

SELF-REGULATION AND ENVIRONMENTAL LAW¹

Rob van Gestel²

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Abstract

Self-regulation and environmental management are becoming more and more important in European environmental law. This article discusses the possibilities of and constraints on ‘transplanting’ certain parts of environmental management systems to public policy and regulations. For instance, does certification of these systems contribute to environmental performance and legal compliance or is it merely a useful tool for ‘environmental advertising’? Furthermore, critical comments are made about the future of the European Environmental Management and Audit Scheme (EMAS). To survive the competition with the international standard for environmental management ISO 14000, the European Commission will have to decide whether EMAS is to become a set of minimum criteria for the implementation of an environmental management system that is suitable for the entire business community or a standard of excellence that benefits only front-runner companies.

1. Introduction

The use of self-regulatory mechanisms, such as voluntary environmental agreements, eco-labelling systems, corporate codes of conduct and certification schemes is increasing dramatically in the field of European environmental policy and law. More in general, one might say that the official legislative policy of the European Union is no longer focusing only on a simplification of the rules and a reduction in the volume of legislation. Today, the European legislature is also looking for more efficient combinations of public and private regulation generally known as ‘co-regulation’. This regulatory strategy implies: attaining certain objectives defined by legislative authorities to private parties, such as NGOs, social

¹ This article is a revised version of the paper presented at an international conference of EU member states on 11, 12 and 13 June 2003 at the Conrad London Hotel, Chelsea Harbour, London. This conference was organised by the Dutch and British Environmental Protection Agencies in close cooperation with the European Commission. More information and working papers are available through <http://www.infomil.nl> (search word: ENAP).

² Rob van Gestel is Associate Professor of Legislative Studies and Environmental Law at Tilburg University.

partners and business associations, which are recognised in various fields of policy.³ For instance, in the Sixth Environment Action Programme the European Commission declares that it is:

currently examining new methods of governance, including alternatives to traditional regulation such as voluntary commitments and agreements, which could improve the ability of enterprises to innovate and change. This also includes, when appropriate, setting a regulatory framework establishing policy objectives and leaving the practical implementation measures to be defined by industry in a consensual manner, in support of the legal framework ('co-regulation').⁴

One of the first attempts to bridge the gap between European environmental legislation and business self-regulation was the introduction of the European regulation allowing the voluntary participation of organisations in a Community Eco-Management and Audit Scheme (EMAS).⁵

This regulation, however, has had only limited success up to now. The number of participants is still very low in most member states, except for Germany.⁶ Moreover, the number of organisations that has been certified on the basis of the international environmental management standard ISO 14001 exceeds the number of EMAS-registered organisations by far.⁷ In my opinion this partly results from ambivalent governmental policies regarding EMAS and the fact that companies do not experience a serious quid pro quo for participation in this voluntary audit scheme.⁸ After all, obtaining an EMAS certificate involves much work. Roughly, a company must have:

- conducted an *environmental review*, considering all environmental aspects of the organisation's activities, products and services, and have developed methods to assess its legal and regulatory framework and existing environmental management practices and procedures;
- established an effective *environmental management system* (EMS) aimed at achieving the

³ Interinstitutional Agreement on better law-making, OJ 2003, C 321/01, p. 3.

⁴ Communication from the Commission on the Sixth Environment Action Programme of the European Community 'Environment 2010: Our future, Our choice', COM (2001), 31 final.

⁵ Council Regulation 1836/93/EC, which introduced EMAS I, was adopted on 29 June 1993. Originally, EMAS was set up as a voluntary management tool for industrial companies, to evaluate, report and improve their environmental performance.

⁶ http://europa.eu.int/comm/environment/emas/about/participate/sites_en.htm.

⁷ <http://www.ecology.or.jp/isoworld/english/analy14k.htm>.

⁸ Paradoxically, research shows that, while supranational in scope, domestic factors such as regulatory styles and market structures play an important role in companies' decisions to participate in environmental management system codes. Thus, while globalising forces may lead to the creation of supranational standards, these standards will not necessarily lead to a convergence in the behaviour of the target groups. See K. Kollman and A. Prakash, 'EMS-Based Environmental Regimes as Club Goods: Examining Variations in Firm-Level Adoption of ISO 14001 and EMAS in the U.K., U.S. and Germany', *Policy Sciences* 35 (2002) 1, 43-67 (esp. p. 60). Their research shows, among other things, that supporters of environmental programmes can create incentives for companies to participate only if the policy architecture creates excludable benefits for them and at the same time reduces the costs of participation.

organisation's environmental policy defined by the top management. The management system is to define responsibilities, environmental objectives/targets, means, operational procedures and training needs, and create monitoring and communication procedures;

- carried out internal and external *environmental audits*, assessing in particular the management system in place and the ability to conform with the organisation's policy and programme as well as compliance with relevant environmental regulatory requirements;

- provided an *environmental statement* of its environmental performance which lays down the results achieved as compared to the environmental objectives and the steps to be taken in order to improve the organisation's environmental performance continuously.⁹

The European Commission regards the EMAS II regulation as a more comprehensive one than 'just' another environmental management system standard,¹⁰ mainly because the standard explicitly focuses on legal compliance and transparency. The business community in general, however, apparently does not discern many economic or legal advantages that specially benefit an EMAS-registered organisation.¹¹ Also, public authorities in the member states do not have a clear view on if and how they can make EMAS registration part of their environmental regulatory policies. Both companies and public authorities remain interested in the answer to the question how EMAS registration can serve their respective objectives, but a lack of clarity about the benefits and the effectiveness of the obligations of the regulation seems to lead to a passive attitude on both sides.

In this article, I will discuss some key issues and dilemmas that are crucial for the future of the EMAS Regulation when it comes to the possibilities of 'transplanting' certain parts of environmental management systems (EMSs) to public policy or regulation.¹² The

⁹ Regulation 761/2001/EC of the European Parliament and the Council of 19 March 2001 (EMAS II).

¹⁰ Major changes in EMAS II compared to EMAS I are: the extension of the scope of EMAS to all sectors of economic activity, including public authorities; the integration of ISO 14001 as the environmental management system required by EMAS (although EMAS is supposed to continue to differ from ISO with regard to legal compliance, communication and environmental performance); the potential extension of EMAS to the entire organisation rather than its being restricted to a specific site; strengthening of the role of the environmental statement to improve the transparency of the communication of environmental performance between companies and the wider community; and greater emphasis on indirect environmental effects including financial investments, administrative decisions and procurement procedures. See B.J. Richardson, 'Horizontal Instruments', in H. Somsen (ed.), *The Yearbook of European Environmental Law*, Vol. III (Oxford: Oxford University Press, 2003), pp. 438-439.

¹¹ J. Clausen, M. Keil and M. Junwirth, The State of EMAS in the EU: Literature Study for the European Conference 'The EU Eco-Management and Audit Scheme: Benefits and Challenges of EMAS II', Brussels 2002, pp. 39-42 (http://europa.eu.int/comm/environment/emas/pdf/general/literature_study_020506.pdf).

¹² In the field of comparative law, the doctrine of 'legal transplants' is well known. See, e.g., A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974) and P. Legrand, 'The Impossibility of Legal Transplants', *Maastricht Journal of European and Comparative Law* 4 (1997) 4, 111-124. Scholars of comparative law usually consider a legal transplant to be 'the moving of a rule or system of law from one country to another'. In environmental law, however, the concept of legal transplants has a different meaning. J.B. Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law', *Ecology Law Quarterly* 27 (2001) 4, 1295-1371, for example, uses this doctrine to explain the borrowing of national legal rules concerning emissions trading in the US into international treaties, such as the Kyoto Protocol, about climate change. I think that we could even move one

lessons that might be drawn from linking EMSs to environmental permits and enforcement policies are especially based on the experiences in the Netherlands.¹³ However, they are probably also relevant for legislators, policy-makers and enforcement agencies in other countries.

In section 2, I will discuss certain open clauses in the EMAS requirements from a legal point of view. In section 3, I will compare public regulation and self-regulation and deliberate on the frictions that may result from linking environmental permits to certified environmental management systems. In section 4, I will argue that, in the near future, critical choices will have to be made about the regulatory course of EMAS: Is it going to be promoted exclusively as a management tool or do we want EMAS to evolve towards a public environmental-policy-supporting regulatory system? In sections 5 and 6, two different policy approaches are presented to turn EMAS into a more regulatory standard. Section 7 contains some concluding remarks.

