Non-regulatory Instruments and Public Access to Environmental Information

Professor Jeremy Rowan-Robinson*

One of the most important aspects of environmental justice is the procedural standards applied to the administration of environmental protection services. The development of procedural standards has been an important focus of administrative law in the United Kingdom. The role of administrative law is not simply to safeguard citizens but to facilitate public administration and to help to achieve public policy goals. Given the multilateral nature of most environmental policy issues, the focus of good administrative practice has been justice both for those citizens most directly affected by the exercise of power and the wider public constituency. This has entailed, inter alia, the development of procedural requirements for public notice, the establishment of public registers of permit applications and decisions, requirements to provide information, consultation and public participation arrangements, opportunities to object, and access to the courts to challenge unlawful actions and decisions.

I. INTRODUCTION

The theme of the conference to which this paper is addressed is *Environmental Justice and Market Mechanisms.* "Justice" is, of course, a protean word. For the purposes of this paper I am looking at just one aspect of justice, the procedural standards applied to the administration of services having a public dimension and, in particular, to the administration of environmental protection. Procedural standards are commonly thought of as requirements of justice.[1]

* Professor of Law, Centre for Environmental Law and Policy, University of Aberdeen. This is an edited version of a paper delivered originally at the conference on *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law* 5–7 March 1998, The University of Auckland, New Zealand.

1 Hart, H.L.A., *The Concept of Law* (2nd ed, 1994).

The development of procedural standards has been an important focus of administrative law in the United Kingdom (UK). Administrative law in the UK, as in many other countries, developed to meet the onrush of public administration of a wide range of services in the aftermath of the Second World War. Principles of what might be called "good public administration"[2] evolved. At first, these principles were concerned to provide protection for the citizen, a system of checks and balances, against the rolling forward of the power of the state. Public administration was viewed essentially as a narrow contest between the state and the citizen most closely concerned with the exercise of power. The focus of administrative law was initially on this bilateral relationship; its concern was with securing adequate access to justice for such citizens. The Franks Committee,[3] which was influential in the evolution of administrative law in the UK, emphasised the importance of safeguards such as a right to notice, an opportunity to object, a right to be heard, provision for reasoned decisions and access to the courts to challenge unlawful actions and decisions.

Of course, public policy decisions are not just a narrow contest between two parties; they are about what ought to be done in the public interest.[4] This is more obviously the position with environmental protection than with many other areas of government intervention. The role of administrative law is not simply to safeguard citizens but to facilitate public administration and to help to achieve public policy goals.[5] The public interest has been recognised by the gradual empowerment[6] of a wider range of interested parties in decision-making processes. In other words, administrative law has slowly moved towards more of a multi-lateral relationship; and its focus has been enlarged to encompass access to justice, not just for those citizens most directly affected by the exercise of power, but for this wider constituency. This can be seen in the development of procedural requirements for public notice, the establishment of public registers of permit applications and decisions, a requirement to provide other information, consultation arrangements, opportunities for public participation and for third parties with a sufficient interest to seek redress for administrative decisions through the courts.

2 For comment on the development of principles of good public administration see Committee of Ministers of the Council of Europe, Resolution (77)31 "On the Protection of the Individual in Relation to the Acts of Administrative Authorities" (1977); JUSTICE – All Souls, *Administrative Justice: Some Necessary Reforms* (1988).

3 Committee on Administrative Tribunals and Inquiries, Cmnd. 218 (1957).

4 Ganz, G., *Administrative Procedures* (1974); McAuslan, P., *Ideologies of Planning Law* (1980).

5 Harlow, C. & Rawlings, R., *Law and Administration* (2nd ed, 1997).

6 For an analysis of the difficulties encountered in empowering the wider public in the planning process, see McAuslan, supra note 4.

