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Relevance Beyond Borders: Recent Developments in EU Environmental Law and Policy

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Developments in the environmental law and policy of the European Union (EU) are increasingly marked by multiple international dimensions: this trend is certainly evident in key policy documents and new legislative initiatives of the EU over the period mid-2009/mid-2010. This note will thus review the new “Europe 2020” Strategy and selected policy and legal instruments on climate change, biodiversity, corporate social responsibility and pesticide management issued in the above-mentioned time period, with a view to highlighting their relevance beyond the EU borders.

Europe 2020

The highest-profile policy development of the past year has been the launch of the Europe 2020 Strategy – a strategy for smart, sustainable and inclusive growth,¹ which was endorsed by the European Council in June 2010.² This is the successor to the Lisbon Strategy, which aimed at making the EU the world’s most competitive knowledge-based economy by 2010.³ “Europe 2020” builds on three pillars: developing an economy based on knowledge and innovation (“smart growth”); promoting a more resource-efficient, greener and more competitive economy (“green growth”); and fostering high-employment economy in delivering social and territorial cohesion (“inclusive growth”). The strategy, and its second pillar, are clearly dominated by climate change policy considerations: the EU target for green economy reiterates the EU so-called “20-20-20” climate change target – cutting greenhouse gas emissions within the EU by 20% from 1990 levels by the year 2020, while also increasing the share of renewable energy to 20% and improving energy efficiency by 20%.⁴ Similarly, the predominance of climate concerns can be detected in the concept of “resource-efficient” Europe, which entails decoupling growth from the use of resources, shifting towards a low-carbon economy, increasing the use of renewables, modernizing the transport sector and promoting energy efficiency. Quick references can also be found to preventing environmental degradation, biodiversity loss and unsustainable use of natural resources. The second pillar further proposes two flagship initiatives to be implemented by the EU and its Member States: “an industrial policy for the globalization era,” and “resource-efficient Europe.” The latter notably includes decarbonising the transport sector and promoting renewable energy sources. Finally, the idea of competitiveness under the green economy pillar is substantiated as promotion of green technologies.

¹ Commission Communication, “Europe 2020: A strategy for smart, sustainable and inclusive growth,” COM(2010)2010, 3 March 2010.

² European Council Conclusions of 17 June 2010.

³ European Council Conclusions of 24 March 2000.

⁴ Commission Communication, “20 20 by 2020. Europe’s Climate Change Opportunity,” COM(2008)30, 23 January 2008.

It should be underscored that Europe 2020 is not just a policy commitment, but a policy process under the overall guidance of the European Council, whereby Member States are to develop national strategies based on EU-wide guidelines and possibly country-specific recommendations issued by the Commission. Policy warnings in case of inadequate response from the Member States are also envisaged. European stakeholders are also expected to participate in the monitoring process at the national level, and through the European Parliament, the Economic and Social Council and the Committee of the Regions at the EU level. Annual reports by the Member States and EU-wide yearly reports by the Commission will be produced.

The international dimension of Europe 2020 is quite prominent: on the one hand, the EU commits to continue its efforts in the multilateral climate change negotiations, as well as in the process leading to the Rio+20 Summit in 2012, which will, *inter alia*, discuss the concept of green growth; on the other hand, the EU commits to increase its outreach on the bilateral level with a view to building mutual understanding with third countries in the search of a global solution to climate change. The bilateral approach in the external dimension of the strategy is further reinforced by the proposed use of “regulatory dialogues” with partner countries in order to promote equivalence, mutual recognition and convergence in green growth and climate change regulatory approaches and tools; and the use of “high-level strategic dialogues” on energy and climate, access to raw materials and global poverty.

Returning to the internal dimension of EU policy-making, it should be finally noted that the green pillar of the Europe 2020 Strategy is linked to the ongoing review of the EU Sustainable Development Strategy (SDS). The latest review was in fact launched in July 2009.⁵ According to preliminary policy documents on the review,⁶ the SDS will continue to provide a long-term vision and constitute the overarching policy framework for all Union policies and strategies,⁷ with an increased focus on climate change, energy (particularly in the transport sector), loss of biodiversity and natural resources. The SDS is expected to support the shift to a safe and sustainable low-carbon and low-input economy, which clearly indicates the need to ensure clearer links to the future EU 2020 strategy. Notwithstanding obvious overlapping, the two strategies are expected to proceed in parallel, with the SDS focusing more on the green pillar.

