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When Law Loses Its Legitimacy

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Key words: law – legitimacy – discretion – limits – quality of law – forum of adoption of an EU instrument – control – legal limbo – mandatory force

Abstract

This essay's objective is to warn the regulator and individuals against illegitimate forms of law, notably law without limits. Significantly, alarm is not taken based on theoretical possibilities, but it rests on examples of regulatory instruments.

Nearly two years were needed to go through the complexity of illegitimate regulatory instruments, identify, select, and explain certain forms of illegitimacy. To analyse these forms and, in a more general manner, to study illegitimacy it has been necessary for the author to create concepts.

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When Law Loses Its Legitimacy corresponds to the need for exposing existent issues, which however may not be easy to detect but have a considerable impact on society. More precisely, the essay aims to get at the core of what illegitimate law is.

The author's general interest is to reflect on reality and connect the dots.

To meet the need for grasping reality, polymaths Stefano Musumeci and Émilie Ciclet founded the concept **RE-THINK NOW RESEARCH FOR A BETTER SOCIETY** (*www.re-think-now.com*), where existence theory (ontology) and logic are the foundations for every argumentation. Both researchers draw on various ambits – law, economics, language, sociology, etc. – in order to get at the core, and more generally they are interested in topics which are vital to a civilised society.

Both researchers need support for developing their research. Thus, your support is appreciable.

1. Premise

Law consists of rules that must be respected. Instruments, which are made of rules, are named law when they are adopted according to the legal processes[1] used to make law. Such processes indeed confer rules obligatory character. For instance, in the Treaty on the Functioning of the European Union (TFEU) legal instruments named legislative acts (see Table 2) are those accepted 'by legislative procedure' (see Article 289(3) TFEU).

Instruments which are recognised as law in virtue of their being adopted according to legal processes may however be devoid of *legitimacy*. Legitimacy is more than processes. It primarily stems from *soundness*.

Law is sound when it is logical, coherent, not self-contradictory, exempt from defects as to justice, or possesses the other qualities covered by the meanings of the adjective *sound*. The piece of law analysed below is unsound because it includes compulsory rules that have no limits.

Open-ended rules are illegitimate: when in place*,* unlawful behaviours[2] cannot be detected or cannot be discerned with certitude. As it will be shown, when open-ended rules are resorted to, any actor's behaviour in the field of action[3] indicated by an instruction is valid, even though it may not appear to be the case. Entire discretion is thus given if man behaves within the field of action indicated by a rule. As a consequence, open-ended instructions can make unsound practices *be recognised* as lawful. Besides, if the field of action of a rule is itself open-ended, what will be pronounced unlawful can hardly be predicted. Therefore, there is no *legal certainty*.

Problematically, unrestricted rules of a legal measure despite being discretionary may, because of their very nature, not be evidenced. Therefore, an illegitimate piece of law may remain in force. On top of that, illegitimate *supplementary instruments*[4] can possibly be created also in consequence of the open-ended rules of the initial legal measure.

1. A legal process is a series of actions enabling regulation control. These actions are enshrined in law so that regulatory instruments are not made arbitrarily.
2. The word *behaviour* (or *conduct*, or *comportment*) designates a way of acting. Behaviours (or conducts, or comportments) are included in binding rules and in non-binding rules.
3. The notion of *field of action* is necessary when open-ended rules are addressed. In part 2, the examined instances are helpful to understand the concept of *field of action*.
4. I have labelled *supplementary instruments* the tools that are additional to a piece of law and that elaborate or explain it.

2. The case of an unsound legal provision

The provision I have chosen for analysis is Article 11b(6) of Directive 2004/101/EC[5], which is part of a piece of law[6] (Directive 2004/101/EC) on the European Union (EU) greenhouse gases emission trading system.

The EU greenhouse gases emission trading system sets a cap on the quantity of gases that can be released in the atmosphere. Identified economic actors producing gases, and thus a country aggregating its own actors, must respect the cap.

Significantly, if a company passes the ceiling, it 'shall be held liable for the payment of an excess emissions penalty'[7]. In order not to be fined the company can use emission credits obtained via Kyoto Protocol mechanisms[8] from projects which are implemented abroad and which are considered to be emission-saving.