The procedural standards that evolved reflected the public administration of a wide range of services and the extensive use in administration of a "command and control" approach. That is now changing. Since 1979, the UK has witnessed a radical restructuring of the processes and institutions of public administration. The objective has been to achieve greater efficiency through introducing the discipline of market forces.[7] This restructuring has been evident in other countries also. The rolling back of the state as the provider of services and the search for instruments more in tune with the market (than command and control regulation) to achieve public policy goals has raised serious questions about the continuing relevance of administrative law and about the principles of "good public administration".[8] It is not that there is no place in the new public administration for procedures for guiding and controlling the exercise of governmental power; it is simply that procedures built into command and control regimes to safeguard citizens and the wider public interest are not necessarily appropriate, either in objective or format, for a market-orientated approach to public administration.[9] Attention has turned to new ways of promoting and safeguarding the public interest. These have included value for money audit, efficient management processes, performance indicators, published standards, adequate complaints procedures and citizens' charters, what one commentator has referred to as "the new public law".[10]

This wider concern in the UK about the changing character of administrative law provides the context for this paper. In environmental protection, as in other fields of public administration, the trend is towards reducing the role of command and control systems (although they will continue for the foreseeable future to play a major role) and towards introducing more of the discipline of the market through the use of new policy instruments.[11]

7 Freedland, M., "Government by Contract and Public Law" (1994) *Public Law* 86.

8 McAuslan, P., "Public Law and Public Choice" (1988) 51 *MLR* 681; Freedland, supra note 7; Lewis, N., "Reviewing Change in Government: New Public Management and Next Steps" (1994) *Public Law* 105; Oliver, D., "Law, Politics and Public Accountability: The Search for a New Equilibrium" (1994) *Public Law* 238; Harlow, C., "Back to Basics: Reinventing Administrative Law" (1997) *Public Law* 245.

9 McAuslan, supra note 8, at 681.

10 Scott, C., "The New Public Law" in Willett, C. (ed), *Public Sector Reforms and the Citizen's Charter* (1996).

11 See Government White Paper, *This Common Inheritance* Cm. 1200 (1990); also Department of the Environment, Transport and the Regions, "Economic instruments for water pollution" (1997) (consultation paper).

II. TOWARDS SHARED RESPONSIBILITY FOR THE ENVIRONMENT

Underlying the drive towards market mechanisms in environmental protection in Europe is the recognition that responsibility for the environment is shared. This is reflected in the European Union Fifth Action Programme on the Environment.[12] The Programme sets out to achieve changes in behaviour patterns affecting the environment through the involvement of all sectors of society: public administration, public and private enterprise and the general public. The intention is that shared responsibility will be achieved through a broadening of the range of instruments employed in administering environmental protection. The Programme notes that "whereas previous environmental measures tended to be prescriptive in character with an emphasis on the 'thou shalt not' approach, the new strategy leans more towards a 'let's work together' approach". The concept of shared responsibility is also explicitly recognised in the UK government policy paper on the environment *This Common Inheritance.*[13] Responsibility for the environment, states the paper, is not a duty on government alone; it is shared: "It is an obligation on us all" (para 1.38).

The policy paper goes on to acknowledge the importance of public access to environmental information if people are going to be able to assume their share of responsibility: "If people are given the facts, they are best placed to make their own consumer decisions and to exert pressure for change as consumers, investors, lobbyists and electors" (para.1.20). This has been acknowledged also at European level. EC Directive 90/313 on *Freedom of Access to Information on the Environment* requires government agencies and other bodies with environmental responsibilities to make available to members of the public information held by them, not just about pollution, but relating generally to the environment.