Climate Change

The political priority attached by the EU to climate change has now been reflected in the Treaty on the Functioning of the European Union (TFEU), since the entry into force of the Treaty of Lisbon.⁸ As a result, a combined reading of that provision and the pre-existing environmental integration principle (now renumbered as Article 11

⁵ Commission Communication, “Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development,” COM(2009)400, 24 July 2009.

⁶ Presidency's report on the 2009 review of the Union's Sustainable Development Strategy, 1 December 2009.

⁷ European Council Conclusions of 11 December 2009.

⁸ Article 191(1) TFEU reads: “Union policy on the environment shall contribute to pursuit of the following objectives: [...] promoting measures at international level to deal with regional or worldwide environmental problems, *and in particular combating climate change.*” (emphasis added).

TFEU⁹) points to an obligation to mainstream climate change in all, internal and external, EU policy areas. This is coupled with a significant institutional development: the creation in 2010 of a separate climate-focused Directorate-General within the European Commission (DG-CLIMA) that comprises former climate change officers of DG Environment and DG External Relations.¹⁰

Certainly the major legal development of 2009-2010 has been the adoption of a complex set of legislative acts to tackle climate change and energy: the so-called Climate and Energy Package. The key elements of the Package include an amended ETS Directive,¹¹ which extends and revises the EU Emissions Trading Scheme (ETS), by providing that GHG emissions permits will no longer be given to industry for free, but be auctioned by Member States from 2013 onwards. The amended ETS Directive is complemented by an Effort Sharing Decision,¹² through which the Package introduces binding emission targets for each Member State in sectors that are not included under the ETS, including agriculture, transport, buildings and waste. Both instruments are linked to a new Directive on Carbon Capture and Storage (CCS),¹³ which regulates this controversial mitigation technology for the first time (by setting conditions for the assessment of storage sites, authorization procedures and closure of such sites) and provides incentives for pilot activities. The Package, in addition, includes a Regulation on Passenger Cars,¹⁴ which complements previous measures to promote energy efficiency. Furthermore, the Package includes a Directive on Renewable Energy,¹⁵ which introduces for the first time a mandatory national target for each Member State for the overall share of energy from renewable sources in gross final consumption of energy. To this end, the Directive requires Member States to adopt a national renewable energy action plan setting out national targets for the share of energy from renewable sources consumed in transport, electricity, heating and cooling in 2020. Notably, the Directive on Renewable Energy also includes provisions on biofuels sustainability criteria (which are also reflected in the Directive on Fuels Specifications¹⁶ that also forms part of the Package). The

⁹ Which reads: “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”

¹⁰ See EU press release “Commission creates two new Directorates-General for Energy and Climate Action”, IP 10/164, 17 February 2010.

¹¹ Directive 2009/29/EC of the European Parliament and the Council of 23 April 2009 amending Directive 2003/87/EC so as to Improve and Extend the Greenhouse Gas Emission Allowance Trading Scheme of the Community.

¹² Decision 406/2009/EC of the European Parliament and the Council of 23 April 2009 on the Effort of Member States to Reduce Their Greenhouse Gas Emissions to Meet the Community’s Greenhouse Gas Emission Reduction Commitments up to 2020.

¹³ Directive 2009/31/EC of the European Parliament and the Council of 23 April 2009 on the Geological Storage of Carbon Dioxide and Amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006.

¹⁴ Regulation (EC) No 443/2009 of the European Parliament and of the Council of 23 April 2009 Setting Emission Performance Standards for New Passenger Cars as Part of the Community’s Integrated Approach to Reduce CO₂ Emissions From Light-duty Vehicles.

¹⁵ Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC.