Resorting to emission credits in the EU system is however not always authorised. For instance, actors undertaking large hydroelectric activities[9] may not be authorised to use emission credits if their projects are not declared valid according to the instructions of Article 11b(6).[10]

Now, Article 11b(6) will be examined. It is so formulated:

> Member States shall, when approving [large hydroelectric projects], ensure that relevant international criteria and guidelines, including those contained in the World Commission on Dams November 2000 Report 'Dams and Development A New Framework for Decision-Making' [WCD Report], will be respected during the

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5. 'Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms', OJ L 338/18, 13.11.2004.
6. Directive 2004/101/EC is EU *secondary law*. EU *secondary law* mainly comprises EU regulations, directives and decisions. Secondary law can take the form of legislative, delegated and implementing acts (see Table 2). Indicatively, EU law is also made of *primary law* which essentially consist of the EU Treaties which are the foremost source of law.
7. See Article 16(3) of 'Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community', OJ L 8, 13.1.2009.
8. Credits obtained via Kyoto Protocol mechanisms include Emission Reduction Units (ERU) and Certified Emission Reductions (CER).
9. Directive 2004/101/EC considers as large hydroelectric projects those exceeding 20 MW.
10. Article 11a of Directive 2009/29/EC provides for other restrictions. The complete name of the directive is 'Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community', OJ L140/63, 5.6.2009.

development of such project activities.

Article 11b(6) lacks limits. Precisely, the article demands the compliance with the WCD criteria and guidelines while all the other norms ('relevant international criteria and guidelines') to be respected are not identified.[11] Moreover, the WCD criteria and guidelines comprise rules that set no limit.

The provision's open-endedness can be illustrated by the following three instances of instruction.

FIRST INSTANCE.

A rule from the WCD guideline 3 on Free, Prior and Informed Consent displays *a line of conduct without this line being mandatory*. In concrete, the rule states that

> [t]he manner of expressing consent will be *guided* [italic is mine] by customary laws (WCD Report, p.281).

This instruction is unrestricted because of the verbal element *guided*, which allows acting not in accordance with the *indicated comportment*, the latter consisting of expressing consent pursuant to customary laws. The element indeed shows a line of conduct to go by which may not be followed. The line of conduct (the indicated comportment) can always be kept at a distance. In point of fact, *it is not obligatory*. In reality, *any manner of giving consent* is valid.

Concretely, by requiring the compliance with this instruction including the idea of *guide*, the regulator[12] may authorise hydroelectric projects of companies[13] that will never respect customary

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11. It should be noted that Article 11b(6) is perplexing due to the use of the expression 'criteria and guidelines'. The article demands compliance with the relevant international criteria and guidelines contained in the WCD Report, whereas the whole of the report consists of guidance chapters and one chapter of the report is named '[c]riteria and [g]uidelines'. Thus, it is unclear whether all guidance types of the WCD Report or only the chapter named '[c]riteria and [g]uidelines' must be respected. However, as the use of the expression *criteria and guidelines* sounds more specific than a possible generic use of such terms as *guidelines*, *criteria*, it appears that only the '[c]riteria and [g]uidelines' chapter must be observed.

12. I intend *regulator* to mean either many or one of the governing institutions of a political regime. The regulator may not be an elected body.

13. Companies are the actors that can ask *indigenous and tribal peoples* if they agree with the construction of hydroelectric projects. And by asking them, companies may respect conducts evidenced by customary laws.

laws on the manner of expressing consent[14]. Companies may only have the objective to respect customary laws, or they may only declare to have this aim.

SECOND INSTANCE.

The instruction which is directly visible in Article 11b(6) and which mentions that 'relevant international criteria and guidelines' must be observed is also unconstrained. It is the case due to the *open-ended qualification* 'relevant' having no *fixed and precise* limit or method to determine what criteria and guidelines must be observed. In fact, any international guidance addressing *Sustainable Development* (SD)[15] is valid.

Furthermore, as SD is an open-ended concept, the field of action (i.e. the obligation to respect international criteria and guidelines on SD) is itself open-ended. By virtue of such field of action there is no certainty as to what international norm can be pronounced irrelevant.

THIRD INSTANCE.

