved in implementation. The integrated and media-based character of the IPPC permitting system caused turf wars between ministries as well as within different branches within the ministries of environment working on different media. Implementing the IPPC in Greece ran into administrative inertia and antagonisms between different public services, the Ministry of Environment and the Ministry of Development.<sup>3</sup> In the Czech Republic, divisions within the Ministry of Environment failed to communicate with each other, causing communication problems also with the regional authorities. EU templates often clashed with the established path-dependencies of labor division within the administration which proved to be difficult to change. For example, while landfills in the Czech Republic were subject to the IPPC

Directive, the waste policy division continued to communicate only with the media specific experts (World Bank, 2007 ).

At the initial stage, the most pressing problem was the lack of administrative capacities to undertake preparatory actions for the application of the directive. Data on industrial installations covered by the directive and their productive techniques regarding international references on BAT in different industrial sectors was not readily at hand in most of the Southern member states and Central and Eastern European (CEE) candidate countries. National authorities had to prepare national sectoral reports to serve as the basis for defining BAT at the European level. This process was dominated by industry representants and regulators from Western Europe, while most Southern European states (with some exceptions) and CEES did not manage to send representatives to Seville, making them rather passive policy-takers (Koutalakis, 2008). Main problems that caused delays in the practical application of the directive were the lack of data on industrial installations covered by the directive. To solve this problem, Poland and Greece resorted to private consultant firms and contracted out studies in order to develop an inventory of emissions from statutory pollution sources, the collection of data used for the definition of BAT-Based ELVs (Guttenbrunner, 2009; Koutalakis, 2009). The technical requirements of the directive were quite challenging for the often out-dated research capacities in Southern and Eastern European member states. In order to monitor and process different requirements on the national and the regional level, new laboratories with better equipment and international accreditation had to be established and technical staff to be trained (Gyulai, 2004).<sup>4</sup> Even if both domestic and EU funds were made available to meet these challenges, integrating them fully in the regulatory cycle often caused serious delays.

The legal concepts introduced by the IPPC Directive did not fit with domestic political and regulatory culture either. The *descriptive* rather than *prescriptive* regulatory style of the directive posed difficulties for both state and non-state actors in interpreting its legal provisions. While being often used in countries with Anglo-Saxon legal traditions most of continental European public administrations had not much of a tradition in dealing with flexible and voluntary agreements (Knill, 2001). The open and adaptable definition of BAT-based emission limit values requires just that from the administration. Guidance documents, such as BREFs, were alien to legal thinking and practice as they do not hold immediate direct legal effects and dilute the role played by the state as the main regulator.<sup>5</sup> Few guidance

documents have been drawn up to sustain implementation and even where this happened these were often unavailable for large part of their addressees.<sup>6</sup> Prior to the transposition of the IPPC Directive, pollution prevention was typically media-based legislation. This relied on very detailed descriptive regulations which in the view of regulators did not make the case-by-case negotiations of the integrated permit either necessary or desirable (World Bank 2007: 31). As sectoral limit values in Central and Eastern Europe were in several cases more restrictive than those in the EU, the legitimacy of the new approach remained low among both national level and street-level administration.<sup>7</sup>

Vertical integration of regulatory structures posed even higher difficulties. The main problem encountered was the weak administrative capacity of the regional environmental inspectorates. Typically, new requirements had to rely on existing or in some regions even decreasing numbers of personnel for carrying out new functions. For the Central and Eastern European countries, the number of permitting procedures doubled during the accession period, while staffing numbers of the inspectorates only increased slightly (Jávor and Németh, 2007). Due to the low wages in the public sector, maintaining qualified staff emerged as an additional challenge. On the regional level, public administration responsible for issuing the permits had limited experience interpreting the technical details of the IPPC Directive and felt unprepared to negotiate with business actors (Kohlheb and Pataki, 2002, CES, 2003). In Poland, lacking foreign language skills created further problems deciphering the BREFs (Krochmal, 2004).<sup>8</sup> Street-level staff lacked not only training but also the understanding for consulting with business actors over permitting details. In Hungary, environmental inspectors feared that different derogation periods or phasing-in arrangements could be easily become misinterpreted as corrupt practice by the public and therefore only cautiously applied them (CES, 2003). The requirements of the directive have complicated the permitting procedure by massively increasing the workload of the inspectorates and extending the time business actors had to wait for their permits (MKIK, 2004).

