

CONTENTS

elni News	1
Articles	3
Procedural Participation under the Environmental Impact Assessment Directive <i>Pedro Machado</i>	3
The New Directive on Strategic Environmental Assessment <i>Jan de Mulder</i>	14
The Integration of Voluntary Agreements into Existing Legal Systems <i>Regine Barth and Birgit Dette</i>	20
The EU and Climate Change: Is a Clarification of EU Legal Competence possible? <i>Frédéric Jaquemont</i>	30
Overview of the Community Guidelines on State Aid for Protecting the Environment <i>Mercedes Fernández Armenteros</i>	36
The Environmental Interest of Private Injunction Proceedings against the Owner of Cross-Border Air Polluting Plants before his National Court <i>Janna Lehmann</i>	43
European Commissions Proposal for a Directive relating to Environmental Noise - A First Step towards Controlling the Problem <i>Dirk Teßmer</i>	50
Making Choices: The European Commission's Proposal for a Sixth Environment Action Programme <i>Sven Deimann</i>	54
Imprint	60

ELNI NEWS

Enforcing Environmental Policy (EEP) - News from the EEP Network

The last issue of ELNI Newsletter reported on the start of the EEP Network, which was set up with the financial support of the European Commission on the 1st July 2000 and will run for three years until June 2003. The Network '**Enforcing Environmental Policy**' (EEP-Network) is a European Research Training Network on the instruments of environmental policy in the areas of climate protection and air pollution.

It associates six European research teams working on environmental law and economics: ELRC (Environmental Law Research Centre, University of Frankfurt, coordinator of the EEP), CIRED (International Research Centre on the Environment and the Development, Nogent sur Marne), CERDEAU (Centre for Study and Research on Environmental and Planning Law, University of Paris I), FEEM (Fondazione Eni Enrico Mattei, Milan), FIELD (Foundation for International Environmental Law and Development, London) and the Institute for Applied Ecology (Öko-Institut, Darmstadt office).

The EEP Network aims to enhance the scientific knowledge of the functioning and effectiveness of various instruments in the field of climate change and air pollution policies on the local and the international level. It also shall promote the development and the implementation of other instruments to complement or supplement legislation at an appropriate level in Europe.

Within the network, six young economic and law researchers from various European countries have been appointed to work on the common research project. The kick-off workshop and the second plenary workshop of the EEP Network took place in Frankfurt in September 2000 and in Nogent-sur-Marne in January 2001. All documents related to these workshops can be downloaded from the EEP homepage <http://www.uni-frankfurt.de/fb01/eep>.

As a part of the training programme offered to the young researchers, a two-day workshop was organised in April in London. The young researchers had the opportunity to discuss their research plans and the current status of their research work with external experts, among them senior experts as well as other young researchers, who also presented papers. The debates were chaired by Prof. Eckard Rehbinder, University of Frankfurt, and Prof. Philippe Sands, Foundation for International Environmental Law and Development (FIELD). Various legal and

economic aspects of air pollution and climate change were discussed, ranging from command and control approaches, trade permits, taxes and environmental agreements to the potential role of carbon sinks, the policy mix in the EC, and the EC road transport policy. The programme of the workshop can also be downloaded from the EEP homepage.

Frédéric Jaquemont (ELRC) and Janna Lehmann (CERDEAU), two young legal researchers, have further elaborated their paper for publication in this issue of the elni Review which you will find on pp.30 and 43 respectively.

CAVA Final Workshop in Brussels

The EU-funded network project "Concerted Action on Voluntary Approaches" was concluded at the final CAVA Workshop in Brussels on February 1 2001. The results of the three-year project were presented by the researchers from CERNA, the coordinator of the network, and the associated research institutes and then discussed with highlevel police makers and representatives from industry organisations. For this final workshop, policy briefs were prepared which represent a synthesis of the five previous workshops and research findings within the project. The policy paper prepared by Regine Barth and Birgit Dette on "The Integration of Voluntary Agreements into Existing Legal Systems" is included in this issue of the elni Review (pp.20).