The following WCD criterion has no limitation either, due to fact that it includes an *open-ended action* combined with an *open-ended qualification*. The criterion is formulated as follows:

> [d]evelopment objectives *reflect* a river-basin-wide *understanding* of *relevant social, economic, and environmental* values, requirements, functions, and impacts that identifies synergies and potential areas of conflict (WCD Report, p.265). (Italic is mine)

Reflecting a river-basin-wide understanding of relevant social, economic, and environmental values, as contextualised in the rule, has no restraint since no fixed and precise limit or method exists to determine lawful conducts.

This absence of restraints is first of all due to the rule's comprising an action which is open-ended. Reflecting an *understanding* of something is indeed an *open-ended action* because the manner of

14. The *conduct* set by the rule is identified with such a manner of expressing consent as it will be guided by customary laws. In this example, it is relevant to note that an *indicated conduct* is not the same notion as a *conduct*. An *indicated conduct* is the *ideal conduct* that may be referred to in a rule, and it is not open-ended. In the examined case, the indicated behaviour is the manner of expressing consent pursuant to customary laws.

15. The criteria and guidelines which must be complied with are norms on Sustainable Development (SD). SD is a concept that cannot be developed in this essay. However, it can be mentioned that it is commonly agreed that the notion concerns a development, which respects the economic, social and environmental spheres. Cf. Steurer et al. (2005). SD has open-ended character because *one never really knows what this notion includes*. Steurer et al. (2005) stresses that 'CSR [corresponding to SD applied to companies] can *easily be interpreted as including almost […] everything*'.

identifying the understanding is not defined.

Moreover, like the second instance, the third instruction entails the open-ended qualification *relevant*. Thus, even if the action of showing an understanding was defined, 'relevant' would still constitute a problem. In fact, any development objective reflecting a river-basin-wide understanding of social, economic, and environmental values, requirements, etc[16] is valid due to the use of 'relevant'.

Further, using the adjectives 'social, economic, and environmental' is a broad manner to define the values, etc. Thus, the field of action of the third instance appears to be particularly open-ended, which engenders uncertainty in the determination of illegal behaviours.

Open-ended rules need limits. Yet, the open-endedness may pass unnoticed due to:

- the fact that a conduct is indicated (even though not mandatory),
- rules appearing to include limits (which actually are no restraint because of vague actions or open-ended qualifications).

3. Article 11b(6) supplementary instruments: not more legitimate than the initial provision

- **An issue of control**

Because of demanding the respect of open-ended instructions, Article 11b(6) requires the creation of a new *legislative act* (see Table 2). In fact, the provision's open-ended obligations necessitate *limits*. In other words, the article's requirements call for *plenification*[17] in order to be *complete*.[18]

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16. The wording *development objectives reflecting a river-basin-wide understanding of social, economic, and environmental values, requirements, functions, and impacts that identifies synergies and potential areas of conflict* constitutes the field of action.

17. I have created the ***plenification*** concept on the basis of the Latin word *plenus* in order to evidence an important operation which consists in conferring limits on an instruction. Indeed, with this action, constraints are given to an instruction so that it become complete and not be an *empty obligation*. I also use the words *plenify* and *plenitude*; the latter indicating the condition of being complete.

18. Importantly, as long as an article features open-ended rules, it cannot be characterised by the plenitude condition.

Plenification is a vital action, since it gives law its *inherent* binding force[19]. And on account of its binding force, law requires *control*.

Control is a key notion and can simultaneously refer to many definitions.

It means the possibility to *modify* or *reject* an instrument during its adoption process.

It also means the opportunity to verify the *processes leading to a tool's adoption* (i.e. the creation and adoption processes; see Table 1). Citizens' elected representatives or, more generally, the public may have this opportunity.

Moreover, the concept of control refers to the *judicial examination of the legitimacy of an instrument* that has already entered into force.

If the described control operations are not possible in the situation of compulsory rules, this impossibility means that the foundation of a regulatory system is not respected. In fact, if citizens cannot control mandatory rules *indirectly*, i.e. via their elected representatives, or *directly*, i.e. by scrutinising the adoption process and challenging the mandatory rules at courts once they are in force, then the foundation is not observed. Indicatively, the foundation of regulatory power *rests on the citizens* of a system (see Ciclet 2013) because the regulator derives from its citizens his power to plenify rules and, more generally, to impose obligations.