2. Certified EMSs between expectations and legal reality

In this section, I will address three major questions. The first is: To what extent does EMAS *guarantee* a certain environmental performance of registered organisations? I would like to remind the reader that a legal answer to this question differs from an empirical one. It is irrelevant here, for instance, whether EMAS-registered sites in general show higher or lower emissions than sites without an EMS. From a legal perspective, it is only relevant to what degree EMAS registration warrants that individual organisations at least show the environmental performance that is required under relevant regulations. For industrial installations falling within the scope of the IPPC Directive this means,¹⁴ among other things, operating according to the Best Available Techniques (BAT).¹⁵

step further by claiming that the whole idea of emissions trading is based on a transplantation of economic principles (a market for tradable emission rights) into a legal system (legislation concerning the rules for emissions trading). Therefore, perhaps a better definition of this phenomenon would be ‘translegal transplanting’. In the case of linking of management and audit schemes with environmental permits, the transplantation occurs between management concepts and legal rules.

¹³ For a summary of the Dutch policy consult the ‘Circular on the framework licence and the customised licence’, developed by the Ministry of Housing Spatial Planning and the Environment together with the Ministry of Transport, Public Works and Water Management, The Hague, November 1999 (available in English through <http://www2.vrom.nl/docs/internationaal/w2-10.pdf>).

¹⁴ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ L 257, 10 October 1996, pp. 26-40.

¹⁵ Article 2(11) of the IPPC Directive defines BAT as ‘the most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and the impact on the environment as a whole’. Article 9(4) of the IPPC Directive states that permits are to include emission limit values based on BAT, without prescribing the use of any technique or specific technology, but taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions. The prohibition of

The second question addresses the relationship between EMS certification - ISO 14001 certification or EMAS verification - and enforcement. To be more specific, the true question is: What exactly does verification, or certification, prove in the sphere of compliance with environmental laws? Are certification bodies and public inspection agencies pursuing the same goals and roughly applying the same methods of investigation? Or does certification essentially differ from monitoring compliance and enforcing laws by public authorities?¹⁶

Last but not least, it will be interesting to see what EMAS has to offer when it comes to communication with the public. According to Article 1(2)(c) of EMAS, one of the key objectives of the EMAS II regulation is providing information on environmental performance and stimulating an open dialogue among all interested parties. This confronts us with the question: Does the focus on *external* communication mean that EMAS is no longer primarily an *internal* management tool for those in charge of the organisation?

2.1 An EMS and environmental performance

From a legal perspective, EMAS - but the same goes for ISO 14001 - offers no special guarantees when it comes to emission reductions, waste prevention, external safety,¹⁷ or energy efficiency.¹⁸ The reason for this is very simple: the promotion of continuous improvement in EMAS and ISO 14001 hardly refers to the speed of improvement in environmental performance and does not mean the same as, for instance, performance according to BAT, as the IPPC Directive demands from operators of (large) industrial installations.

In my view, environmental performance according to BAT implies that an installation should at least operate according to techniques that have been developed on a scale that allows implementation in a certain sector, under economically and technically viable

prescribing techniques in the environmental permit has to do with the fact that the freedom of choice is to be left to the operator of a plant when it comes to the implementation of different techniques that are all capable of achieving emission targets in accordance with BAT.

¹⁶ See, about this question in general, G.J.M. Evers, 'Experiences with Certification: Reconsidering the Use of a Communicative Instrument for the Purpose of Enforcing Legislation', *Tilburg Foreign Law Review* (2003) 10; <http://www.tilburguniversity.nl/tilec/events/seminars/051203/TFLR02.pdf>. This article was based on the author's doctoral thesis, *Blind vertrouwen? Een onderzoek naar de toepassing van certificatie ten dienste van de handhaving van wettelijke voorschriften* ['Blind faith? A study of the use of certification for the purpose of enforcing legislation'] (Den Haag: Boom Juridische uitgevers, 2002). The book contains a summary in English.

¹⁷ The tragic accident at the fertiliser factory of Atofina in Toulouse on 21 September 2001, for instance, took place on a site that had been certified according to ISO 14001 from 1998 onward (see the press releases at <http://www.atofina.com/grandeparoisse/gb/comm/communiquer.cfm>).

¹⁸ R. Krut and H. Gleckman, *ISO 14001: A Missed Opportunity for Sustainable Global Industrial Development* (London: Earthscan, 1998), p. 10.

conditions.¹⁹ At the same time, operating according to BAT, may also mean that for an individual installation a higher level of environmental protection may be required if, for example, local ecological circumstances make this necessary or scientific advances make it possible.²⁰ Only through a loophole, one may argue that EMAS does say something about the level of environmental protection and improvement that is required from a registered organisation. After all, Article 3(2)(a) and Article 6(4) of EMAS state that EMAS-registered organisations should at all times comply with relevant environmental laws and regulations.²¹ As far as these laws include emission targets, environmental principles (the prevention or precautionary principle) or environmental standards, such as BAT, these elements - in theory - also become part of the verification process.

Nevertheless, environmental performance will for a large part remain a matter of attitude in nature and is strongly influenced by the social surroundings of the organisation (financial stability, NGO pressure, public disclosure and consumer interest). It is first and foremost the attitude of organisations that make EMSs work in favour of the environment, and not the other way around.²² Sometimes this insight is blurred as a consequence of policy statements that are intended to promote the use of EMSs. For example, according to the Commission's 'Working paper regarding incentives to EMAS-registered organisations' participation in this eco-management and audit scheme suggests taking a stance in favour of 'environmental excellence' and even moving 'beyond legal compliance'.²³ However, what

¹⁹ The fact that every installation under the IPPC Directive has to perform according to this general BAT level has to do with creating a level playing field concerning the application of technical standards. An individual company, for instance, cannot call upon its poor financial situation to evade obligations to invest in technical improvements that are common practice in a certain branch. If this were not the case, this would lead to serious distortions of competition.

²⁰ Annex IV of the IPPC Directive.

²¹ Article 3(2) of EMAS states: 'In order for an organisation to be registered under EMAS it shall: (a) Conduct an environmental review of its activities, products and services in accordance with Annex VII addressing the issues contained in Annex VI and, in the light of the results of that review, implement an environmental management system covering all the requirements referred to in Annex I, in particular the compliance with the relevant environmental legislation. . . .' Article 6(4) states: 'If, at any time, a competent body concludes, on the basis of evidence received, that the organisation is no longer complying with one or more of the conditions of this Regulation, the organisation shall be suspended or deleted from the register, as appropriate, depending on the nature and scope of the failure. If a competent body is informed by the competent enforcement authority of a breach by the organisation of relevant regulatory requirements regarding environmental protection, it shall refuse registration of that organisation or suspend it from the register as appropriate.'

²² The same goes for ISO 14001, as shown by G. Vastag and S. Melnyk, 'Certifying Environmental Management Systems by the ISO 14001 Standards', *International Journal of Production Research* 40 (2002) 18, 4743-4763. Companies that implement environmental management systems in their organisation are often focused on 'process optimisation', and are not primarily concerned with improving environmental outcome in terms of emission reductions, as is shown by F. van der Woerd, *Self-Regulation in Corporate Environmental Management: Changing Interactions between Companies and Authorities* (Enschede/Utrecht: Febo, 1997).

²³ The working paper was distributed among the participants in the ENAP conference in London in 2003 (on file with the author).

does this mean? Are environmental verifiers really going to check whether EMAS-registered organisations, falling within the scope of the IPPC Directive, have implemented measures that go beyond 'just' applying the best available techniques to improve environmental performance? Are certification bodies and verifiers equipped to perform such an investigation?²⁴

Last but not least, does the penetration of laws and regulations into an audit scheme not alter the fundamental characteristics of the EMS as a management tool and the job of verifiers as providers of a commercial service to the organisation?

2.2 EMS certification and compliance

Perhaps the most interesting question from a public-policy perspective is to what extent verification on the basis of EMAS or the certification of an EMS on the basis of the ISO 14001 standard guarantees compliance with laws and regulations. Is there a difference between the two standards in this respect?