RELIEF Research Project

In January 2001 the largest research project on green purchasing known in Europe was started. RELIEF, by full name "Environmental Relief Potential of Urban Action on Avoidance and Detoxification of Waste Streams through Green Public Procurement", is supported by the EC research programme on Environment and Sustainable Development, key action "City of Tomorrow and Cultural Heritage".

The project is coordinated by ICLEI, the International Council for Local Environment Initiatives and carried out by a consortium of research partners from five countries, and is supported by the Cities of Kolding/ Denmark, Hamburg/Germany, Malmö/Sweden, Miskolc/Hungary, Stuttgart/ Germany and Zurich/ Switzerland.

RELIEF will develop an extensive set of data on the environmental benefits which are potentially achievable through green purchasing. For this pur-

pose methods on environmental assessment of products, assessment of public buying power and evaluation of market conditions will be developed. Based on local case studies and priority identification, scenarios will be developed for the application of Green Purchasing at a European level and the environmental effects of this will be calculated. The results of this will be combined with a research on innovation fostering contractual arrangements (performance criteria in tendering, contracting, ...) and a legal analysis. The final outcomes (policy recommendations, procurement guidelines, trade code) will be discussed in roundtables and cumulate in a European Cities for Green Purchasing Campaign.

For more information see: <http://www.iclei.org/europe/ecoprocura/relief/index.htm>

New Title and Layout

You might have wondered what has happened to Elni when you had a first look at the front page. The

elni "Newsletter" has been renamed in "Review", since in our view the elni Newsletter is more than just a newsletter. We also thought it about time to change elni's appearance after so many years and to allow our graphic designer to adapt elni's layout to the corporate design of the Öko-Institut. With the new design we want to emphasize the Institute's role in supporting the review. Without the institute's financial contributions the elni review would not have existed for over 10 years now.

Personnel changes

Birgit Dette, coordinator of the environmental law division of the Öko-Institut and elni, has been delegated to work with the EC Commission, DG Environment. Her colleague Regine Barth has taken over her position. We wish Birgit that she will gain a deeper insight into the Commission's work and new experience, but we very much hope that she will come back again to the Öko-Institut.

ARTICLES

Procedural Participation under the Environmental Impact Assessment Directive*

Pedro Machado

Introduction

The concern with the settlement of a procedural framework regulating the administrative decision-making is usually associated, in historical terms, with a precise constitutional matrix: in a *democratic* constitutional framework every public decision-making must be submitted to a certain process.¹ Moreover, the administrative procedure served to reconcile broad grants of administrative discretion typical of the post-war administration with the growing distrust on bureaucratic/expertise power and the preservation of pluralistic values enshrining post-war societies.² Simultaneous, the expansion of the administrative power represented a challenge for the conception of participation as limited to electoral control, therefore reinforcing the pluralist model.³ In the design of such a procedural framework a reasonable degree of participation of individuals who are likely to be adversely affected by the outcome of administrative decision-making constitutes the basic expression of any modern legal order subjected to the *rule of law*.⁴

Given this backdrop, the view sustained in this work starts from the assumption that the EIA Directive must be understood in the realm of the constitutional framework in which Community environmental law was placed. The purpose of the this paper is therefore twofold: one the one hand, it proposes a constitutionally-principled interpretation of the procedural framework laid down by the Di-

rective on Environmental Impact Assessment;⁵ on the other, it seeks to flesh out, in coherence with the mentioned constitutionally-principled approach, the participatory dimension of the EIA procedure. The paper is therefore structured upon two sections. The first will be dealing with the analysis of the nature of the procedure introduced by the EIA Directive. The remaining one will then highlight the core of such a procedure, trying to demonstrate that procedural participation amounts to its unavoidable feature. Put differently, the absence or distortion of procedural participation in any EIA process amounts to its degeneration as an instrument to cope with the environmental risks associated to a concrete project, converting it in a *diverse procedural model* from the one enshrined in the EIA Directive.

1 The EIA Directive and the Proceduralisation of Community Environmental Law

By having granted environmental goals a constitutional status, the Community has assumed that its task is to preside over an environmental policy which revolves around the principles and constitutive elements peculiar or exclusive to environmental concerns, rather than one which is primarily designed to compensate for the externalities associated with the internal market.⁶ Moulding EC environmental policy by reference to the constitutional principles like the ones of prevention or precaution implies recognising that the environmental protection demands its own resources and methods of law-making. And it is within this normative backdrop that the legal instruments put forward at EC level must be dealt with and, in casu, the EIA Directive.