¹⁶ Directive 2009/30/EC of the European Parliament and the Council of 23 April 2009 amending Directive 98/70/EC as regards the Specification of Petrol, Diesel and Gas-oil and Introducing a Mechanism to Monitor and Reducing Greenhouse Gas Emissions and amending Council Directive

sustainability criteria apply to imported as well as local biofuels, to protect high-value biodiversity land and high-value carbon-stock land, as well as ensuring delivery of substantial reductions in greenhouse gas emissions. Lack of compliance with these criteria does not lead to a ban on imports or use within the EU, but rather to a series of disincentives. The Package finally includes amended guidelines on state aid for environmental measures, which were adopted by the Commission in 2008.¹⁷

While it is beyond the purposes of this note to delve into the innovations and legal complexities of the Package,¹⁸ a few of its international dimensions will be briefly highlighted. The ETS directive is considered “an important building block for the development of a global network of emission trading systems.”¹⁹ In addition, it allows EU Member States to determine the use of revenues from auctioning, establishing that at least half of the proceeds should be used to fight climate change in the EU and abroad, as well as to alleviate the social consequences of moving towards a low-carbon economy. The CCS directive, which principally aims to ensure the environmental sustainability of CCS, can also be seen as a pioneering example of domestic legislation that the EU is keen to discuss at the multilateral negotiating table as a source of inspiration within the UNFCCC framework.²⁰ Finally, the biofuels sustainability criteria of the Renewables Directive aim to influence the international **debate concerning biofuels, which is occurring in different multilateral fora**. The EU, for instance, continues to support the development of international sustainability standards for biofuels within the framework of the Convention on Biological Diversity (CBD), making reference to its own sustainability criteria as a relevant example in that respect.

Finally, legislative developments related to the bilateral external relations of the EU should be mentioned: in the wake of the Copenhagen Climate Change Conference, the European Parliament adopted a resolution calling for, *inter alia*, mainstreaming climate change in bilateral external relations.²¹ In early 2010, the second amendment to the Cotonou Agreement²² – the world’s largest economic and political framework

1992/32/EC as Regards the Specification of Fuel Used by Inland Waterway Vessels and Repealing Directive 93/12/EEC.

¹⁷ Community Guidelines on State Aid for Environmental Protection (2008/C 82/01); see also EU Memo/08/31: State Aid: Guidelines on State Aid for the Environment – Frequently Asked Questions, 23 January 2008.

¹⁸ For a quick guide, see EU press release, “Council adopts climate-energy legislative package”, 8434/09 (Presse 77), 6 April 2009.

¹⁹ EU Memo/08/796: Questions and Answers on the revised EU Emissions Trading System, 17 December 2008.

²⁰ See EU submission to the UNFCCC Subsidiary Body for Scientific and Technological Advice, in “Views related to carbon dioxide capture and storage in geological formations as a possible mitigation technology: Submissions from Parties”, UN Doc FCCC/SBSTA/2010/MISC.2, 13 April 2010, at 31-42.

²¹ European Parliament Resolution of 10 February 2010 on the outcome of the Copenhagen Conference on Climate Change, 10 February 2010, para 7, where it “urged the EU to agree on a ‘Roadmap for Mexico’ which will include the discussion of climate policies in every strategic partnership and bilateral and multilateral cooperation agreement in order to create a more coherent external climate protection strategy.”

²² The Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part and the European Community and its Member States of the other, signed in Cotonou on 23 June 2000; the text resulting from its second revision (March 2010) is available at http://ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf. See in particular arts. 1, 8, 11, 20(2) and 32bis.

for North-South cooperation, involving seventy-nine African, Caribbean and Pacific (ACP) countries – introduced several clauses related to climate change, that made it an issue that should be integrated at every level of the partnership, should be considered a security threat to be taken into account in the partnership, and should be covered by EU financial assistance. In addition, a whole new article is devoted to climate change cooperation, with mandatory language calling for cooperation to strengthen and support mitigation and adaptation policies and programmes, including through institutional development and capacity-building; and to enhance the capacity of ACP States in the development and participation in the global carbon market. A recent free trade agreement between the EU and South Korea, in addition, include a commitment to cooperate on trade-related aspects of the current and future international climate change regime, including issues relating to global carbon markets, ways to address adverse effects of trade on climate, as well as means to promote low-carbon technologies and energy efficiency.²³ It can be expected that climate-specific cooperation clauses will be used more and more frequently in future Association and free trade agreements concluded by the EU.