This question will be answered in two steps. First, it is important to determine to what extent the two standards contain substantive rules that directly (and not only procedurally) relate to the compliance with regulations. Second, to what degree can third-party audits be compared to public surveillance and enforcement activities? In answering these questions, one will have to pay attention to some general differences between ISO 14001 and EMAS that may influence the extent to which the implementation of the EMS says anything about an organisation's legal compliance. Unlike EMAS, ISO 14001 does not prescribe the certification of the implemented environmental management system by an independent third party. Yet, if an independent party does not certify the implementation of ISO 14001, it seems precarious in public policy to attach any legal consequence to the assertion that a functioning EMS has been implemented within the organisation. Therefore, we can only compare the EMAS-registered organisation with its ISO 14001 *certified* counterpart.²⁵

Another pitfall under the ISO 14001 standard lies in the fact that the concept of 'organisation' is not accurately defined. Because of this, a company may choose to bring only a part of its enterprise and business activities under the regime of the standard, thereby leaving processes that are more difficult to manage and improve from an environmental perspective outside the certification scope. Such proceedings may, of course, lead to serious misunderstandings about the value of the EMS. EMAS, on the other hand, contains stricter conditions concerning the registered organisations. The entity registered as an organisation under EMAS, in general, will not be smaller than a site. The registration of entities smaller than a site is only allowed under exceptional circumstances and may not be used for 'cherry

²⁴ Article 16 of the IPPC Directive refers to BAT-reference documents, prepared by the European IPPC bureau in Sevilla (<http://eippcb.jrc.es/>). These so-called 'BREFs' are intended as tools for permitting authorities to decide which production techniques and monitoring procedures are in accordance with the best available techniques in various branches of industry (paper, steel, waste incineration, etc.). BREFs are written as guidelines for, esp., public authorities. Their purpose is to help to redress any technological imbalances in the European Community and to promote the worldwide dissemination of emission limit values and techniques.

²⁵ L. Oluoch-Wauna, 'EMAS and ISO 14001: A Comparison', *Environmental Policy and Law* 1 (2001) 4/5, 237-249 (at p. 244).

picking', according to the European Commission.²⁶

In general, the ISO 14001 standard requires the top management to commit itself to comply with relevant environmental legislation and regulations and with other requirements to which the organisation subscribes.²⁷ In accordance with this standard, a certification body is to verify the existence of the commitment to comply and the availability of internal procedures to identify legal obligations, monitor compliance and, if necessary, take corrective measures. In other words, a certification body is to check whether the implemented EMS enables an organisation to fulfil its legal obligations.²⁸ External audits are to establish the effectiveness of the EMS on this point. Nonetheless, it is important to point out that these audits seem to be unsuited for tracking down signs of fraud in the operation of a company's internal monitoring system as far as the information about compliance with regulations at the shop-floor level is concerned.²⁹ I think that the only way a third party can check the effectiveness of the system when it comes to legal compliance is to compare the knowledge about laws and regulations within the organisation with the existing obligations as established by the enforcement agency, which, however, is not *explicitly* required in any EMS standard. Furthermore, it may be useful for a certification body to perform spot checks to determine whether monitoring procedures really work and can prevent violations out of negligence. EMAS requires a method of verification that seems to come close to this suggested 'compliance test'.³⁰ However, the Council regulation clearly leaves room for other interpretations in this respect.

Furthermore, at least in the Netherlands the actual certification and verification schemes that are used in external audits of EMAS and ISO 14001 by certification bodies all

²⁶ Commission decision of 7 September 2001 on guidance for the implementation of Regulation (EC) No. 761/2001 (EMAS), Annex 1.

²⁷ ISO 14001:1996, Article 4.2.c.

²⁸ Oluoch-Wauna (2001), p. 243. The Dutch verification scheme for EMAS tell us that certification bodies primarily have to check whether the organisation is able to discover and repair violations of relevant environmental legislation. The independent auditors are not supposed to check whether the organisation actually complies with all relevant laws and permit conditions. See Stichting Coördinatie Certificatie Milieu- en ARBOzorgsystemen (SCCM), 'EMAS Verification Scheme', The Hague, 27 March 2002 (especially § 4.8). The Dutch version of the verification scheme can be downloaded from <http://www.sccm.nl> (click on 'EMAS').

²⁹ Experiences in the Netherlands with, for instance, the certification of companies responsible for the removal of asbestos from buildings have shown that private certification bodies cannot prevent calculated violations by waste disposal companies of environmental regulations concerning the removal of this highly dangerous waste material. See the research report by J. Tempelman, *Asbest in puin en puingranulaat* (Apeldoorn: TNO Milieu Energie en Procesinnovatie, 1998) and the report by the Raad voor Accreditatie, 'Rapportage resultaten beoordelingen van de eindcontrole na asbestsaneringen uitgevoerd door de RvA', Utrecht, 11 July 2002.

³⁰ Annex V, § 5.4.3, Legal compliance: '... The environmental verifier shall not validate the environmental statement, if during the verification process he observes, for example through spot-checks, that the organisation is not in legal compliance.'

look very alike.³¹ This is the more alarming since Dutch empirical research has shown that ISO 14001 certification offers no special guarantees for compliance in daily practice. The study, conducted on behalf of the Dutch Ministry of Justice, shows that 63 per cent of the companies with an ISO 14001 certified EMS violate the rules of the *Wet verontreiniging oppervlaktewateren* (Pollution of Surface Waters Act), while only 24 per cent of the companies without an EMS do the same.³² A possible explanation for a part of these striking results is that companies with an EMS are usually large and more complex organisations.

First, the size of companies appears to be a relevant factor in matters concerning compliance with the law, because 57 per cent of the companies with over 200 employees violate one or more rules of the Pollution of Surface Waters Act, against only 31 per cent of the smaller businesses. Second, another explanation may be that businesses with a certified EMS maintain a closer relationship with permitting and enforcement authorities leading to more ‘attention’ in the sphere of surveillance. This may explain the higher non-compliance rates. Third, a theoretical possibility is that organisations with a certified EMS are supposed to meet higher emission standards and therefore are also more likely to fail in ‘picking those higher fruits’. All the same, it remains striking that organisations with an ISO 14001 certificate do not have better compliance records.

In addition to the conditions of ISO 14001, EMAS registration requires verification of the environmental statement and pays special attention to compliance with laws and regulations. EMAS-registered organisations are, according to Annex I, under B(1), to be able to demonstrate that they:

- (a) have identified, and know the implications to the organisation of, all relevant environmental legislation;
- (b) provide for legal compliance with environmental legislation; and
- (c) have procedures in place that enable the organisation to meet these requirements on an ongoing basis.³³

Although this special attention may reveal all sorts of verification activities, it goes without saying that the verifier will not be satisfied with just finding monitoring procedures. Article 10(2) of EMAS states that member states should consider how an EMAS registration may be taken into account in the implementation and enforcement of environmental legislation in order to avoid ‘unnecessary duplication’ of effort by both registered organisations and

³¹ Cf. the certification scheme for ISO 14001 and the verification scheme for EMAS-registered organisations as designed by the SCCM (also the notified body for EMAS in the Netherlands) at www.sccm.nl.

³² H.M. Prinsen and R.M.M. Vossen, *Eindrapport Naleving en handhaving van de Wet verontreiniging oppervlaktewateren in 2000-2001* (The Hague: Expertisecentrum Rechtshandhaving, Ministerie van Justitie, 2002), p. 7.

³³ However, the International Network for Environmental Management (INEM) states: ‘There are no published cases where a site has been deregistered for non-compliance with environmental legislation, but there have been cases where companies did not obtain registration to EMAS because of legislative non-compliance. If a company has an incidence of non-compliance and the relevant authorities are informed and have accepted this, for example by way of a remediation order with a transitional period, or with some form of documented or written approval, then there should be no basis for deregistration’ (http://www.inem.org/htdocs/toolkit/introduction1_3.html).

competent enforcement authorities.³⁴ This reference to avoiding duplication suggests that there is an actual overlap between the external audits of the EMS and enforcement actions by public authorities. Yet, the provisions of EMAS leave open to what extent the highly procedural requirements of any EMS standard may substitute for the monitoring of permit conditions or other legal provisions.

Apart from these distinctions concerning the characteristics of the regulations and EMS standards, there are also significant differences in approach and method of investigation between auditors and public supervisors. An environmental verifier is any person or organisation independent of the organisation being verified who obtained accreditation in accordance with the conditions of the EMAS Regulation.³⁵ In most member states, private certification bodies carry out the verification. This corresponds to the Commission's acknowledgement of the so-called EAC guidelines for the accreditation of certification bodies for environmental management systems.³⁶ Certification processes show significant differences compared with the traditional public regulatory system as to the supervision and enforcement of legislation and permit conditions.