By introducing a specific procedure destined at assessing the effects of development projects on the environment in the Member States' legal order, the EIA Directive does not put forward a heavily de-

* The present article corresponds to an abbreviated version of a paper presented by the author at the Workshop on European Environmental Politics Between Global Challenges and National Particularities, held in at the Robert Schuman Centre/European University Institute (Florence) on 7 May 2001. The authors thank the participants on that workshop, and in particular Duncan Lifferink in his quality as discussant, for the comments made following the presentation of the paper. Needless to say that any errors or omissions remaining are those of the author only.

Pedro Machado, Ph.D. Researcher, Europe University Institute, Law Department, Florence, Italy

¹ See Mannori and Sordi (2001) 464-465.

² See Reich (1985) 1618-1619.

³ See Fiorino (1989) 530.

⁴ See Nehl (1999) 2. For the Community, see also the landmark judgments Case 294/83 *Parti Écologiste Les Verts v. European Parliament* [1986] ECR 1339, para. 23; *Opinion 1/91* (EEA) [1991] ECR I-6079, para. 21.

⁵ See Dir. 85/337/EEC [1985] OJ L175/40, then amended by Dir. 97/11/EC [1997] OJ L73/5 (hereinafter EIA Directive). See, for a general overview of the amended text of the EIA Directive, Ladeur and Prella (1999).

⁶ See Somsen (1998) 163.

tailed procedural framework, thus being permeable to some extent to national legal traditions related to administrative procedure. Yet it does not amount to a neutral piece of legislation derived from the Community and left to the Member States to compound it according to the principles and values present in their legal orders. On the contrary, the EIA Directive is structured upon a core procedural value, notably the one of *co-operative participation*, as will be demonstrated below. The participatory dimension enshrined in the EIA Directive flows decisively from the implications that granting environmental protection a constitutional status at EC level bears.

Therefore, the common assumption of describing the requirement for an environmental impact assessment under the EIA Directive as a *procedural obligation*, 'under which information on the alleged impacts on the environment of a certain development project is collected',⁷ although being correct, tells us very little about the core of the EIA Directive. First, because it does not reveal the ambit of application of the Directive. Crucial questions like 'Does it submit every decision on a project to the procedural obligation it introduces?' or 'What is the juridical nature of such a procedural obligation?' are neglected by the aforementioned assumption. Second, it provides a rather incomplete and unsatisfactory explanation for the significance and the implications of proceduralising public decision-making concerning private and public projects likely to have significant effects on the environment. In this realm, the basic question to be answered would be 'What are the core features of the EIA procedure?'

If one follows the interpretative path suggested in the landmark judgement rendered in *Kraaijeveld*,⁸ beginning by stressing the Directive's *telos* through the relevant dispositions in its preamble, and confronting it then with its pertinent norms, it becomes clear that the EIA Directive aims at providing the competent authorities with relevant information to enable them to take a decision on a specific project in full knowledge of the project's likely significant impact on the environment. The *telos* of the Directive is asserted in these precise terms by the Community legislator in the first recital of the preamble to the amending Directive.⁹ While the original text of the EIA Directive only referred to the concept of procedure under the expression 'development consent procedure', the Community legislator now

characterises in the first recital, *in fine*, of the same preamble the '... *assessment procedure* ... [as] a fundamental instrument of environmental policy as defined in Article 130r of the Treaty and of the Fifth Community Programme of policy and action in relation to the environment and sustainable development.'¹⁰ Furthermore, the nature of such an assessment procedure must be viewed in the light of the fifth recital of the original text of the EIA Directive, when it alludes *in fine* to the information gathered during the EIA procedure under the following formula: '... this assessment *must* be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question'.¹¹