Together with the quantity and complexity of the permits, the weak management capacities of staff left an enforcement gap. Also, high levels of variations between the enforcement practices (frequency, permitting fees, length of permitting) both among different regions in the same member state, as well as between different member states remain typical. Bohne reports high differences between the consistency of Western and Southern European enforcement strategies regarding the IPPC (Bohne, 2006). Enforcement remains

unsatisfactory and competence overlaps seem to be common also in the CEEs. Permitting and inspections are often carried out by the same staff. In several countries, including Hungary and Romania, it has been common practice that enforcement staff was also privately involved in the writing of permits for business actors.<sup>9</sup> At the same time, the transparency of enforcement remains clouded as statistical data about inspections carried out and the fines, prosecutions following from the activities of the inspectorates are scarcely available.

### **Demand Side: Weak Business Actors**

While state administration was overwhelmed by the application of the IPPC Directive, the regulatory targets suffered from even more serious capacity deficits, which further undermined the effective application of the directive. Business actors had to shoulder the major part of the cost of the directive. They faced both high investment costs in order to reduce the pollution levels of their installations and had to take into consideration an increasingly complex, time-consuming and expensive permitting procedure based on integrated permits.

Not surprisingly, business actors were highly critical of the introduction of the IPPC single permit requirements. A survey carried out by the World Bank in the new member states indicates that 43 percent of business respondents in CEEs thought that the IPPC Directive posed the highest level of difficulty in complying with EU legislation. Beside the extensively high investment, a major problem was to raise awareness and understanding of IPPC requirements within private industry and the consulting business. Several business sectors were fully unaware of the complexity and time-intensiveness of the new permitting system and started preparations very late. Critics pointed to the additional administrative burdens emanating from the addition of a second permitting procedure that largely overlaps with existing licensing. Both in Greece and Hungary, industrial associations lobbied for reducing both administrative burdens on industrial investments and costs and for the introduction of permitting procedure that simplified the permitting requirements by establishing a 'one-window' permitting system to coordinate the fragmented permitting system (Koutalakis, 2009, Mayer and Dragos, 2005).

In sum, weak state capacity met with equally weak capacities in the business sector. Nevertheless, both sides showed only limited inclination to compensate their weaknesses by engaging in mutual cooperation. Business actors have had little confidence in the capacities of the state to provide a level playing field. The weakness of regional environmental authorities prevented applying the IPPCD uniformly across different regional environmental authorities and industrial sectors (Mayer and Dragos, 2005). In Hungary, business community repeatedly pointed to the lack of uniformity in implementation across municipalities, regions and industrial sectors (MKIK, 2004). The business sector feared distorting effects on competition and preferred the preexisting sectoral legislation, even though it was stricter at times, since its regulation was well known and easier to monitor and enforce by the regional authorities. Industry is also sceptical towards any procedure that is directly or indirectly related to data provision for regulatory purposes (Koutalakis, 2009; Justice and Environment, 2007).

While in Western Europe, many coordination problems between state and business actors could be solved by relying on the existing corporatist structures and for e.g. awareness campaigns directed towards industrial organisations, due to the weakness of such sectoral associations in Southern and Eastern member states, state administration often had difficulties finding reliable partners to communicate the new permitting requirements. The pooling of resources and sharing of compliance costs was further impaired by a general distrust between business and state actors, who expected defection (Greenspan Bell, 2004).

In order to cope with the (financial) challenges of the IPPC Directive, a number of alternative strategies emerged to cooperation. First of all, a substantial number of the highly polluting installations, regulated under the large combustion plants directive, used the possibility to opt-out under the provision of the directive (Article 4.4).<sup>10</sup> Some of the new member states have successfully applied for very long phase-in (transition) periods for large part of their highly polluting industries. For example, in Romania about one-third of the industrial plants under the IPPCD were given grace periods reaching up to 12 years (Buzogany, 2009b; DANCEE, 2003).