First of all, certification is normally a commercial service provided to a customer. In this commercial relationship, the certification body has, unlike governmental authorities,³⁷ no reason to adopt a 'vigilant' or 'distrustful' attitude towards the person or company under supervision. Audits of the EMS are intended to assess whether the organisation qualifies for a certificate. The assessments are systematically made in a way that is roughly the same for all clients. For the certification body it is difficult to adapt its actions on the basis of a suspicion or the stained compliance record of its client; after all, the client has to pay for the extra activities that may be undertaken. Also, the certification body is in no position to enforce compliance when the client violates the law. Of course, the body may take corrective measures, such as a warning linked to a time period in which the certified organisation is to take corrective action or a suspension of the certificate. Ultimately, however, the client can always walk away from the contract with the certification body if he does not agree with the measures that are to be taken. Therefore, certification can only function as a kind of private permit system based on regular assessments, not as an instrument of law enforcement.

³⁴ Recommendation 2001/331/EC of the European Parliament and the Council of 4 April 2001, providing for minimum criteria for environmental inspections in the Member States also explains, in § IV(b) that plans for environmental inspections are to 'take into account relevant available information in relation to specific sites or types of controlled installations, such as reports by operators of controlled installations made to the authorities, self monitoring data, environmental audit information and environmental statements, in particular those produced by controlled installations registered according to the Community Eco-Management and Audit Scheme (EMAS), results of previous inspections and reports of environmental quality monitoring'.

³⁵ EMAS, Article 2(q).

³⁶ Commission decision of 16 April 1997 on the recognition of certification procedures in accordance with Article 12 of Council Regulation (EEC) No 1836/93 of 29 June 1993. The guideline concerned was replaced as a consequence of the publication of ISO Guide 66.

³⁷ V.C. de Graaff, *Private Certification in a Governance Context: An Assessment towards Communicative Governance* (Delft: Eburon Publishers, 1996).

2.3 External information and communication

EMAS requires an open attitude of the organisation towards its surroundings. A central aspect in the EMAS Regulation is the environmental statement to be issued by a company applying for EMAS registration. Such a statement, which has to be made publicly available, is to 'pay particular attention to the results achieved by an organisation against its environmental objectives and targets and the requirement of continuing to improve its environmental performance and . . . consider the information needs of relevant interested parties'.³⁸ The statement has to be validated by the environmental verifier and updated on a yearly basis. EMAS requires that the policy, programme, environmental management system and details of the organisation's performance and legal compliance are made publicly available as part of the environmental statement. The organisation must be able to demonstrate to the environmental verifier that anybody interested in the organisation's performance can easily and freely be given access to the information required. Also, EMAS-registered organisations must be able to demonstrate a dialogue with the public and other interested parties including local communities and customers with regard to the environmental impact of their activities, products and services in order to identify the interested parties' concerns. These requirements are farther-reaching than those of ISO 14001, which only requires that the organisation's environmental policy is publicly available.

Nonetheless, I wonder whether EMAS offers enough guidance to organisations in order for them to accomplish all these specific assignments concerning the establishment of the correct procedures for communication with all interested parties. Who are the interested parties?³⁹ What exactly are the best practices for establishing a fruitful dialogue with the public? The environmental statement and the dialogue with interested parties outside the organisation may lead to interaction between the organisation and the outside world that may have similar results as public rule making and enforcement activities.⁴⁰ The most difficult question is to what extent the EMAS Regulation can contribute to this kind of openness of the organisation.⁴¹

Annex III of EMAS (section 3.3), for example, contains stringent conditions for the environmental statement. The statement is to give an accurate appraisal of the organisation's performance, has to be understandable and unambiguous and must allow for comparison with the organisation's performance in the past on a yearly basis, with the performance of other

³⁸ EMAS, Article 3(2)(c).

³⁹ Do public authorities, e.g., take a special position among the interested parties when it comes to the information that should be provided to the public?

⁴⁰ S.E. Gaines and C. Kimber, 'Redirecting Self-Regulation', *Journal of Environmental Law* 13 (2001) 2, 157-184 (at p. 169) have also stressed the need to enhance public participation in the self-regulatory decision making process of industrial organisations, and in the monitoring and supervision of the environmental performance of these organisations.

⁴¹ Prior research shows that environmental disclosure does not necessarily accurately or unbiasedly reflect as firm's underlying measures of environmental performance. S. Hughes, A. Anderson and S. Golden, 'Corporate Environmental Disclosures: Are They Useful in Determining Environmental Performance?', *Journal of Accounting and Public Policy* 20 (2001) 3, 217-240.

organisations and with regulatory requirements. Apart from this, the information must be accurate, non-deceptive, substantiated, verifiable, relevant, representative, et cetera (Annex III, section 3.5). Of course, careful examination by the environmental verifier on the basis of the above-mentioned conditions can be an important aid for the organisation, but whether the statement will be informative for all interested parties, such as local residents, NGOs, or public authorities, depends mainly on the aspiration of openness of the registered organisation.⁴² An organisation that does not intend to give the general public account of its environmental performance can hardly be compelled to do so by a verifier. While the EMAS Regulation elaborates on the conditions of the environmental statement, the verifier cannot fall back on strict rules concerning the content of the information that is required. For example, Annex III, section 3.2 requires, among other things, ‘a summary of the data available on the performance of the organisation against its environmental objectives and targets with respect to its significant environmental impacts’, but leaves the organisation the freedom choose what figures on pollutant emissions are enclosed.⁴³

I think that to achieve a truly informative environmental statement an organisation will have to communicate with interested parties about the question which information they particularly need. For this reason, EMAS should more specifically link together the aspects of providing information towards the public and starting a dialogue with interested parties.

3. Market-oriented certification versus public-policy-related eco-management and audit schemes

The EMAS Regulation and related policy documents seem to target two different aspects. First, it is tried to persuade organisations to set up an EMS and draw up an environmental statement, so that the organisation starts a programme to master and improve environmental performance in collaboration with its stakeholders, thus making the organisation more transparent. Second, EMAS tries to link the increase in the organisation’s initiatives to a different approach in regulation and enforcement. These two different policy objectives should also correspond with different approaches taken by public authorities.

From a public-policy perspective, the whole spectrum of manifestations of self-regulation can be viewed as a sliding scale that begins at free, unconditioned self-regulation

⁴² In the case of ‘leading edge reporters’, Ball, Owen and Gray (2000) could discover no instances where the consequences of poor environmental performance or the risks associated with poor performance were explained and evaluated. They concluded that verifiers usually do not make recommendations that address failings in performance and, in some cases, even distance themselves from this responsibility. This does not imply that certification and verification procedures do not prove beneficial to corporate management in identifying the strengths and weaknesses of their control systems, but it is difficult to see how this will contribute to meaningful external environmental transparency and accountability. A. Ball, D. Owen and R. Gray, ‘External Transparency or Internal Capture? The Role of Third-Party Statements in Adding Value to Corporate Environmental Reports’, *Business Strategy and the Environment* 9 (2000) 1, p. 19.

⁴³ Actual disclosures reveal that management normally emphasises positive news or pro-environment decisions, with the disclosure of negative items being limited to mandatory requirements. See D. Cormier, I. Gordon and M. Magnan, ‘Corporate Environmental Disclosure: Contrasting Management’s Perceptions with Reality’, *Journal of Business Ethics* 49 (2004) 2, 143-165, at p. 161.

(such as codes of conduct, informal agreements and standardisation) which is initiated and accomplished by the private parties involved and ends with obligatory adherence to strictly conditioned self-regulation to which legal consequences are attached by means of legislation.⁴⁴ This occurs, for example, in the field of product safety. In the so-called 'New approach', private standards and conformity assessment procedures are being used in European directives that harmonise national legislative requirements for market access.⁴⁵ Somewhere along this line, self-regulation gets linked to and is used for the purpose of executing and enforcing public regulations. One should be aware that, at that point, the type of self-regulation in question changes from a market-oriented (or group-oriented) phenomenon into something that has to fulfil the function that is attributed to it by the legislator or another regulatory authority. After all, not every kind of self-regulation can play a role in, or can be conditioned by means of legislation, without losing its effectiveness, or a part of the original purposes it had, in an unconditioned private sphere. Environmental management systems and certification activities fulfil different purposes if looked at from a market-oriented point of view or from a regulatory perspective. Friction may occur if public policy does not pay attention to those differences and to the limits of the potential of this phenomenon.