It flows from the cited recital that it was the intention of the Community legislator to clarify the procedural nature of the environmental impact assessment. Assessing the significant effects a project can have on the environment shall only be done, in the framework of the Community environmental policy, according to a procedural model, being this model the one introduced by the EIA Directive. More concretely, such a procedure constitutes the adequate instrument to gather the relevant information which will enable the decision-maker to decide on granting the consent requested by the developer on the basis of its effects on the environment. Still following the indications stemming from the preamble, the Community legislator hints at one of the basic tenets of the procedure introduced by the EIA Directive: the procedure *must* allow for the participation of actors other than the developer, namely the authorities with competence to render a statement on the content and extent of the information to be elaborated and supplied for the assessment, which is to say the authorities holding competence on environmental matters, and the people, in particular those eventually concerned by the project under assessment.

Consistent with the objectives proclaimed in the preamble to the EIA Directive, its recently amended Article 6(1) now compels Member States to 'take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To this end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to

⁷ See Sifakis (1998). In the same vein, see also Wathern (1988) 6.

⁸ See Case G72/95 *Aannemersbedrijf P. K. Kraaijeveld BV and others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paras. 3-13.

⁹ Again, see Dir. 97/11/EC [1997] OJ L73/5.

¹⁰ Once again, see Dir. 97/11/EC [1997] OJ L73/5 (emphasis added).

¹¹ See Dir. 85/337/EEC [1985] OJ L175/40 (emphasis added).

Article 5 shall be forwarded to those authorities.’ The participatory dimension of the EIA Directive is furthermore reinforced by its also amended Article 6(2) when obliging Member States ‘to ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.’ In a nutshell, the EIA Directive introduces a procedure destined to provide the Member States’ competent authorities with relevant information about the impact of certain projects on the environment. Yet, the Community legislator did not adopt a neutral stance against the structure of such a procedure. On the contrary, he shaped it according to a *normative participatory* view of administrative procedural law, in the sense that the information collected within the EIA procedure is the result of the multiple contributions of the environmental actors concerned. Rather than the concern with the rationalisation of administrative decision-making guaranteed by a set of rules guiding the bureaucratic action it is the prominence given to *procedural participation* that relieves in the normative framework enshrined in the EIA Directive.

Notwithstanding the more detailed analysis that will be dedicated below to the issue of procedural participation under the EIA Directive, it suffices to say, at this point, that the participatory element imbuing the EIA procedure demands access to the procedure for all other relevant environmental authors, namely the authorities likely to be concerned by a certain project on grounds of their specific environmental competencies and the public. The participatory strategy embodied in the EIA procedure is furthermore confirmed by the norm incorporated in its Article 1(5).¹² Indeed, by leaving out of the EIA Directive’s ambit of application all projects whose details are approved by a specific act of national legislation, the Community legislator renders clearly participation as an underpinning value of the EIA procedure. In essence, democratic legislative procedures endeavour to maintain a reasonable access for all groups to those procedures whose democratic character consists precisely on its potential responsiveness to the claims of those groups.¹³ Be it through representation or through direct participation, the legislative procedure seeks to accommodate a variety of interests by allowing them to be voiced, and by bestowing on them, during the

deliberation phase, serious consideration in the development of the legislative norms.¹⁴

Within the participatory backdrop offered by the legislative procedure, the Community legislator found unnecessary to submit the projects whose details are adopted by a legislative act to the EIA requirement, ‘since the objectives of this Directive [EIA Directive], including that of supplying information, are achieved through the legislative process.’¹⁵ Thus, the EIA Directive considers procedural participation to be guaranteed by the features arising from the national legislative procedures in that they allow for the representation of the different interests related to projects adopted by acts of national legislation.

This said, another conclusion can immediately be drawn regarding the nature of the procedure adopted by the EIA Directive. By excluding the national legislative procedures from the realm of its application, the competent national authorities to which the EIA Directive is intended to be applied are *a fortiori* national administrations. Thus, the procedure it introduces has an *administrative nature*,¹⁶ which means that the EIA Directive aims at introducing in the Member States’ administrative legal orders a procedure framed according to the *value* of participation .