Binding rules, whether plenified or unplenified, should therefore be controlled. Besides, when a legislative act needs plenification and supplementary instruments are created, the supplementary instruments should be controlled. Indeed, it is likely and normal that such instruments plenify an initial legal measure needing restrictions, since without the plenification by the additional tools it cannot be guaranteed what behaviour is illegal in the field of action mentioned by the initial open-ended measure.

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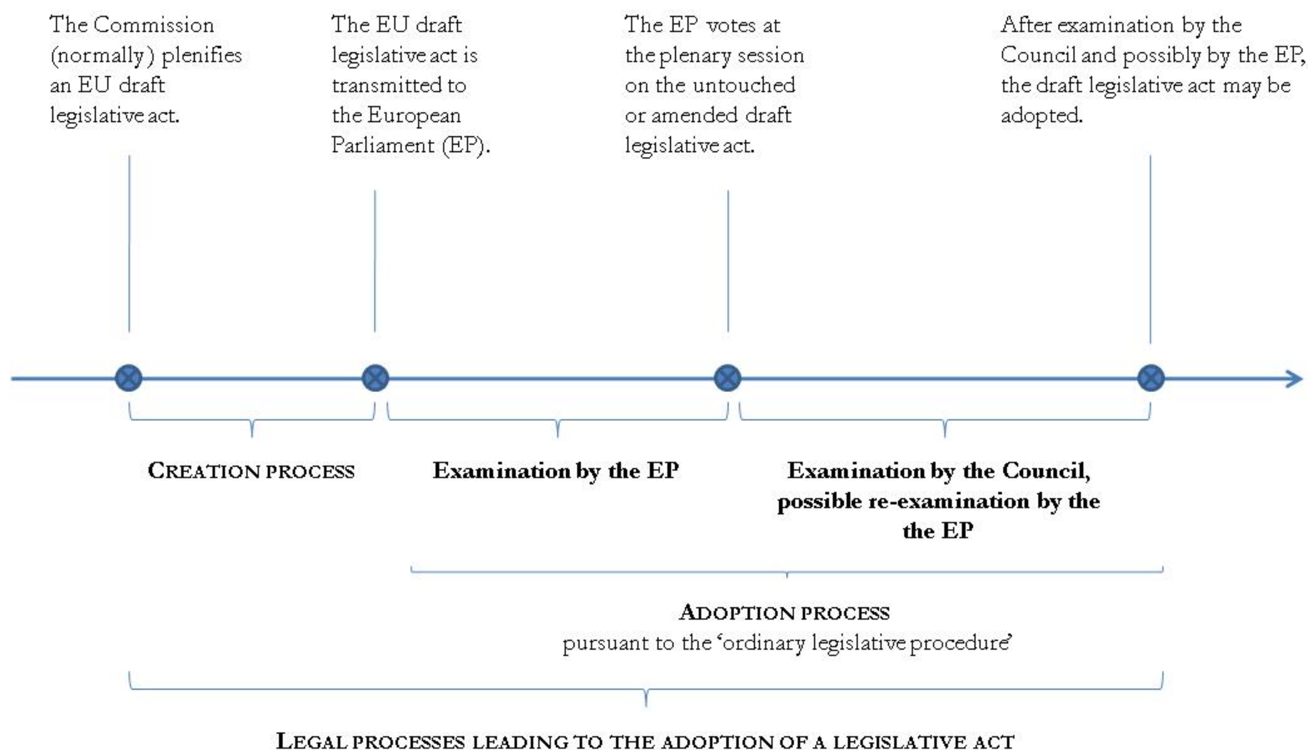
19. Plenification confers legal measures their *inherent mandatory force*, while legal processes may create law *without true compulsory force*, i.e. law which is mandatory only because adopted through legal processes making any instruction stringent. We can say that a law without true compulsory force is *a mechanically mandatory law*.

Table 1. Simplified scheme of the legal processes leading to the adoption of legislative acts



As for Article 11b(6), because it needs plenification and supplementary instruments were created, the adoption process of Article 11b(6) supplementary instruments should have been controlled and the instruments should be controllable. Yet, the EU citizens' elected representatives were not able to modify[20] or reject the Guidelines on Article 11b(6)[21] and the Compliance Report[22] before their adoption. Plus, the representatives' monitoring of their adoption was hindered due to the lack of transparency of the process.