The provision of information is not, of course, an end in itself; it is a means to an end and there are several possible ends.[14] These include promoting public reassurance and subjecting the performance of environmental protection agencies to public scrutiny. More importantly, access to information is seen as a way of promoting shared responsibility through facilitating participation by interest groups (investors, consumers, etc.) in policy formulation and in decision-making with regard to environmental matters. The importance of the linkage

12 European Union Fifth Action Programme on the Environment, *Towards Sustainability* (1992) COM (92)23.

13 White paper, supra note 11.

14 Rowan-Robinson, J., Ross, A., Walton, W. & Rothnie, J., "Public access to environmental information: a means to what end?" (1996) 8(1) *Journal of Environmental Law* 20. See also: *Your Right to Know: The Government's Proposals for a Freedom of Information Act* Cm. 3818 (1997).

between public access to information and public participation in promoting shared responsibility was recognised in the guidelines that emerged from the Third Ministerial Conference "Environment for Europe" in Sofia in 1995. The guidelines are intended to help promote public participation and transparency in environmental decision-making in the fifty-three countries belonging to the UN Economic Commission for Europe. Further attention is to be given to participation at the Fourth Ministerial Conference later this year. The linkage is also recognised in the 1992 *Rio Declaration on Environment and Development*, Principle 10 of which states:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities ... and the opportunity to participate in decision-making.

Yet procedures for access to information and public participation are central to the multi-lateral relationship of administrative law referred to earlier, the continuing relevance of which is currently being questioned. Put another way, the drive to bring the discipline of the market to environmental protection would not seem to be obviously compatible with the drive to promote public access to information and public participation. The purpose of this paper is to test this question of compatibility. It assesses how far access to information and public participation procedures are likely to be able to transcend the change from administrative regulation to market mechanisms. This transition is still at an early stage and there is, of course, only limited experience in the UK of the use of such instruments. To make some assessment of the position, this paper focuses on two market mechanisms that have a track record in the UK in environmental protection and considers what provision is, or could be, made for access to information and public participation. The mechanisms are environmental agreements and tax credits. They are now considered in turn.

III. THE USE OF ENVIRONMENTAL AGREEMENTS

There is nothing very new about the use of agreements to achieve public policy goals by government agencies in the UK having responsibilities for the environment. The power to negotiate agreements for planning purposes was first introduced in 1909 and for nature conservation in 1949. What is new is the extent to which agreements are being employed in practice to secure the voluntary regulation of activity. The key feature of this approach is that people choose whether to accept regulation of their activity. The assumption is that when arrangements are entered into voluntarily there should be more willing and effective compliance than is the case where regulation is imposed.

Agreements may be categorised in different ways. First of all, there are instances where government has taken a conscious decision to rely on the voluntary approach to secure public policy goals. Much rural activity (eg, agriculture and forestry) is largely free from conventional regulation. Historically, landowners in the UK have enjoyed the right to carry on these activities, which were perceived as beneficial to the countryside. The achievement of public policy goals with regard to such activity (eg, safeguarding sites of nature conservation interest) relies on the willing co-operation of the landowner. This is secured through the negotiation of an agreement. In such cases, the landowner is in a strong bargaining position. The negotiation is characterised by freedom of contract, and the cost of regulation will be borne by the state, generally through a compensation payment for any loss resulting from the agreement.

This may be illustrated by reference to agreements relating to nature conservation sites (other than European sites). If a landowner wishes to carry on an activity that might damage such a site, notice must first be given to the government agency responsible for nature conservation (in Scotland, Scottish Natural Heritage). If the agency would prefer the activity not to proceed or to proceed in a way that safeguards the nature conservation interest, they have four months to attempt to negotiate a management agreement with the landowner. In the meantime, the landowner cannot carry on the activity. If an agreement is concluded, the landowner will be compensated for any profit forgone. If the negotiation is unsuccessful, the landowner will normally be able to proceed with the activity. Research shows that in Scotland, the agency has been largely successful in securing agreements.[15] Persistent failure to secure the protection of such sites would, no doubt, persuade the government to contemplate the introduction of a formal command and control regime.