It suffices to point out the ECJ’s prudence in delimiting the ambit of application of the exemption contained in that provision. According to the judgement held in the *Bozen* case, Article 1(5) is to be interpreted as follows:¹⁷

‘... in order for a legislative act to display the same characteristics as development consent, as defined by Article 1 of the Directive, the act must lay down the project in detail, that is to say in a sufficiently precise and definitive manner so as to include, like development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment.

It is only by complying with such requirements that the objectives referred to in the second condition laid down by Article 1(5) can be achieved through the legislative process. If the specific legislative act by which a particular project is adopted, and therefore authorised, does not include the elements of the specific project which

¹² Article 1(5) of the EIA Directive states: ‘This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.’

¹³ See Mashaw (1990) 276.

¹⁴ See Ely (1980) 80.

¹⁵ See again Article 1(5) of the EIA Directive, *in fine*, as well as the eleventh recital in the preamble to the Directive.

¹⁶ On the qualification of the EIA procedure as an administrative procedure, see Greco (1996) 512-514.

¹⁷ See Case C-435/97 *World Wide Fund (WWF) and others v. Autonome Provinz Bozen and others* [not yet published], paras. 59-60.

may be relevant to the assessment of its impact on the environment, the objectives of the Directive would be undermined, because a project could be granted consent without prior assessment of its environmental effects even though they might be significant.'

Following this reasoning, the ECJ does not integrate in the exemption granted by Article 1(5) of the EIA Directive to the projects approved by legislative acts those projects which, although provided by a legislative provision setting out a programme, receive development consent under a separate administrative procedure.¹⁸ This confirms the administrative nature of the procedure set out in the EIA Directive for it compels Member States to introduce in their legal orders a specific administrative procedure destined to provide the administrative authorities holding competence to decide on the development consents with relevant environmental information regarding the project under approval. Yet, if the obligation addressed to the Member States is of procedural nature, the Directive impregnates the national administrative legal orders, in the domain of environmental impact assessment, with a substantive value, notably the one of participation.

From what has been said until now it has been inferred that the administrative procedure incorporated in the EIA Directive protects the value of participation about the treatment of environmental actors.¹⁹ Shaped according to such a value, the parameter of procedural fairness lies then in the allowance for the different positions regarding a certain project to be voiced during the EIA procedure, and to be given a *reasonable* treatment by the decision-maker, *rectius* by the development consent authorities. But the normative model enshrined in the EIA Directive must not only be perceived under the allowance of granting space for all 'visions of the world' to be voiced during the procedure. In the realm of the EIA procedure, its broad participatory dimension appears closely linked to the objective of the environmental impact statement, namely the one of providing the development consent authorities with *information* concerning the significant effects the project might have on the environment.

In this vein, participation of environmental actors other than the developer in the EIA procedure is not primarily aimed at checking the information given by the developer and, ultimately, the decision taken

by the development authorities.²⁰ Procedural participation, as established in the EIA procedure, performs a *constitutive* function for it is aimed at providing the decision-maker with information other than the one provided by the developer. This becomes clear in the light of Article 8 of the EIA Directive. By demanding the development consent authorities to take into consideration the information provided by the developer, according to Article 5 of the EIA Directive, and the one collected after consultation of the environmental authorities and the public, pursuant to Article 6 of the said Directive,²¹ the Community legislator's perspective on the information collected under the EIA procedure amounts to a complex one. More concretely, the information to whose gathering the EIA procedure aims at is viewed as the result of 'complex constellations of interests', to use a wide-spread expression among the German doctrine,²² thus being the outcome of the different visions uttered through the procedure in which regards the project under assessment.²³

Conceptualised as such, the EIA procedure becomes associated with a broad concept of administrative procedure according to which it is viewed as a set of actions aimed at the attainment and processing of information.²⁴ Yet, the EIA procedure shifts from a strict formal conception of procedure to a *substantive* one under which the gathering of information is viewed as the outcome of the different contributions given through the procedure by the environmental actors involved. To be more precise, the Community legislator has taken a stance on what *kind* of participation the EIA procedure demands in order to provide the decision-maker with the pertinent information to decide on the development consent requested by the developer. Rooted in participatory values, the EIA procedure thus attributes an equivalent importance to the information provided either by the developer either by the environmental authorities and the public. And it is because of the substantive parameter according to which the EIA procedure is shaped that the decision-maker *must*

¹⁸ *Ibid.*, para. 63.