The control issues arose because no legal mechanism was in existence for the control of the adoption of Article 11b(6) additional tools. In particular, no legal process prescribed the record of

20. Members of the European Parliament (EP) can modify rules when they are entailed by a draft legislative act (see Table 2).
21. It should be noted that **uppercase Guidelines** refer to the instrument supplementary to Article 11b(6). Thus, they must not be confused with the **lowercase WCD Report guidelines**, on which Article 11b(6) places an obligation. I also name the Guidelines **Guidelines on Article 11b(6)**. The complete denomination of the Guidelines is 'Guidelines on a Common Understanding of Article 11b(6) of Directive 2003/87/EC as Amended by Directive 2004/101/EC'.
22. The full name of the 'Compliance Report' is 'Compliance Report Assessing Application of Article 11b(6) of Emissions Trading Directive to Hydroelectric Project Activities Exceeding 20 MW'. This tool is an annex of the Guidelines on Article 11b(6). It contains a questionnaire and parts in which hydroelectric projects validators write their conclusions.

specific information on the tools.

No EU legal process was available for the adoption of Article 11b(6) supplementary instruments because they had not been identified as future EU tools. In fact, the EU had not envisaged a possible adoption of the instruments by an EU institution[23].

Besides, no other legal process applied, since the additional tools' adoption was associated with the forum constituted of all the Member States (see Guidelines on Article 11b(6), 3, p.1), which does not have legal processes to discuss or plenify EU law.

The fact that Article 11b(6) supplementary instruments were not labelled as EU tools can be explained by the non-perception of the *necessity to plenify* Article 11b(6). Indeed, had this need been perceived, an EU legislative act would have been made out of the supplementary instruments, and thus EU legal processes would have been available.

Table 2. Overview of EU secondary law forms

LEGISLATIVE ACTS	NON-LEGISLATIVE ACTS
They are adopted by 'legislative procedure' (see Article 289(3) TFEU). Draft legislative acts are made by the Commission. There are different legislative processes involving, at varying degrees, the Council[24] and the European Parliament (EP). The 'ordinary legislative procedure' is illustrated in Table 1. **Article 11b(6)** is a provision of a legislative act.	The Commission drafts non-legislative acts and is responsible for their adoption. There are two types of non-legislative acts: - **Delegated acts** - **Implementing acts** (involving monitored committees) Some control mechanisms are associated with these types of acts.

We have seen that scrutiny by the EU citizens' elected representatives of the adoption of Article 11b(6) supplementary instruments was significantly impeded due to the unavailability of control processes guaranteeing information record. Information was also not secured for the *scrutiny of any individual* (public scrutiny). *Minutes* and *drafts of the tools* were for instance not guaranteed, and they are in fact unavailable.

Fortuitous information on the adoption process can be found. Yet, it is *scarce and imprecise.*

23. I do not use the word *institution* with the meaning intended in the TFEU, in which *institution* refers only to a definite number of EU entities. In the present essay, it can refer to any EU entity.
24. The Council, composed of the Ministers of the EU, is also named Council of the European Union or Council of Ministers.

Such information is visible in the Guidelines on Article 11b(6) and in a Commission working document on monitoring the application of EU law (European Commission 2009(b)). In the Guidelines on Article 11b(6) we read that

> [t]his document [the Guidelines on Article 11b(6)] stems from an attempt to reach an agreement among *the Member States* and *the Commission* on the interpretation and application of Article 11b(6) (Guidelines on Article 11b(6), 1, p.1). (Italic is mine)

The Guidelines on Article 11b(6) also state that

> [b]y *adopting these [G]uidelines*, and the Compliance Report Template *through national procedures* by 1 April 2009, *Member States* aim at creating a level playing field for proponents of hydroelectric project activities (Guidelines on Article 11b(6), 3, p.1). (Italic is mine)

The Commission working document, whose content is more fortuitous than the Guidelines on Article 11b(6), mentions that

> [The Guidelines on Article 11b(6)] and the [Compliance Report] are the output of one year's work of an *informal working group set up by Member States and the Commission*. The final version of the documents was *presented to Climate Change Committee [gathering both the Member States and the Commission]* on 29 January 2009 (European Commission 2009(b), p.232). (Italic is mine)