Member states have also made massive use of General Binding Rules (GBRs), i.e. sectoral limit values that are used to set permit conditions. They provide direct conditions or minimum standards and are binding to the authority and the operator. This allows to make the

permit structure less compelling compared to the requirements of local environmental quality standards implied by the BAT (VITO, AEA and LEIA, 2007). In practice, “old” regulatory tools such as GBRs are an opportunity to circumvent the BAT requirements and encourage the usage of national level standards, which are preferred because of regulatory transparency, administrative efficiency, consistency and comparability.<sup>11</sup> Thus, countries with weak regulatory capacities include BAT merely as a formal reference to enact emission limits that are mostly identical with sectoral pollution standards prior to the introduction of the IPPC (Justice and Environment, 2007). Especially authorities in the new member states lacked the technical capacity to assess BAT and thus have fallen back on the sectoral emission limit values during permitting, which were mostly identical with the pre-IPPC ones.<sup>12</sup> As a result of these resource and capacity constraints, the economic assessment of BAT varies from country to country. In Hungary, regional authorities managed to fulfill their rapidly growing permitting duties despite high capacity shortcomings, but at the price of diluting the requirements of a truly integrated cross-media BAT-based permit the IPPC Directive requires (Jávor and Németh, 2007, Kohlheb and Pataki, 2002). At times, the BAT concept was even replaced by applying stricter standards than EU legislation would require (Mayer and Dragos 2005).<sup>13</sup> In Romania, where the BAT principle is often regarded as being at odds with the domestic administrative culture, the BREFs were simply validated through command-and-control style Ministerial Orders rather than leaving them as open guidance documents.<sup>14</sup> Instead of pooling resources to improve implementation, state and business actors negotiated with Brussels for longer derogation periods – hoping that necessary investments could be covered after accession by the Structural Funds or through external bank credits.<sup>15</sup>

Adding to this, according to Rave and Triebswetter, member states such as Poland, Spain and Italy an economic assessment on the sectoral level is not likely to take place, even though this is recommended by the Commission (Rave and Triebswetter, 2008). Assessments of the economic feasibility of BAT are thus done only implicitly and on case-by-case basis. Such procedures remain open to distortions by local and regional interest groups and thus impede the consistent implementation of the directive. Due to lack of technical capacities of both government and business sector, Portugal failed to set up a working BAT system (Fernandez and Font 2009b:84). Moreover, legal uncertainty regarding the binding character of BAT-requirements for existing installations and costs involved for the upgrade of infrastructure was in general wide-spread. Business actors had difficulties in interpreting the requirements of the BREFs. The co-existence of the integrated permitting system based on BATs with the

older sectoral legislation with its strict emission limit values increased legal uncertainty and complicated the permitting process. The permit applications submitted were incomplete, making the duration of the process longer and the tasks of the authorities even more difficult.

To be sure, there are quite important differences between industry sectors *within* Southern and Eastern member states in how they implement the IPPC Directive. Financial resources, external trade orientation, levels of foreign direct investments and expertise available to business actors are crucial in shaping relations with authorities, resulting in significant differences among different industry sectors. Competitive export-oriented industry branches had no difficulties in playing a proactive role in designing the Best Available Techniques (BATs) for their industrial sector by providing the technical expertise demanded by the IPPC Directive.<sup>16</sup> In the case of the Hungarian pharmaceutical industry, for instance, the used technologies were up-to date in order to survive on a highly competitive market. Thus, the Hungarian Pharmaceutical Manufacturers Association did not only offer to formulate the relevant BREF early on but did also participate at the European level Technical Working Groups that determine the BAT norms (Buzogany 2009). In contrast, small and medium enterprises, mostly from the agricultural sector often lacked even information about the existence of the directive and were confronted with huge capacity problems they could hardly solve (Mayer and Dragos, 2005).

Despite the promotion of stakeholder involvement in the policy process, there is in fact little evidence that the IPPC Directive has strengthened the participation of business actors in regulation. Certainly, business actors with typically tight links to politics, such as strategically relevant energy producers, could profit from their governmental contacts as they did before. Yet, the business community complained that consultations were sporadic and their awareness of the requirements that would affect them was incomplete (World Bank 2007). It has been also noted that the procedural character of the directive did not change regulatory practices even if it added ad hoc information exchanges between state and business actor. There was little effort to explain the implications of the directive, while the new requirements were exceedingly costly and costs had to be carried by the business sector.