3.1 Management tool or administrative regulation?

The idea behind EMAS was to establish a management system geared to controlling environmental performance. An EMS is first and foremost an internal management tool. This implies that an organisation may have all kinds of reasons to implement an EMS. First, an organisation may commit itself to a better environmental performance from an ethical perspective. Second, management may have economical reasons to improve environmental performance. The organisation may, for example, wish to cut back on its energy expenses. Third, the public image of the organisation may be an important reason for turning to environmental management. An organisation's public image may be important in its relation with clients or potential clients, local residents, the general public, et cetera. These reasons for the implementation of an EMS are all internal or market orientated.⁴⁶

An organisation may also want an EMS to improve its relation with public authorities and to get some kind of special treatment such as more flexible permit conditions, fewer administrative burdens or less frequent surveillance visits. However, this motivation demands a change of perspective. How can public authorities benefit from an EMS? (Is it possible to

⁴⁴ J. Verschuuren, 'EC Environmental Law and Self-Regulation in the Member States: In Search of a Legislative Framework', in H. Somsen (ed.), *The Yearbook of European Environmental Law*, Vol. I (Oxford: Oxford University Press, 2000), pp. 102-121.

⁴⁵ European Commission, Guide to the implementation of directives based on the New Approach and the Global Approach, Brussels 2000; http://europa.eu.int/comm/enterprise/newapproach/legislation/guide/document/1999_1282_en.pdf.

⁴⁶ An interesting case study on the motivational aspects of the implementation of ISO 14001 by companies was carried out by D. Rondelli and G. Vastag, 'Panacea, Common Sense, or just a Label? The Value of ISO 14001 Environmental Management Systems', *European Management Journal* 18 (2000) 5, 499-510.

create win-win situations?)

An environmental management system can only to a small extent guarantee compliance with laws and regulations. This is notably due to the fact that EMAS and ISO 14001 are rather 'empty' management tools that have to be fed with environmental targets,⁴⁷ whereas laws and regulations may contain explicit and substantive environmental performance standards. Successful implementation of an EMS may help the organisation to comply with laws and regulations. However, the actual content of the EMS - that is, the whole of allocated responsibilities, established processes and registering and monitoring procedures - strongly differs from the legal obligations concerning, for example, environmental permits according to the IPPC Directive. The limited overlap between the two regulatory frameworks mainly lies in registering, monitoring and reporting obligations and the compliance therewith.⁴⁸ Therefore, the implementation of an EMS can only substitute for legal specifications in a limited way.

Furthermore, the well-functioning of an EMS should be accomplished by the complete organisation's adherence to the recurring processes of planning, doing, checking and acting (the famous Deming circle). In other words, the effectiveness of an EMS heavily depends on the internal motivation of the whole organisation (not only top management, but also the personnel at the shop-floor level).⁴⁹ This is one reason why the EMAS Regulation demands employee involvement. Internal motivation may very well be the most important factor concerning an organisation's compliance with laws and regulations. Nonetheless, an enforcement agency cannot be sure such internal motivation exists. Inspection agencies need clear performance-based standards against which compliance can be measured and enforced. In short, whereas environmental management standards are guidelines that can be used by well-motivated organisations to improve their performance, laws and regulations are supposed to contain clear rules and criteria for environmental performance. After all, these rules are not only guidelines for how to behave in an ecologically responsible manner, but are also used, by enforcement agencies, to check the environmental performance of the organisation.

One may, however, try to adjust EMS standards, like EMAS, to more performance-

⁴⁷ T. Tilbor en I. Feldman, *ISO 14000: A Guide to the New Environmental Management Standards* (Chicago/London/Singapore: Irwin Professional, 1996), p. 6, have also stressed this characteristic of environmental management systems.

⁴⁸ See the U.K. Environment Agency report 'Environmental Management Systems & Operator Performance at Sites Regulated under Integrated Pollution Control': '. . . having an externally validated EMS, certified to the international standard ISO 14001 or registered und the European Union's Eco-Management and Audit Scheme (EMAS), is associated with higher levels of operator performance overall, but that this is restricted to the procedural aspects of performance, such as recording and use of information, plant maintenance and management and training. EMS sites are neither more nor less likely to suffer from incidents, complaints or non-compliance events than those without. They are also neither more nor less likely to be subject to enforcement action. Other findings were that sites with an EMS tend to improve their operator performance more quickly than those without, and sites registered under EMAS tend to perform better than those certified to ISO 14001'; <http://remas.ewindows.eu.org/REMAS/downloads/brit.pdf>, p. iv.

⁴⁹ J. Wolfe, 'Drivers for International Integrated Environmental Management', in R. Hillary (ed.), *Environmental Management Systems and Cleaner Production* (Chichester: Wiley, 1997), pp. 15-26.

based regulations or even standards of excellence. In that case, there is the danger that a significant part of the business community will consider the EMS to be something developed for external purposes instead of something that can be modelled by the organisation itself and be implemented for its benefit. These companies could refrain from participating as a consequence of a perceived lack of interest, which in turn might start a process of alienation from environmental management standards.⁵⁰

Notice that the detailed environmental statement, which is prescribed by the EMAS Regulation, may have an intermediate function, where, on the one hand, the organisation is allowed to set its own performance standards, but, on the other hand, has to account for its environmental performance in comparison with that of other organisations or its own environmental targets. In other words, optimal implementation of EMAS may to some extent result in substantive standards being 'imposed on' and 'enforced' through the communicative processes between the organisation and its stakeholders. As stated above, this effect is, however, mitigated by the absence of strict rules concerning the exact content of the environmental statement.

3.2 Private certification versus public inspection

Comparing certification and enforcement activities may uncover similar problems of a troublesome intermingling of private and public regulatory systems. An organisation's choice to have its EMS certified by a third party may also be explained from different perspectives. A reason for the management of an organisation to opt for certification may be to enhance its employees' motivation to implement the EMS correctly. Most organisations, however, will have their EMSs verified for reasons that are external to the organisation. In principle, the fundamental reason for certification is public exposure. The certificate may play a communicative role in both the social environment and market-oriented activities of the organisation. The management of the organisation chooses to use this communicative tool. The advantages of improvement of the public image of the organisation must at least balance the costs of certification.⁵¹ Normally, management will choose the certification body that comes closest in fulfilling its wishes. Although a certification body has a responsibility to all interested parties - a notion clearly embodied in the standards for the certification bodies - it remains, in general, a commercial organisation that provides certification *services* to its

⁵⁰ Dahlström and Skea conclude that in the UK there is little enthusiasm, on the part of any stakeholder, for enhancing certification procedures and investing in information sharing and research to refine and upgrade the existing links between EMS and environmental regulation; see K. Dahlström and J. Skea, 'Modernising Regulation: The Role of Environmental Management Systems', Report of the Final Workshop held at the PSI Conference Centre, London, 18 September 2002 (London: Policy Studies Institute, 2002), p. 31, available at <http://www.psi.org.uk/docs/2003/research/env-reg-relief-Workshop-2-Modernising-Regulation.pdf>.

⁵¹ P. Bansal and W. Bogner, 'Deciding on ISO 14001: Economics, Institutions and Context', *Long Range Planning* 35 (2002) 3, 296-290, at pp. 273-275, have noticed that companies may find that many environmental projects, like other capital investments, do not return the projected gains. A good EMS will, nevertheless, make strong gains if sustained, such as continuing source reduction savings, and identify new areas where impacts had not been considered in the past, which can be valuable in alerting management to potential liabilities or enforcement activities. At the same time, the costs of certification must factor in the annual costs of monitoring, registration and documentation to keep the management system up to date.

clients. Therefore, the *impartial* and *independent* status of the certification body is to be interpreted differently from the legal requirement of impartiality of an enforcement agency. In the international standards for bodies operating certification systems,⁵² the requirement of independence is closely connected with the presence or absence of institutional connections with the organisations supervised and with the presence or absence of market activities that might influence the judgement of the certification body, such as counselling. This requirement is similar to the requirement of independence for public supervisors that exist in most national legislations.⁵³ Yet, the commercial connection between a certification body and a certified organisation as well as the existence of competition between certification bodies are considered to be quite normal, whereas this would be inconceivable regarding the activities of public authorities.