These details shed light on the processes that led to Article 11b(6) supplementary tools' adoption. Yet, they are not sufficient, and they are vague. For instance, the part played by the Commission in the adoption of Article 11b(6) supplementary instruments is hazy, despite the Commission seeming to have a significant role. More generally, with this information it cannot be determined with certainty by external observers which actors exactly adopted Article 11b(6) supplementary instruments.[25]

Imprecise and insufficient data on the adoption process of tools is prejudicial to scrutiny,

25. The creation process of Article 11b(6) supplementary instruments is also foggy. In particular, the identity of the persons part of the *informal* working group which made Article 11b(6) supplementary instruments is unknown. Indeed, we do not know the organisation(s) the members of the group are attached to.

but also to instruments' judicial control by the Court of Justice of the European Union (CJEU)[26]. Indeed, precise, sufficient and also reliable information is crucial to determine whether an instrument has been *in fact* adopted by an EU institution, the acceptation by an EU institution being a prerequisite for tools' judicial examination by the CJEU (see Articles 263 and 267 TFEU).

Another prerequisite for tools' judicial evaluation pursuant to Article 263 TFEU[27] must be met, this too being hard to fulfill in the case of Article 11b(6) supplementary instruments: it must be demonstrated that the instruments are *intended to generate legal effects*.[28]

Article 11b(6) open-ended instructions – especially those of the WCD criteria and guidelines – complicate the verification whether Article 11b(6) supplementary instruments are intended to trigger legal effects. And this complication occurs because an intention to produce *new* legal effects[29] must *in fact* be evidenced.

In concrete, the *character of novelty* is found by the CJEU when 'new obligations' are laid down in supplementary instruments (Case C-325/91, France v Commission [1993] ECR I-03283, para.14) or when a tool 'adds to the text' of an initial measure (Case C-366/88, France v Commission [1990] ECR I-3571, para. 23).[30]

The character of novelty can hardly be proven in the context of unconstrained instructions, since open-ended rules render comparisons between two instructions difficult, to say the least. More concretely, because of open-ended instructions it is arduous to determine whether a rule from a supplementary instrument addresses a *new conduct* or *modifies an existing one*[31].

With respect to the case of Article 11b(6) and its supplementary instruments, the numerous open-ended obligations of Article 11b(6) make it hard to demonstrate that the additional tools treat new conducts or modify existing ones.

As an illustration, the subsequent instruction, which is part of the WCD criteria and guidelines, renders the demonstration a scarcely possible task:

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26. As for Article 11b(6) supplementary instruments, although judicial control is hardly possible notably due to imprecise and insufficient data on their adoption process, the CJEU should assess them because they have an EU character. Indeed, they are additional to **an EU piece of law needing plenification.**
27. Indicatively, the judicial action pursuant to Article 263 TFEU can cause the annulment of instruments.
28. The prerequisite of tools' being intended to generate legal effects is part of Article 263 TFEU, and it has been reiterated in judicial precedents such as Case 22/70, Commission v Council [1971] ECR 263, para.42.
29. See, for instance, Case C-366/88, France v Commission [1990] ECR I-3571, para.11.
30. Indicatively, explanations of an existing conduct do not manifest the character of novelty. See Case C-366/88, para. 23, and Case C-325/91, para.14.
31. Introduction of a conduct and modification of an existing one are the actions that can be performed by means of introducing a *new obligation* and *adding to the text*.

> [d]evelopment objectives reflect a river-basin-wide understanding of relevant social, economic, and environmental values, requirements, functions, and impacts that identifies synergies and potential areas of conflict (WCD Report, WCD criterion, p.265).

As we can notice, the mentioned rule is lexically so indeterminate that comparing quite any rule to it would be unproductive.

- **The supplementary instruments of Article 11b(6) need plenitude**

Supplementary instruments may not plenify an initial measure because they do not secure plenification. In point of fact, instructions of an initial legal act may not find restraints by a supplementary instrument because:

- all of the rules of the additional tool restate the original rules;
- some rules of the supplementary instrument restate original rules, *while* the other rules introduce new conducts and/or alter the original rules and/or are open-ended;
- all of the rules of the supplementary instrument address new conducts and/or alter the original rules;
- all of the rules of the supplementary instrument are open-ended;
- some of the rules of the supplementary instrument introduce new conducts and/or alter the original rules, while the other rules are open-ended.