Secondly, agreements may be employed as a quick way of introducing a measure of new control into an area of activity. In the UK such agreements have been directed at sectors of activity rather than (as with nature conservation) one particular proposal to carry on an activity. Such agreements have proved popular in Holland.[16] They are a substitute for, and avoid the expense and bureaucracy of, formal regulation while the prospect of such regulation in the event of default provides an incentive to comply. As Koppen observes, "the state's role changes from hierarchical imposer to consensus seeking negotiator".[17] The UK govern-

15 Livingstone, L., Rowan-Robinson, J. & Cunningham, R., "Management Agreements for Nature Conservation" (1990) (Department of Land Economy Occasional Paper, Aberdeen University).

16 Koppen, I., "Ecological covenants: regulatory informality in Dutch waste reduction policy" in Teubner, G., Farmer, L. & Murphy, D. (eds), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organisation* (1994).

17 Ibid.

ment have concluded eight such agreements since the early 1970s relating to the storage and transport of pesticides, the banning of certain substances in domestic and industrial washing products, the collection of plastic film from farms and the emission of hydrofluorocarbons.

For example, the Department of the Environment has entered into an agreement with the appropriate trade associations representing the aerosol, foam and fire extinguishing equipment industries to control the use of greenhouse gases in the manufacture and operation of such equipment. The trade association, in turn, will attempt to ensure that their members implement the objectives of the agreement.

Thirdly, agreements may be employed to run alongside and supplement a conventional command and control regime. They are negotiated, not as a substitute for, but in the shadow of conventional regulation and enable regulation to be applied in a way that can be flexible and responsive to local circumstance. The regime changes a unilateral decision-making process to a bilateral negotiation; what Rehbinder refers to as "legal delegalization".[18] Such agreements are quite common in Japan where a company wishing to set up in an area enters into an agreement accepting higher and more detailed standards as evidence of its commitment to the local community.[19] They are also used extensively in the UK so as to achieve greater flexibility in regulating large, complex developments and for securing certainty of control where permits cannot effectively be conditioned.[20] They commonly have an environmental objective. The outcome of the negotiation over the agreement will influence the decision on whether the development should be allowed to proceed.

These agreements are still a manifestation of the voluntary approach but the bargaining strength of the parties is differently distributed. The applicant is seeking a permit to carry on an activity and the grant of the permit will be linked to the prior completion of the agreement. The state is, therefore, in a stronger bargaining position and the cost of regulation is borne by the applicant. The benefits are not, however, all one-sided. The agreement helps the developer to secure the permit; and the process of negotiation enables the applicant to influence the scope and form of regulation.

Against this background, I can now consider how far the increasing use of agreements to secure environmental goals is consistent with the drive to provide public access to environmental information and to promote public participation. In this respect, the first thing to say is that none of the statutory provisions make

18 Rehbinder, E., "Ecological Contracts: Agreements Between Polluters and Local Communities" in Teubner, Farmer & Murphy, supra note 16.

19 Ibid.

20 Rowan-Robinson, J. & Durman, R., *Section 50 Agreements* (1992) (consultants' report, Scottish Office Central Research Unit).

arrangements for public access to information during the decision-making process on agreements; nor do these provisions allow for public participation. The position was challenged in *R v London Borough of Southwark ex parte Daniel Davies.*[21] Objectors to a planning application argued that if a planning agreement was going to be entered into, and if planning permission was going to be granted subject to an agreement, then the terms of the agreement should be made known to the planning committee and to anybody who was objecting before the matter was finally disposed of. The Court of Appeal held that, where an agreement was merely regulatory of how the premises were to be occupied or used, it was not necessary that objectors should be entitled to see the terms of the agreement before it was signed.

Although there is no provision for access to information *during* the decision-making process relating to agreements, several of the statutory provisions make reference to the optional recording of *completed* agreements in the Register of Sasines or the Land Register for Scotland. The purpose of this is to ensure that an agreement, in appropriate cases, will run with the land and bind successors in title. However, one function of recording a document is to ensure that the transaction receives publicity.[22] This is secured by the requirement that recorded documents, including agreements, are open for inspection in Register House located in the Edinburgh. However, a member of the public must, first of all, know of its existence and, secondly, be prepared to go to the trouble of arranging for a search in the register.