This divergent character of certification compared to enforcement is clearly exposed when it comes to the question to what extent a certification body should assess actual compliance of the certified organisation or the question whether the certification body should report violations of public regulations discovered during an audit to the public authorities. Usually, the business community strongly opposes such suggestions, because they would result in the use of ‘their’ instrument in a way that may lead to self-incrimination. Certified organisations will probably feel that their willingness to provide self-surveillance will be used against them.⁵⁴

3.3 Consequences of a troublesome mixture of different regulatory systems

All this leads to the conclusion that an EMS and the certification of an EMS have a commercial background and function in a different way than public regulation and enforcement activities. A public authority may try to link the two systems to benefit from the way organisations have internalised the commitment for better environmental performances by means of their verified EMSs. Nonetheless, the two regulatory systems are not fully exchangeable.

⁵² The standard for bodies operating certification systems for environmental management systems is ISO guide 66.

⁵³ Article 2(4) of the Netherlands *Algemene wet bestuurskunde* (General Administrative Law Act), for instance, requires that

- 1) an administrative authority shall perform its duties without prejudice;
- 2) an administrative authority shall ensure that persons belonging to it or working for it who have a personal interest in an order do not influence its decision-making on the matter.

The General Administrative Law Act is available in English through http://www.justitie.nl/images/11_11380.doc.

⁵⁴ Some people call this the ‘transparency paradox’. C. Waling, ‘Bedrijfsinterne milieuzorg. De keerzijde van transparantie’, *Justitiële Verkenningen* (1999) 2, 48; M. Kidd, ‘Environmental Audits and Self-Incrimination’, *The Comparative and International Law Journal of Southern Africa* 37 (2004) 1, 84-95; M.A. Delmas, ‘Barriers and Incentives to the Adoption of ISO 14001 by Firms in the United States’, *Duke Environmental Law & Policy Forum* XI (2000) 1, 1-38, at p. 31, noted: ‘In the U.S. context, firms might fear that these audit reports would become the new “smoking gun” of environmental litigation.’

Intermingling of elements of the verified EMS in environmental regulations may lead to friction due to incompatibilities. A company might be inclined to refrain from effectively implementing an EMS if that system mainly targets objectives outside of the management's demands. Also, a company would probably no longer adopt an open attitude towards a certification body whose sole objective it is to find violations of regulations that can be communicated to the public authorities. In other words, coerced self-regulation under strict conditions that benefits too little the organisations involved endangers the support for self-regulation for public-policy objectives. It is, therefore, of the utmost importance that a fair balance is struck between the public and private interests of the parties concerned.

4. Critical choices to be made

Without realising it, the European policy concerning the promotion and use of EMSs has come to a crossroads: critical choices will have to be made about the future of EMAS. Are we going to promote EMAS as a purely market-oriented management tool or do we want EMAS to develop towards a public-policy-supporting regulatory system?

Choosing the first option implies that EMAS will be considered to be a phenomenon that belongs to the business community, whose primary goal it is to enhance 'market transparency' in the field of commitment to environmental management.⁵⁵ As a consequence, policy makers should no longer refer to any advantage whatsoever that the implementation of EMAS might have for environmental permitting or enforcement policies. The answer to the question to what extent EMAS should benefit environmental performance is in this option no longer a concern of public authorities. Whether an EMS will be used to improve, for instance, legal compliance will be up to the management of the individual organisation.

Opting for the use of EMAS as a tool that should also benefit public-policy goals entail that public authorities will have to be more involved in making EMAS suitable for assessing environmental performance and legal compliance. This does not imply that governmental influence necessarily leads to the introduction of more obligatory elements into the Council regulation or into national legislation, such as the general requirement of compulsory registration for all installations within the scope of the IPPC Directive. It does, however, indicate that registered organisations will have to meet stricter requirements in the field of transparency, continuous improvement and legal compliance.

For the EMAS Regulation itself, this 'regulatory approach' still leaves room to opt for different policy objectives. One essential choice will be: Do we want to transform EMAS into a genuine standard of excellence or do we first and foremost consider this regulation to be a method of harmonising certain basic administrative procedures and management techniques?

In the end, it all comes down to the question: What do we want EMAS to be? The

⁵⁵ In a research project carried out on behalf of the Dutch Minister of Economic Affairs, we discovered that in the Netherlands four motives to use certification in relation to public policy are the most common, i.e.: certification to *enhance market transparency*, certification to *stimulate voluntary compliance and support enforcement activities*, certification as a necessary *precondition to entering certain markets* for products or services and certification as a way to *demonstrate that products, employees or services are brought in conformity with relevant legislation*. P. Eijlander, G. Evers and R. van Gestel, *De inkadering van certificatie en accreditatie in beleid en wetgeving*, available through <http://www.minez.nl/>.

answer to this question is of great importance, because it will also determine the future of EMAS. If EMAS - in contrast to ISO 14001 - is to become a genuine standard of excellence, this will mean that we will be moving away from equalising the conditions for environmental management and thus let go of the idea that EMAS registration is achievable for almost every organisation. In our view, this is bound to lead to a stronger differentiation between EMAS and ISO 14001 registered companies. In theory, the EMAS Regulation already adds requirements of openness and accountability to a regular environmental management system standard. However, as I have explained above, these additional requirements have to be strengthened to prove that EMAS registration actually has a serious surplus value over ISO 14001. If this choice is not made in the near future, I think there is a serious risk that the EMAS Regulation will be pushed off the market.⁵⁶

In the next sections, I will discuss two different policy approaches that may turn EMAS into a more regulatory standard. According to the first approach, this EMS standard is to be seen as a way to harmonise the *minimum criteria* for administrative procedures and management techniques necessary to master environmental performance (section 5).⁵⁷ In the second approach, an EMS is considered to be an essential part of a special regulatory regime to promote *excellent environmental performance* (section 6).

5. EMS as a general administrative technique to manage environmental performance

In the wake of the implementation of the IPPC Directive, the proposal has been made to lay down the essential elements of environmental management standards in BAT Reference documents (BREFs). This would entail that every IPPC site would have to have an environmental management system as a consequence of the need to apply the best available technique for operating an installation. According to this proposal, every EMS for an IPPC installation would have to contain at least the following features: a definition of an environmental management policy for the installation by its top management, the planning and establishing of the necessary procedures, implementation of those procedures, the checking of performance and taking of corrective action and a review by top management. Optional features would be validation by a certification body or verifier, preparation and publication of a relevant statement, implementation and adherence to an international standard such as EMAS and ISO 14001.

This proposal for an EMS-BREF implies that a general obligation to implement an EMS does not necessarily guarantee the enhancement of an individual installation's environmental performance. The elements that have a voluntary character in the EMS-BREF proposal are - in my view not surprisingly - exactly those elements that should be considered

⁵⁶ M. Glachant, S. Schucht, A. Bültman and F. Wätzold, *Companies' Participation in EMAS: The Influence of the Public Regulator* (Paris: CERNA, 2000), p. 11.

⁵⁷ An example of minimum criteria for monitoring is the Reference Document on the General Principles of Monitoring (July 2003), which is supposed to guide operators of IPPC installations in meeting their obligations with regard to monitoring requirements of industrial emissions. This document can be found through <http://eippcb.jrc.es> (click on 'Activities', go to 'Monitoring systems' and click on 'BREF (07.03)').

essential for an effective and more credible implementation of any EMS.⁵⁸

Moreover, does the fact that the essential elements of an EMS are laid down in a BREF document not indicate that the European legislature is anxious to actually prescribe an EMS in general for IPPC installations? After all, as a rule the promulgation of this BREF document leaves room for deviation in an individual case because of local (geographical and ecological) circumstances or technical features of the installation in question. However, as far as an EMS is concerned it is quite difficult to imagine how these individual circumstances could influence the necessity of, for instance, introducing specific and/or additional administrative procedures into the EMS. Again, does this not imply that an EMS has become a legally binding requirement for every IPPC installation?

In other words, it is of the utmost importance to be aware that the more public authorities try to compel organisations to implement an EMS, the more realistic the risk becomes that the EMS loses its power to work as an ‘acceleration mechanism’ for continuous improvement in environmental performance. This lesson should also be kept in mind if one wants to experiment with linking EMS elements to environmental permit requirements. I believe the Dutch experience may be illustrative for the pitfalls one could easily fall into. For more than ten years now, the Dutch Ministry of Housing, Spatial Planning and the Environment has been trying to develop a successful ‘framework licence’ for companies with a certified EMS that also have an approved environmental policy plan and a positive compliance record, and annually publish an environmental report.⁵⁹ The crux of the framework licence is that it leaves maximum freedom of choice to the licensee to prevent the adverse effects of installations, usually industrial installations. Therefore, it does not contain detailed rules about emission reductions or about the internal organisation of a company that meets the criteria mentioned.