As to the Guidelines on Article 11b(6), plenitude – i.e. a state in which all the rules have limits – does not characterise them. For example, one of the Guidelines on Article 11b(6) states that

> Article 11b(6) refers to 'relevant international criteria and guidelines, including those contained in the' WCD Report. The WCD guidelines [guidelines seeming to have a general meaning here] were designed to reflect best practice on sustainability assessment. As such the *WCD Report can be assumed* to be a fair reflection of the 'relevant international criteria and guidelines', *without prejudging* the *possibility of*

> *considering as well other* relevant criteria and guidelines *in the future*, if such are *accepted* jointly by the Member States (Guidelines on Article 11b(6), 1, p.5). (Italic is mine)

Before evidencing the plenitude problem, it should be remarked that this Guideline on Article 11b(6), such as Article 11b(6) itself, makes a confusing use of the terms 'guidelines' and 'criteria and guidelines'. Moreover, it is formulated in a manner that seems to involve no obligation. Indeed, it declares that 'the *WCD Report can be assumed* to be a fair reflection of the relevant international criteria and guidelines'. Yet, since this Guideline on Article 11b(6) suggests that no other form of guidance than the WCD Report is considered in the present for applying Article 11b(6), then it *does* indicate that the WCD Report must be respected, and more precisely that only the WCD Report must be observed.

Designating the WCD Report as what must be abided by also signifies that all the forms of guidance which are integrated in it must be conformed to. Thus, the WCD criteria and guidelines as well as other WCD chapters including guidance entailing open-ended instructions must be respected. Due to the open-endedness of these instructions, this Guideline on Article 11b(6) needs plenitude.

Another Guideline on Article 11b(6) also confirms that the supplementary tool needs plenitude:

> [t]he Compliance Report includes *an undertaking* [i.e. a guarantee] by an Independent Validating Entity[32] that, in their assessment, the project *respects* the *seven strategic priorities*, outlined in the [WCD Report] (Guidelines on Article 11b(6), 3, p.7). (Italic is mine)

This Guideline on Article 11b(6), like the one that we have just examined, is hazardous. It means that private auditors must guarantee that they *believe* that a hydroelectric project conforms to the WCD *seven strategic priorities*. Yet, considering that a rule is observed does not ensure that it is.

Despite the awkward formulation, this Guideline on Article 11b(6) confirms that the WCD seven strategic priorities (which are norms of the WCD Report) *are designated as constraints* for the

32. *Independent Validating Entity* designates a private auditor (aka Designated Operational Entity, and Accredited Independent Entity). Technically, private auditors assess the Compliance Report. After the assessment, Member States' authorities may give their approval.

evaluation of the Compliance Report questionnaire. The serious problem is that the WCD seven strategic priorities, like other WCD Report's piece of guidance, encompass *unrestricted* instructions.

Concretely, the WCD seven strategic priorities chapter comprises rules including the idea of *guide* as does the WCD guideline on Free, Prior and Informed Consent. As illustration, we report here few lines from the WCD seven strategic priorities chapter:

> [d]ecisions on projects affecting indigenous and tribal peoples *are guided* by their free, prior and informed consent achieved through formal and informal representative bodies (WCD Report, WCD seven strategic priorities chapter, p.215). (Italic is mine)
>
> The customary laws and practices of the indigenous and tribal peoples, national laws and international instruments *will guide* the manner of expressing consent (WCD Report, WCD seven strategic priorities chapter, p.219). (Italic is mine)

The fact that the Guidelines on Article 11b(6) present the open-ended rules of the seven strategic priorities and of the other guidance chapters of the WCD Report as constraints does not only mean that the Guidelines need plenitude; this fact also signifies that open-ended restraints are contemplated for the assessment of the Compliance Report questionnaire.

4. Conclusion

The analysis of Article 11b(6) has demonstrated that if a piece of law demands the observance of rules that have no limits, then the absence of constraints may not be evidenced due to the open-ended obligations seeming to have limits. Therefore, an illegitimate rule may remain in force. However, even if the need for plenification is not detected, the provision still necessitates limits so that unlawful behaviours can be spotted. For this reason, the use of supplementary instruments is indispensable even though plenification is not seen as a necessity.