Some systems of conventional regulation have their own locally based public registers which generally hold details of all applications, authorisations, monitoring information, variations, revocations, appeals and enforcement action. There would seem to be no reason why agreements employed to supplement conventional regulation could not be included in such registers alongside the other information and the government have recently announced an intention to legislate to this effect with regard to planning agreements.

However, a requirement to record agreements in a locally based register is no more than a limited step towards providing public access to information and it will do little to promote public participation. Only completed agreements will be recorded. Members of the public may wish to be aware of the matter while it is still under negotiation and while there is an opportunity to influence what is happening. The Environmental Information Regulations 1992 would seem to apply to information contained in completed agreements. Unfinished documents, however, fall within the category of discretionary confidentiality under the regulations and could be, and generally are, excluded from public scrutiny.

21 [1994] JPL 1116.

22 Reid Committee Report, *Registration of Title to Land in Scotland* Cmnd. 2032 (1963).

Although members of the public have no more than a limited *entitlement* to information about agreements, there is nothing to prevent public authorities, in their discretion, taking a more open approach during negotiations. However, with one exception, there is little evidence of this happening in the UK. The negotiations reflect the characteristics of a private contractual arrangement and tend to remain a matter between the public authority and the landowner. For example, an attempt to conduct research into the use of nature conservation agreements in Scotland was met with the response from the former Nature Conservancy Council for Scotland that they would not provide researchers with information about specific agreements either under negotiation or completed,[23] nor would they provide a list of the parties to such agreements so that landowners might be approached for information. They were prepared to discuss the operation of the legislation generally; but they would discuss individual agreements only if the researchers obtained copies from the Register of Sasines and secured the consent of the other parties to the agreements.

The picture is slightly different with planning agreements, the most widely used of the development agreements. A recent research report commented: "One of the criticisms in the professional and academic literature of the negotiation of agreements is that such negotiations influence the outcome of planning applications but side step the conventional mechanisms of publicity and consultation to which the development control process is subject".[24]

This criticism was considered by the government during the passage through Parliament of the Planning and Compensation Bill. Planning obligations should not, it was acknowledged, be negotiated behind closed doors without other people knowing what was going on. Although there was no legislative change, official advice on the use of agreements from the Department of the Environment goes some way towards meeting the point. Circular 1/97 acknowledges that "there is an obvious and legitimate interest in planning obligations; the process of negotiating planning obligations should therefore be conducted as openly, fairly and reasonably as possible". Planning obligations and related correspondence, continues the Circular, should, as a minimum, be listed as background papers to the planning committee report on the development in question. Such papers are available for objectors to see and respond to and the response can be taken into account by a committee. The general picture in practice seems to be that planning authorities almost never publicise ongoing negotiations until they have reached an advanced stage. At that stage any representations may be too late to affect the outcome. This practice has been criticised recently by the Nolan Committee on Standards in Public Life in its report on Local Government in the UK.

23 Livingstone, L. et al, supra note 15.

24 Rowan-Robinson, J. & Durman R., supra note 20.

The report recommends that negotiations for planning obligations should be more open and that the agreed heads of terms should be reported to the planning committee.[25]

Information about agreements between the government and sectors of industry is readily obtainable from the Department of the Environment, on request, although only after such an agreement has been concluded. Again, there is little scope for interested parties to make their views known while the agreement is under negotiation. Before considering what conclusions are to be drawn from this assessment, this paper will examine the position with tax credits.

IV. USE OF TAX CREDITS

The UK government policy paper on the environment, *This Common Inheritance*,[26] observes that taxes can be an effective means of tackling environmental problems. This observation was no doubt prompted by the success of the differential tax introduced in 1987 to promote the consumption of unleaded petrol. However, although there is continuing interest, progress with the development of environmental taxes in the UK has been slow. Only the landfill tax, introduced in October 1996, can fairly be described as an out and out environmental tax[27] and the difficulties experienced in getting that up and running suggest that taxation is not an easy alternative to conventional regulation for bringing about behavioural change; it does not free those subject to the tax from compliance costs; nor does it dispense with the need for a bureaucracy to implement and enforce its provisions. There is, therefore, limited experience on which to draw in assessing how far the use of taxation is consistent with the drive to promote access to information and public participation.