In some cases, however, industrial associations and policy consultants have indeed participated in drafting national guidance documents as required by the directive. For instance, the Polish Steel Association successfully bargained longer transition periods (until

2010) for receiving integrated permits and financed the training of public administrators to help strengthen the administrative capacities of state actors necessary to apply and enforce the directive.<sup>17</sup> However, given the superior expertise and technical know-how of industry, public authorities often feared to be “captured” by economic interests (Guttenbrunner 2009).<sup>18</sup> Overall, the increased workload for the inspectorates and the exceptionally high costs for the industrial sector made both groups agree about the lacking usefulness and legitimacy of the IPPC Directive, which became regarded as “forced upon” Poland by the EU (Ehrke, 2009).

Civil society faced serious obstacles to become involved with the IPPC Directive due capacity problems, too. The technically demanding requirements, which already overwhelmed specialized domestic regulators and business actors, were even harder to assess for environmental non-governmental organizations (ENGO) which often lacked the necessary expertise. Typically, they could also not afford buying the support of specialized consulting companies. While potentially critical civil society voices were at least weakly represented by large EU-level ENGO networks, such as the European Environmental Bureau, when determining the BAT in the Sevilla process, the domestic IPPC related process remained largely in the hands of state and business actors (Koutalakis 2008). Also public opinion remained skeptical of the involvement of business in the policy process for fears of corruption. Clientelistic traditions and corrupt practices in relationships between state regulators and industry and a legacy of weak enforcement capacities have generated controversy over private involvement in environmental policymaking. The latter is often perceived as the institutionalization of privileged access to decision making for powerful industrial groups, and this generates mistrust among other stakeholders and the public. The dominant perception that law enforcement is not negotiable reflects the wider suspicion among the public that soft laws are just a refined way of circumventing compliance with legal obligations (Koutalakis, 2009).

### **Conclusions: IPPC Reloaded – Back to Hard Regulation?**

The capacity shortcomings revealed in our empirical study have given rise to serious compliance problems and generated considerable controversy over the future of flexible regulatory approaches in EU environmental policies. The European Commission required the

member states till October 31<sup>st</sup> 2007 to finalize their integrated permits. The results were quite disappointing: only about 50% of European industrial plants that fall under the directive have indeed received IPPC permits (Entec UK Limited, 2007). In response to the blatant non-compliance with the IPPC Directive, the Commission has chosen two strategies. First, it continued to lodge infringement proceedings for the failure to observe EU law. In May 2008, the European Commission sent nine member states (Belgium, Bulgaria, Estonia, Greece, Italy, the Netherlands, Portugal, Slovenia, and Spain) first written warnings ("Letter of Formal Notice") under Article 226 of the Treaty for failing to issue new or updated permits for over 9,000 industrial installations by the 30 October 2007 deadline.<sup>19</sup> In January 2009, the Commission issued „final written warnings“ to seven of these states (Belgium, Bulgaria, Greece, Italy, the Netherlands, Portugal, Slovenia, and Spain).<sup>20</sup>

Second, the Commission initiated a two-year “recast” which should lead to a thorough reform and simplification of the EU’s industrial emission policies. As part of the process, the Commission adopted a Proposal for a Directive on Industrial Emissions in December 2007.<sup>21</sup> The Proposal conjoins seven existing directives related to industrial emissions into a single “omnibus” directive. The proposal suggests a stronger harmonisation on the EU level, which contrast with the current rules stating that "technical characteristics of the installation concerned, its geographical location and the local environmental conditions" *can* be "taken into account" by member-state authorities when permits are drawn up.

According to the Commission's proposal, the new directive will yield significant benefits to the environment and human health by reducing harmful industrial emissions through better application of Best Available Techniques. Minimum provisions covering the inspection of industrial installations, the review of permits, reporting on compliance and protection of soil will be introduced with consequent environmental improvements. One of the main ideas is to strengthen the role of the BAT by requiring authorities to justify emission limit values that do not reflect the BAT. Transparency should be increased as any such deviation has to be made public. This will strengthen the role of the Commission, which will be in the position to accept or decline on the deviation. Also, the recast includes streamlining enforcement through the introduction of mandatory plant inspections and a minimal enforcement catalogue. Most importantly, the Commission plans to replace emission limit values with requirements for stricter application of site specific BAT. Responses to these proposals varied considerably. Most significantly, in the European Council the „dirty coal front” led by UK and Spain, Italy,

Poland and the Czech Republic lobbied for more flexibility and the delay of stricter provisions for large combustion plants till 2020.<sup>22</sup>