A crucial aspect in this is, however, that the *Wet milieubeheer* (Environmental Management Act) itself makes no distinction between a ‘normal licence’ and a ‘framework licence’. The law does, up till now, not even mention the existence of a framework licence. In fact, the framework licence represents nothing more than another style of licensing and enforcement that builds on the existing open-ended and aspirative rules in the Environmental Management Act to create as much flexibility for participants as possible in deciding how to accomplish pollution prevention.⁶⁰ Due to the fact, however, that many companies did not meet the criteria for a framework licence, policy makers came up with the idea of a ‘customised licence’ for companies that did not meet all of the criteria for a framework licence, but were entitled to receive somewhat more flexibility than ordinary licence-holders. In the meantime, research has shown that the difference between the two styles of licensing has faded. What is more, many companies seemed to have lost interest in the whole idea of a

⁵⁸ The standard text on environmental management elements that are considered to be part of the best available techniques and that is to become part of all the so-called sector BAT-reference documents on paper, steel, waste incineration, etc., can be found at <http://www2.vrom.nl/docs/internationaal/w2-13.pdf>.

⁵⁹ Examples of framework licences and a study of the framework licence in practice can be found through <http://www.vrom.nl/international/> (search term ‘customised and framework project’).

⁶⁰ However, a proposal was made to provide the framework licence with a more solid legal basis in the Environmental Management Act; *Kamerstukken II*, 2003-2004, 29 711, nos. 1-2.

framework licence because the benefits for them did not outweigh the extra efforts needed to meet the criteria to participate.⁶¹ For one thing, the IPPC Directive, for example, already mentioned that permits should contain emission limit values and equivalent parameters, without prescribing the use of any technique or specific technology.⁶² This comes very close to the Dutch preference for prescribing goal-orientated permit conditions over technical measures for companies that meet the criteria for a framework licence.

One of the main lessons the Netherlands *Evaluatiecommissie Wet milieubeheer* (Environmental Management Act Evaluation Committee) has recently drawn from the study of the policy of framework licensing is that it is perhaps not such a good idea to reduce the differences between framework licences and customised licences because this might easily lead to a policy that rewards the wrong companies (i.e. those that do not have a better environmental performance than average) with a more flexible style of regulation.

6. An example of a 'smarter' enforcement strategy

In several official European policy documents it is suggested that certification can, and should, be used to make public enforcement more effective and efficient.⁶³ Unfortunately, these documents seldom explain in detail how and to what extent supervision and enforcement should be changed to make use of certification in building a smarter enforcement strategy. The Recommendation of the European Parliament and of the Council providing for minimum criteria for environmental inspections in the member states, for instance, states that, in making plans for environmental inspections, relevant information about self-monitoring data, environmental audit information and environmental statements by controlled installations registered according to the Community Eco-Management and Audit Scheme should be taken into account.⁶⁴ However, the Recommendation does not reveal how these inspection plans can be shaped in a way so as to provide outlines for procedures to differentiate between EMAS-registered and other sites when it comes to such problems as balancing routine and non-routine inspections, performing risk assessments and determining the frequency of site visitations. This leaves public inspection agencies in uncertainty about the best way to treat installations with an EMAS registration. On the one hand, they probably want to avoid that highly motivated companies with progressive environmental policy plans will be patronised or treated harshly, while 'easy-riding' competitors are welcomed with a coaching and stimulating style of regulation. On the other hand, inspection agencies would want to have some guarantees before adopting a more flexible and communicative approach

⁶¹ Evaluatiecommissie Wet milieubeheer, *Vergunning op hoofdzaken/vergunning op maat* (vervolgonderzoek met het ECWM advies), ECWM 2002/11. The report is downloadable from www.ecwm.nl (click on 'Rapporten').

⁶² Article 9(4) of the IPPC Directive.

⁶³ E.g., IMPEL, 'Best Practice in Compliance Monitoring' (s.l.: s.n., 2001), pp. 11 and 26.

⁶⁴ Article IV(4)(b) of Recommendation 2001/331 EC of the European Parliament and the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States.

towards EMAS-registered organisations.

The first question to ask to overcome this dilemma is: How can we be sure that an organisation is trustworthy enough for us to rely on its internal procedures for compliance monitoring and to be able to lower, for example, the priority for routine inspections? Is having an EMAS registration enough or do we need more and other criteria? Perhaps the approach taken by the United States Environmental Protection Agency (EPA) in its 'Performance Track' programme may teach us something here.⁶⁵

6.1 Performance Track

The Performance Track programme, which was launched in June 2000, is designed as a voluntary public-private partnership that encourages continuous environmental improvement through the use of certified EMSs, local community involvement and measurable results.⁶⁶ The programme recognises and rewards businesses and public facilities that demonstrate strong environmental performance beyond current requirements. In other words, members will have to accomplish environmental results beyond what could be achieved through regulation and enforcement alone.⁶⁷ An important aspect for the members is that they can get public recognition (members are listed on a special EPA website and the EPA also publishes articles in trade journals and issues press releases, et cetera). Other benefits for members are the lower priority for routine inspections and the possibility of networking with EPA officials and other members of the programme,⁶⁸ of learning from the experience of other members and of reducing paperwork and reporting requirements.

One of the main criteria for qualifying for Performance Track is that a facility must have a clean compliance record and be willing to accept a screening procedure by the EPA.⁶⁹ Membership will not be granted if the compliance screening shows, for instance, a corporate criminal conviction or plea for environmentally related violations of criminal laws involving the corporation or a corporate officer within five years before the application for membership

⁶⁵ U.S. Environmental Protection Agency, National Environmental Performance Track, <http://www.epa.gov/performancetrack>.

⁶⁶ Currently, the Performance Track programme has about 300 members in 41 States. Over 400 companies have applied.

⁶⁷ An overview of the first results of the programme is offered in the first EPA Performance Track Progress Report 'Top Performers: Solid Results' (April 2003), available through <http://www.epa.gov/performancetrack/pubs.htm>.

⁶⁸ The programme is also designed as a learning community of trade organisations, NGOs and businesses. Performance Track Members have created a private, independent membership organisation, the Performance Track Participants' Association. For more information about the activities of the organisation, see <http://www.ptpaonline.org>.

⁶⁹ EPA staff and state officials visit a number of Performance Track member facilities each year. A site visit provides the EPA with the opportunity to verify the information presented in a facility's application, particularly the quality of its EMS and progress towards its performance goals. The EPA provides an assessment of the facility's programmes and progress relative to other facilities in the programme and may suggest opportunities for improvement or partnerships with other firms and sources of technical expertise.

or three or more significant civil violations at the facility within three years before the application for membership. In addition, the EPA may consider whether there are significant problems or a pattern of non-compliance in an applicant's overall civil or criminal compliance history. If so, this may be a reason for refusing membership.

A facility must also be able to demonstrate a specific environmental performance and commit itself to continued improvement. To demonstrate past performance, a facility is requested to select at least two environmental aspects from any of the categories in the so-called Environmental Performance Table and to describe the improvements in its performance during the current and preceding year. In making future performance commitments, facilities are to select at least four environmental aspects drawn from two or more categories, and the aspects selected for past and future performance may not be the same! In documenting past performance and its commitment to continuous improvement, a facility is not to rely on any actions that represent compliance with existing legal requirements at federal, state or local level. As mentioned above, the improvements will have to represent actions taken by a facility that go beyond existing legal obligations.

Another criterion for membership of Performance Track concerns public outreach and performance reporting. In its application, each facility is to describe its activities and plans in three areas: identifying and responding to community concerns;⁷⁰ informing the community about important matters that affect it; and reporting on the facility's EMS and other performance commitments. Applicants are also asked to provide a short list of community/local references who are familiar with the facility and to list any ongoing citizen suits against the facility.

In its Performance Track Progress Report 'Top Performers: Solid Results' of April 2003, the EPA states that it conducted site visits at 79 Performance Track facilities in the month of December 2002. Sixty-eight per cent of the site visits had shown that the member facility fully met all programme criteria.⁷¹ Thirty-two per cent of the visits revealed areas for improvement and only twenty-two facilities showed more significant problems and fell short of the programme criteria. The EPA demanded the facilities' withdrawal from the programme. Since the start a total of 41 members have left the program. The most common reasons for leaving were: EMS deficiencies found during site visits (22 facilities), closures or reorganisations (6 facilities), failure to submit annual performance reports (5 facilities) or other reasons (8 facilities). For the success of the programme it seems important not only to encourage members to look for environmental innovations, but also to remove 'easy-riding' members from the membership list to keep the competitive and exclusive character of the programme alive. For the same reason, it would also be unwise to make membership more easily accessible in the future.