There is, however, one well-established tax credit arrangement in the UK which has as its objective the safeguarding of the environment.[28] This is the provision for tax credits for "national heritage property". "National heritage property" is a term applied, amongst other things, to land of outstanding scenic, scientific or historic interest and buildings of outstanding architectural or historic interest. Government policy is that, so far as possible, such property should remain in private hands but that it should be managed in a way that is sympathetic to the public interest.

25 Committee on Standards in Public Life, *Standards in Public Life: Standards of Conduct in Local Government in England, Scotland and Wales* (1997) (Third Report of the Committee).

26 Supra note 11.

27 The application of VAT to domestic energy and the recent increase in petrol duty were both justified in part on environmental grounds.

28 The provision for contributions to environmental trusts in lieu of landfill tax is a second example.

The normal position in the UK is that, subject to a threshold, inheritance tax is charged when property changes ownership as a result of a bequest. The tax credit provision for natural heritage property arises when a charge to inheritance tax arises in connection with such property.[29] The owner may apply to the Capital Taxes Office (CTO) for conditional exemption. The CTO will ask their advisers[30] to assess whether the property qualifies as national heritage property. If it does, the owner, in order to secure a credit, will be required to undertake to manage the land or buildings so as to preserve its national heritage interest, to refrain from doing anything that will detract from that interest and to promote reasonable public access. The undertaking may be in the form of a statement of conditions or in the form of a management plan. In the event of such an undertaking being given, the CTO will confirm that the transfer is conditionally exempt from inheritance tax. The exemption is from all liability; there is no attempt to set off the value of the undertakings against the tax liability. The appropriate advisory body (above) will monitor the position to ensure compliance with the undertaking. The transfer is conditionally exempt in the sense that the tax is deferred until the undertaking ceases to apply, either because it has been breached or because it is not renewed on a subsequent transfer. In the event that it ceases to apply, the deferred tax will become payable. This brief description is a simplification of a complex piece of legislation.

It has proved very difficult to obtain information about the operation and impact of tax credits for such property. The problem is the confidential nature of tax arrangements. As a result, although the Inland Revenue publish global information about inheritance tax relief, it has proved impossible to find out which areas of the countryside are safeguarded through such undertakings. The global information shows that 48,000 hectares of land in Scotland are subject to conditional exemption.[31]

In terms of the assessment for the purposes of this paper, the position quite simply is that there is no provision for public access to information about the environmental benefits or effects of the tax credit arrangement either during negotiation of an undertaking or after agreement; nor is there any provision for public participation. While it is understandable that information about a person's tax liability should be treated in confidence, it is not clear why information about the location of the properties that benefit from credits, about the undertakings that have been given and about their implementation should be withheld from the public. The extent to which tax credits are contributing to the government's

29 See Inland Revenue, *Capital Taxation and the Natural Heritage* Inland Revenue IR67 (1996).

30 In Scotland the Scottish Natural Heritage for land of scenic and scientific interest and Historic Scotland for buildings of architectural interest and for land and buildings of historic interest.

31 Parliamentary Debates (1997) vol. 274, No. 80, col. 777.

goal, that heritage property should be managed in a way that is sympathetic to the public, would seem to be a matter of legitimate interest.