These developments indicate that soft law is not necessarily a panacea for achieving effective regulation in an ever wider and more diverse Union. While harmonization appears to be even less feasible in the EU 27, the weak capacities of most of the new and some of the old member states seriously constrain the application of more flexible and voluntary policy instruments. Somewhat paradoxically, the lack of capacity to enact and enforce hard regulation, which fuels the demands for soft law, undermines their very effectiveness. These findings are in line with the broader literature on (new modes of) governance that argues that non-hierarchical, private self-regulation or public-private co-regulation require a strong shadow of hierarchy to be effective (cf. Héritier and Lehmkuhl, 2008; Börzel, 2009a; Héritier and Rhodes, forthcoming). It remains to be seen whether the new Directive on Industrial Emissions casts a sufficiently long shadow to compensate for the weak capacities of Southern and Eastern member states.

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## Notes

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- <sup>1</sup> Council Directive 96/61/EC.
- <sup>2</sup> Interview, Public Official, Ministry of Environment and Water Management. Bucharest, 11.07.2007.
- <sup>3</sup> Interview, Public Official, General Inspectorate of Environment Protection and Water, Budapest, 03.12.2007.
- <sup>4</sup> Interview, Public Official, Ministry of Environment and Water Management, Budapest, 05.12.2006.
- <sup>5</sup> Interview, Public Official, General Inspectorate of Environment Protection and Water, Hungary, 03.12.2007.
- <sup>6</sup> Interview, Policy Expert at a Consulting Company, Warsaw, 9.0.2006; Interview, Public Official, Ministry of Environment and Water Management, Bucharest, 11.01.2007.
- <sup>7</sup> Interview, Public Official, Ministry of Environment and Water Management, Budapest, 05.12.2006, Interview, Policy Expert at a Consulting Company, Budapest, 29.11.2007.
- <sup>8</sup> Interview, Policy expert, Environmental think tank, Wroclaw, 14.10.2005.
- <sup>9</sup> Interview, Public Official, Ministry of Environment and Water Management, Budapest, 05.12.2006.
- <sup>10</sup> Report on existing plants declared for eligibility under Article 4.4 of LCP Directive <http://dataservice.eea.europa.eu/dataservice/metadetails.asp?id=1086>.
- <sup>11</sup> The option of using GBRs for implementation of the IPPC Directive is given in Article 9 (8).
- <sup>12</sup> European Environmental Bureau: IPPC Recast - Promising but Far From Perfect, [www.eeb.org/publication/Metamorphosis-48-February2008.pdf](http://www.eeb.org/publication/Metamorphosis-48-February2008.pdf), p 10, (Accessed on 12.06.2009).
- <sup>13</sup> Interview, Policy Expert at a Consulting Company, Budapest, 29.11.2007.
- <sup>14</sup> Interview, Public Official, Ministry of Environment and Water Management. Bucharest, 11.07.2007.
- <sup>15</sup> Interview, Ministry of Environment and Water Management, Bucharest, 23.11.2005 and Interview, Policy Expert at a Consulting Company, Bucharest, 12.01.2007.
- <sup>16</sup> See Andonova, 2003 for a similar argument.
- <sup>17</sup> Interview, Policy Expert with Industrial Association, Warsaw, 23.10.2005.
- <sup>18</sup> Interview, Policy Expert at a Consulting Company, Warsaw, 9.10.2006; Interview Policy Expert at a Consulting Company, Warsaw, 16.10.2006; Interview, Public Official, Polish Environmental Ministry, Warsaw, 11.10.2006.
- <sup>19</sup> European Commission: Commission warns nine Member States for not issuing industrial permits on time, IP/08/704, Brussels, 6 May 2008, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/704&format=HTML&aged=0&language=EN&guiLanguage=en>, (Accessed on 20.10.2009).
- <sup>20</sup> Environment: Commission pursues action against 10 Member States over industrial permits, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/175&format=HTML&aged=0&language=EN&guiLanguage=de> (Accessed on 20.12.2009).
- <sup>21</sup> Proposal for a Directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) (Recast) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0844:FIN:EN:PDF> (Accessed on 20.12.2009).
- <sup>22</sup> European Voice: Pollution proposals face opposition, <http://www.europeanvoice.com/article/imported/pollution-proposals-face-opposition/64169.aspx>, (Accessed on 05.07.2009).