But if supplementary instruments to a legal measure needing restraints are created without the plenification objective, then these instruments may not be controlled or controllable because an EU *legislative act* would not be envisaged for them due to the non-identification of the objective. In fact, if an EU legislative act is not contemplated, no legal processes may apply for tools' control. Further, if an EU instrument is not selected at all and the tools' adoption forum has no binding

control processes, then instruments' control will not be ensured.

More concretely, if an EU legislative act is not contemplated it signifies that instruments cannot be modified and rejected by the EU citizens' elected representatives before tools' adoption. Plus, if such act is not envisaged and if the adoption forum has no legal processes for tools' control, this means that the record of information is not guaranteed. And this absence of guarantee can prevent the judicial examination by the CJEU because the TFEU designates the EU paternity of tools as a condition for the court's judicial control.

Significantly, if control mechanisms are not ensured or are absent, this situation is unsound because it means that the regulator does not respect the foundation of EU power which is based on the EU citizens. Indeed, if the EU citizens cannot *indirectly* (via their elected representatives) control the processes for adopting instruments necessary for the plenitude of a legal measure, or if they cannot *directly* control these processes or the tools once in force; then the foundation is not respected.

Precisely, the foundation is not respected because it is likely and normal for tools additional to an open-ended legal measure to plenify it. Plus, in a more subtle manner, the foundation is not observed because those who must apply Article 11b(6) look to its supplementary instruments so as to legitimately apply the compulsory open-ended instructions of the legal measure.

As we have seen, the absence of control mechanisms prescribed by law can originate from the EU not selecting an EU legislative act for the future adoption of a tool and/or from the unavailability of binding control processes in the forum adopting the tool.

Specifically, no EU mandatory control mechanism applied for the adoption of Article 11b(6) supplementary instruments because an EU legislative act had not been selected for them and no legal process for their control applied at all.

No EU legislative act had been selected since the plenification objective had not been perceived and since the EU had not contemplated a possible adoption of Article 11b(6) supplementary instruments by an EU institution. Furthermore, as no mandatory control mechanism at all existed for the control of the tools' adoption, the availability of records on Article 11b(6) additional tools' adoption was not ensured, and more generally no form of control was secured.

Information that can be found on Article 11b(6) supplementary instruments is in reality insufficient and unclear, which makes the judicial examination by the CJEU hardly imaginable. We are thus in presence of a *vicious circle of illegitimacy*: the non-recognition of the EU origin of the tools,

and more generally the unavailability of control processes, did not guarantee information on the tools' adoption. And because of this lack of information the tools can hardly be identified as adopted by an EU institution.

In sum, the absence of legal processes can place any instrument in a *legal limbo*[33]. Again, as far as tools' control and the legitimacy of an adoption forum are concerned, it should also been borne in mind that even if the Member States are those who apply EU law and perform as one of the principals of EU action[34], they should not constitute an independent arena to create tools having EU character. Instruments with such character should not be created in the context of another forum than the EU.

From this essay it should also be remembered that open-ended rules are a serious menace: they cause discretionary evaluations and they are not easy to detect, which is a reason for not making a legislative act out of instruments supplementary to an open-ended piece of law. Moreover, the instances we have proposed in the present analysis have shown that supplementary instruments may not be controlled or controllable notably due to failing to identify the necessity to plenify an initial legal measure; and these instruments can in turn need plenitude. Besides, supplementary instruments may not be *judicially controllable*, not only because of the absence of binding control processes, but also due to the fact that they complicate the determination whether they add new conducts to an initial legal measure and whether they alter it.

The limit issue goes beyond the analysis carried out in the present study. EU *primary law* – for instance governing the conduct of the regulator – is also affected (see Ciclet 2013). The regulator and individuals should therefore be aware of the perils unleashed by unconstrained regulatory tools.

The instruments we have examined show that the regulator and individuals should pay particular attention to regulation and should inquire into any case in which law loses its legitimacy.

To give the reader a concrete flavour of the topics I have tackled in the present study, after the References he can find both of the supplementary instruments of Article 11b(6).

33. Scott 2011 employs this relevant expression.
34. See Ciclet 2013, who highlights the serious issue of the lack of limit in the behaviour of the EU regulator whose power rests on the Member States and ultimately on their citizens, that indeed constitute the ultimate principal of the EU action.

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