Biodiversity

In early 2010, the European Council committed to a new EU-wide post-2010 vision and target for biodiversity:²⁴ namely, “to halt the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, restore them in so far as feasible, while stepping up the EU contribution to averting global biodiversity loss.” This basically maintains the previously agreed EU target (“to halt biodiversity loss in the EU by 2010”), but postpones its achievement and includes for the first time consideration of ecosystem services. In addition, it broadens the scope to encompass the need to restore ecosystems when they are failing to provide the services needed, and recognizes the EU’s own interest in taking action to address biodiversity loss beyond its borders. The latter is expected to entail reducing the impacts of EU consumption patterns on biodiversity elsewhere and enhancing biodiversity protection efforts in other countries.²⁵ The EU target has been agreed before the international community sets a global target at the forthcoming Conference of the Parties to the Convention on Biological Diversity to be held in Nagoya, Japan, in October 2010.

In terms of legislative developments, late 2009 saw the enactment of Regulation 1007/2009 on trade in seal products,²⁶ which bans from the EU market seal products unless they result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. An additional exception concerns seal products of an occasional nature that are exclusively used as goods for personal use; and by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources, in which case these products can be placed on the EU market only on a non-profit basis. This piece

²³ Free Trade Agreement between the European Community and its Member States, of the one part, and the Republic of Korea, of the other part (initialled on 15th October 2009), in particular art. 13.5 and Annex 13. The full text is available online at:

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en>.

²⁴ European Council Conclusions of 26 March 2010.

²⁵ Commission Communication, “Options for an EU Vision and Target for Biodiversity beyond 2010,” COM(2010)4, 19 January 2010.

²⁶ Regulation (EC) No. 1007/2009 of the European Parliament and the Council of 16 September 2009 on trade in seal products.

of EU legislation has been challenged before the World Trade Organization by Canada and Norway,²⁷ and is currently being considered by the EU judiciary as well: the General Court of the EU decided to suspend the application of the Regulation until it renders judgment on an application for its annulment brought by Inuit representatives.²⁸

Corporate social responsibility

Europe 2020 also includes a commitment to renew the EU strategy to promote Corporate Social Responsibility (CSR) as a key element in ensuring long-term employee and consumer trust. This commitment should be read in conjunction with the support expressed by the EU for the UN Framework on Human Rights and Business “Protect, Respect and Remedy,”²⁹ which the Danish and Spanish Presidencies affirmed “provides a key element for the global development of CSR practices” and “constitutes a significant input to the CSR work of the European Union.”³⁰

Along these lines, two recent legislative developments should be highlighted, that have extraterritorial implications. First, the EU voluntary ecolabel award scheme was revised in late 2009.³¹ It intends to promote products with a reduced environmental impact during their entire life cycle and to provide consumers with accurate, non-deceptive, science-based information on the environmental impacts of products, by allowing the placing of a logo on products that meet the standards of the scheme. The revised regulation allows EU Member States’ control over business activities carried out outside the EU by entities that voluntarily join the scheme, as it is applicable to any goods or services supplied for distribution, consumption or use on the EU market, including imported goods. An entry point for human rights considerations has also been created, as the general requirements for EU Ecolabel criteria include consideration “where appropriate” of “social and ethical aspects, by making reference to related international conventions and agreements such as relevant ILO standards and codes of conduct.”

Second, the so-called EMAS (Environmental Management and Audit System) Regulation was also revised. This scheme, in turn, aims to encourage continuous improvement of the environmental management of organizations voluntarily participating in the scheme (irrespective of their public or private ownership, legal

²⁷ Press release, “Canada Requests WTO Consultations on EU Seal Products Ban,” 2 November 2009, available online at: http://www.international.gc.ca/media_commerce/comm/news-communiqués/2009/327.aspx; and International Centre for Trade and Sustainable Development, “Canada, Norway Launch WTO Complaint over EU Seal Ban”, *Bridges Trade BioRes*, Volume 9, Number 20, 13 November 2009.