While Performance Track is quite clear about the conditions for membership, it remains rather vague when it comes to the effect of participating in the programme or the reduction in the number of inspections. This is not so strange, because reducing the number

⁷⁰ The Track Program Guide states that typical efforts could include a designated community liaison official, periodic public meetings or open houses and similar mechanisms. The level of public outreach, moreover, would depend not only on the size of the facility, but also on the degree of community interest and the environmental effects of the facility's operations.

⁷¹ First Year Progress Report, available through <http://www.epa.gov/performance-track/pubs.htm>, p. 6.

of inspections always is a hazardous undertaking. After all, it is obvious that having a certified EMS and a clean compliance record in the past does not guarantee full compliance. Therefore, it would be naïve to believe that internalisation of environmental values and close communication between businesses and regulators could ever replace enforcement. As Malcolm Sparrow noted, ‘if complete consensus were possible on any regulatory issue - that is, if a solution existed that served the interest of every private party - then the issue would probably not warrant regulatory attention’.⁷²

So, the real challenge is to develop an enforcement strategy that can balance between prevention and repression, trust and distrust, independence and cooperation. Such a strategy would have as its starting point a knowledge-based method of risk assessment that enables inspection agencies to differentiate between reliable and less reliable organisations when deciding not only on the number of site visits, but also on the imposition of sanctions.

6.2 Inspection frequencies and sanctions

The starting point of the enforcement strategy should be that government resources are limited and that universal compliance cannot be achieved without active efforts from the regulated community to ‘police’ itself. Inspection agencies are to set priorities when it comes to checking companies’ compliance with different types of rules and regulations. For this reason, it seems quite natural that attention is primarily given to those facilities and regulations that constitute the greatest risks. This corresponds with the principles of proportionality and non-discrimination as developed by the European Court of Justice. The only way, however, in which a fair balance can be struck between the efforts to discover offences and the threats that are posed by a non-compliance is through developing a monitoring and compliance policy on the basis of past experiences. In my opinion, such a policy should at least take into account:

- the degree to which compliance with certain rules or permit conditions contributes to the interest of the environment (for instance, mere administrative regulations versus emission standards);
- the general attitude towards compliance in a certain branch (branch-related factors may also be heavy international competition or the number of risk-seeking entrepreneurs);
- the compliance record of a business in the past and its sensitivity for blaming and shaming;
- the probability that certain violations will occur if inspection frequencies are lowered because of the existence of informal control mechanisms (neighbourhood watch, alertness of NGOs, media attention et cetera);
- the degree to which third parties, such as local residents and NGOs, have an interest in regular inspections;
- the amount of manpower and means that is necessary to discover offences in relation to the success in terms of finding violations (the number of inspections related to the odds of tracing offences on the one hand and the odds of discovering non-conformity by performing an individual investigation because of the complexity of the facility on the other hand);
- the degree to which other overseers on related policy areas conduct inspections that may yield relevant information about the attitude towards compliance with environmental laws;
- the degree to which other parties (the regulated addressee or third parties such as certification bodies) already monitor compliance and the willingness to be open about violations.

⁷² M.K. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Washington DC: Brookings Institution Press, 2000), p. 17.

Especially this last factor also gained attention in the U.S. policy on facilities with a certified EMS. Since 1995, the U.S. EPA has developed a policy in ‘Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (or the EPA’s Audit Policy)’. The purpose of this policy is to improve the protection of human health and of the environment by encouraging regulated entities to voluntarily *discover*, promptly *disclose* and expeditiously *correct* violations of federal environmental regulations.⁷³

In the year 2000, this Audit Policy was revised, but its essence remained the same. The policy contains nine conditions,⁷⁴ and entities that meet all of them are eligible for 100 per cent mitigation of any gravity-based penalties that otherwise could be imposed.⁷⁵ Organisations that wish to benefit from this policy have to prove that they are able to systematically and voluntarily discover items of non-compliance through environmental audits or other compliance management systems before an inspection agency does so.⁷⁶ Furthermore, the regulated entity has to disclose fully specific violations that occur in writing to the EPA within 21 days (or within such shorter time as may be required by law) after it discovered a violation has, or may have occurred. The regulated entity is to remedy the violation within 60 calendar days from the date of discovery and certify this, again in writing, to the EPA. Nonetheless, the EPA retains the authority to order an entity to correct a violation in a shorter period of time whenever this is feasible and necessary to protect public health and the environment adequately. Also, preventive steps should be taken to avoid recurrence of the violation. Further, it is important that the specific violation, or a closely related one, does not occur in the next three years at the same facility or within five years as part of a pattern at multiple facilities owned or operated by the same entity.

While this U.S. audit policy was developed to prevent self-incrimination and to reward openness about the regulatory behaviour of businesses, one should remember that inspection agencies should now and then double-check the results of monitoring reports and themselves investigate whether a facility complies with the relevant laws and regulations. Public authorities may never totally rely on the results of audits performed by certification bodies. By using a method of paying surprise visits and performing spot checks, public inspectors can keep private auditors and verifiers alert, thereby lifting their level of investigation. After all, one may assume that the management of a facility will not be pleased when it is confronted with the discovery of non-compliance by the authorities that could have been prevented by an adequately performed external audit. A warning is in place.

⁷³ The first Audit Policy was issued on 22 December 1995, Federal Register Vol. 60, no. 66706.

⁷⁴ These nine conditions, together with an explanation of the EPA Audit Policy, are published in the U.S. Federal Register of 11 April 2000, Vol. 65, No. 70, pp. 19618-19627.

⁷⁵ ‘Gravity-based’ refers to that portion of the penalty over and above the portion that represents the entity’s economic gain from non-compliance.

⁷⁶ Regulated entities that do not meet this one condition, but do meet the other eight conditions are eligible for 75% mitigation of any gravity-based civil penalty and the EPA will not recommend criminal prosecution by the Justice Department.

7. Conclusions

First of all, we may conclude that ten years after the start of EMAS, there is still no clarity about the true effectiveness of this environmental management scheme when it comes to improving environmental performance and legal compliance. Does EMAS merely guarantee that an organisation is able to direct its continuous improvement and knows what its legal obligations are, or do EMAS-registered companies really have better performance records in this respect? The answer is that after all these years we still do not have a great amount of hard data on this topic. What is even more striking, however, is that there does not even seem to be *communis opinio* on the public policy regarding EMAS: Do we want EMAS to be merely a business tool for enhancing market transparency or do we consider EMAS to be part of a more comprehensive regulatory strategy to improve compliance with existing environmental legislation? The answer is hard to give because the position of the European legislature is ambiguous.

On the one hand, EMAS has remained a strictly voluntary management tool for business purposes; on the other hand, EMAS has over and over again been linked to regulatory reform, deregulation and avoiding unnecessary duplication of monitoring and enforcement activities. Furthermore, the dominating policy regarding EMAS has up till now been to increase the number of participants without seriously asking whether widespread participation will go hand in hand with a high level of environmental performance of the registered organisations. In my view, we will have to decide whether we want EMAS to become a standard of excellence for 'front-runners' or whether we want it to be a set of minimum criteria for the implementation of environmental management systems that is suitable for the entire business community.

To turn EMAS into a genuine 'acceleration mechanism' for a successful environmental policy entails the need for special measures regarding the transparency of the organisation, public accountability and trustworthy verification. Furthermore, as a standard of excellence EMAS should be given an exclusive status; only those organisations that clearly demonstrate to have gone beyond compliance should be able to participate in the Eco-Management and Audit Scheme. For this reason, the criteria for determining the level of environmental performance should be crystal clear. Besides, a special warning is in place for regulators: they should not mix a more communicative style of licensing with a way of negotiated enforcement. Even if companies have proven to be willing to go beyond compliance, this does not mean that they will never fall back into a less proactive position. Therefore, public authorities should always stay alert, and from time to time keep performing unannounced surveillance checks to verify that the EMS is still functioning properly.

Last but not least, I want to state that in itself there is nothing wrong with considering EMAS to be a minimum standard for the implementation of administrative procedures to manage environmental performance; however, in that case public authorities will have to be extremely careful to attach importance to the fact that an organisation is EMAS registered as far as enforcement and environmental permitting is concerned.