V. CONCLUSION

The first and obvious conclusion from this assessment is that experience so far in the UK with the mechanisms selected for review is that they are not presently compatible with the drive to increase public access to environmental information and to promote public participation in environmental decisions. Nor is it easy to make any public assessment of the contribution of such mechanisms in individual cases to achieving environmental goals. Agreements and tax credits are negotiated behind the scenes. In terms of the discussion in the introduction to this paper, the relationship is bilateral not multi-lateral. Such mechanisms may well be instrumental in promoting a sense of shared responsibility for the environment, the "let's work together" approach of the EU Fifth Action Programme, on the part of landowners (and that is important); but they will do nothing to extend the concept to a wider constituency and there is a feeling, therefore, of justice denied.

This conclusion is not surprising. To talk of procedural safeguards in the context of market mechanisms would seem, on the face of it, to be a contradiction in terms. At the beginning of this paper, I mentioned that the introduction of the disciplines of the market into public administration had raised serious questions about the continuing relevance of administrative law and about principles of "good public administration". However, I also mentioned that the value of continuing to guide and control the exercise of governmental power was not in question; but that the objective of emerging controls such as value for money audit was the encouragement of a market-orientated approach to public administration.

With environmental protection, however, there is growing pressure internationally and at European level for the disciplines of public access to information and public participation to transcend this change in public administration. Although it would be wrong to generalise from such a limited assessment, it is reasonable to suggest that domestically (within the UK) the indications are not encouraging and that the question of the compatibility between the increasing use of market mechanisms and the drive to increase access to information and public participation clearly deserves attention.

I do not believe they need to be incompatible. With regard to the mechanisms on which I have focused in this paper, I have already indicated how the arrangements for access to information and public participation can be enhanced in the context of planning agreements and I do not see why similar steps cannot be taken with regard to other agreements directed at individual activities. As for

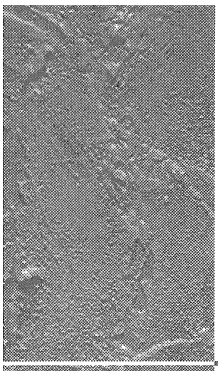
sector agreements, the European Commission have advocated that, in addition to those actually negotiating the agreement, all relevant business associations, environmental protection groups and local or other public authorities should be appropriately informed of what is going on and should have an opportunity to comment on the draft.[32] The Dutch experience with waste prevention and waste recycling, as described by Koppen,[33] shows how third parties can be introduced into what are normally bilateral negotiations surrounding a sector agreement with a central role in determining appropriate targets and how best to achieve them being given to "target groups". These comprised representatives of those likely to be most affected whether as producers, consumers, regulators or those with a more general interest in environmental protection. Although the process ran into difficulties (eg, the selection of the target groups determined the nature and focus of discussion; and the discussion was time consuming and did not produce consensus), the experience shows that the negotiation of agreements need not be a wholly private affair.

An individual's tax liability clearly is a private affair. The environmental interest lies in the objectives of the tax, how the tax will operate to achieve those objectives (including, for example, the range of exemptions) and whether the objectives are being met. Access to information and opportunities for participation need to focus on policy formulation and implementation rather than on the application of the tax to individuals and this has been the case in the UK with the landfill tax. Where, however, tax credit arrangements exist in return for environmental benefits, as with national heritage property, it would seem appropriate to subject the adequacy and the delivery of the benefits in individual cases to some form of public scrutiny.

What is needed is an acknowledgement at the domestic level that the market mechanisms that are being developed to secure environmental protection should be linked explicitly to the disciplines of access to information and public participation. Procedures capable of establishing the sort of multi-lateral relationship to which I referred in the introduction to this paper should be developed. This acknowledgement is emerging in the UK with planning agreements; but it needs to go further. There is, for example, no mention of these disciplines in the consultation paper on "Economic Instruments for Water Pollution" issued by the Department of the Environment, Transport and the Regions in November last year. In the absence of such an acknowledgement, these disciplines will remain a feature of command and control regimes but will be by-passed by the new instruments of public administration. The consequence will be frustration in achieving the goal of shared responsibility and a continuing feeling of justice denied.

32 European Commission, *Communication and Recommendation* (1996).

33 Koppen, supra note 16.



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