²⁸ Case T-18/10 R, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, Order of 19 August 2010.

²⁹ Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights’, UN Doc A/HRC/8/35, 7 April 2008.

³⁰ Swedish and Spanish Presidencies Declaration, “Protect, Respect, Remedy– Making the European Union take a lead in promoting Corporate Social Responsibility”, November 2009. Note that the Commission commissioned a legal study to the University of Edinburgh on the matter, which will be available at: <http://www.law.ed.ac.uk/euenterpriseslf/>.

³¹ Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, particularly arts. 2, 3(2), 6(3)(e) and 9(c).

form or profit-making purposes) by allowing registration of organizations and use by organizations of EMAS logo for communication and advertising purposes (but not directly on products or their packaging). Similarly to the Ecolabel Regulation, the new EMAS Regulation allows consideration of human rights through consideration of “the importance to stakeholders and employees of the organization” as part of the assessment of the significance of an environmental aspect by an organization.³² Furthermore, the regulation allows Member States’ extraterritorial control by referring to “indirect” environmental impacts, such as environmental issues that can result from the interaction of an organization with third parties and which can be influenced by an organization to a reasonable degree (including the environmental performance and practice of contractors, subcontractors and suppliers if they can be influenced to a reasonable degree by the organization). In addition, Member States “may” provide competent bodies with responsibility for registration of organizations located outside the EU.

Pesticide Management

Another major legislative development of late 2009 is the Directive establishing a framework for EU action to achieve the sustainable use of pesticides.³³ It aims to achieve sustainable use of pesticides by reducing the risks and impacts of pesticide use on human health and the environment and promoting the use of integrated pest management and of alternative approaches or techniques such as non-chemical alternatives to pesticides. It applies to plant protection products. It requires Member States to adopt national action plans to reduce risks and impacts of pesticide use; provide access to appropriate training and establish certification systems for professional pesticide users; ensure regular inspections of pesticide application equipment; adopt specific measures to protect the aquatic environment and drinking water from impacts of pesticides; reduce the use of pesticides or the risks in specific areas such as protected areas or areas used by vulnerable groups; and ensure that handling and storage of pesticides as well as treatment of their packaging and remnants do not endanger human health or the environment.

Furthermore, according to the EU regulation, aerial spraying is generally – but not absolutely – prohibited. It can be approved in advance, in special cases, subject to the following cumulative conditions: the absence of viable alternatives or existence of clear advantages in terms of reduced impacts on human health and the environment as compared with land-based application of pesticides; explicit approval for aerial spraying of used pesticides, following a specific risk assessment; certificate for the enterprise responsible for providing aerial spray application; adoption of specific risk management measures to avoid adverse effects on the health of bystanders, if the area to be sprayed is in close proximity to areas open to the public (no spraying is allowed in close proximity to residential areas); and adoption of best available technology to reduce spray drift on the aircraft.³⁴ While the regulation clearly concerns only EU

³² Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC, particularly arts. art. 2(7) and 11(1), and Annex I paras. 2(v) and 2(b)(vii).

³³ Directive 2009/128/EC of the European Parliament and the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides.

³⁴ The latter as from 2013.

Member States, its discipline of aerial spraying that may have significance beyond the EU, given the possible transboundary consequences, as illustrated by the ongoing case on aerial spraying before the Court of Justice.³⁵

Conclusions

Recent policy and legal developments in the EU are significantly characterized by the EU desire to be an “environmental leader” not only within its borders, but also on a global level. In a growing number of cases, such as those highlighted in this note, the EU wishes to influence ongoing multilateral negotiations by taking early action domestically, even if this means, at least in certain instances, running the risk of being challenged on the basis of alleged WTO law incompatibility by other countries. To prevent such risk and generally ensure that this type of initiatives are better understood beyond its borders, the EU is using more and more systematically its bilateral external relations to build trust among, and possibly engage in collaborative action with, third countries concerning its internal environmental policies and laws that are connected with international environmental goals or ongoing multilateral debates.

³⁵ Aerial Herbicide Spraying (Ecuador v. Colombia), <http://www.icj-cij.org/docket/index.php?p1=3&code=ecol&case=138&k=ee>.