¹⁹ On the relation between procedures and values, see Galligan (1996) 31-48. According to this author, procedures are connected to values in two ways: they advance certain general social values and they protect certain values about the treatment of individuals.

²⁰ Linking pluralism with a lay or common sense control exercised on technocratic administration, see Shapiro (1999) 2-3.

²¹ Article 8 of the EIA Directive also compels the development consent authorities to take into consideration the information gathered pursuant its Article 7, i.e. the information provided by another Member State different from the one where the project is carried out but which is likely to have significant transboundary effects. Since the study of these cases does not fit in the scope of the present work, no further developments on Article 7 of the EIA Directive will be provided.

²² See Schmidt-Aßmann (1984) 4.

²³ For a comprehensive vision of the multi-polar nature of environmental decision-making procedures on grounds of the complexity of interests it has to deal with, see Hoffmann-Riem (1994) 593-599.

²⁴ See Schmidt-Aßmann (1993) 318.

take into consideration²⁵ that information in the development consent procedure.

But if the EIA procedure enshrines an encompassing vision of the information gathered pursuant to the environmental impact statement presented by the developer and the opinions expressed by the environmental authorities and the public, the weightiness of such information is scantily treated by the Community legislator in the EIA Directive. It has already been pointed out the constitutive nature of procedural participation in the realm of the EIA procedure. Yet, Article 8 of the EIA Directive, by itself, does not embody decisive criteria concerning the due weightiness to be granted to the diverse information gathered during the EIA procedure. Which weight shall the environmental authorities concede to the information fostered during the public consultation phase? And even considering the constitutive nature of the participatory phase of the EIA procedure, is such information supposed to be given the same weight as to the one provided by the developer? After all, was not the concern of the Community legislator primarily directed at the information to be provided by the developer, as flows from the normative densification established in Annex IV of the EIA Directive? And does this not indict at the greater weight that should be given to the developer's information? It would be tedious insisting on this inquisitorial path. The questions just posed serve only to confirm the absence of guiding criteria established in the EIA Directive in order to assess the weight to be given to the information gathered in the realm of the EIA procedure. Yet, it would be inappropriate to conclude *in limine* for the absence of the said criteria. And this because of the *constitutionally valued interpretation* one must endeavour towards environmental protection at EC level.

Environmental protection, being a Community constitutional goal, is a shared duty not only of the EC institutions and Member States bodies but also of citizens.²⁶ Thus, in every Environmental Action Programmes the Community has stressed the role of

the citizen in the formation and implementation of an effective environmental policy. Most recently, the Fifth Environmental Action Programme, named 'Towards Sustainability', identified the citizen as one of the actors having *shared responsibility* for the environment, especially through making *informed environmental choices* whether as voters or consumers.²⁷ It was also the idea of an environmental shared responsibility incumbent on citizens that led to a growing desire to co-opt citizens into monitoring the state of the local environment and assisting in the implementation of applicable environmental policies.

Within this constitutional backdrop, the EIA procedure cannot rest on a 'technical knowledge model' under which every administrative choice tends to be based on technical knowledge, the monopoly of which excludes any effective individual participation.²⁸ This concern in avoiding an environmental decision-making procedure solely based on technical knowledge becomes even more acute when one bears in mind that the environmental decision-maker, in a context of uncertainty, tends to bow on scientific expertise, disregarding the concerns and opinions of lay people.²⁹ Yet, such a reasoning based upon the monopoly of scientific knowledge would only be legitimate in a world where risks could be ordered according to 'objective' measures of probability and magnitude of harm, and where the concept of risk would constitute an objective property of an event or activity measured as the probability of well-defined adverse effects.³⁰ Environmental risks, however, tend to reflect social and cultural value judgements. This simple but core assumption explains, for instance, why the EC environmental policy – at least, in its early phase – never evolved beyond a predominately reactive role, namely reacting to public pressure and the direct effects of large-scale environmental accidents.³¹ It explains furthermore the limitations of

²⁵ See again Article 8 of the EIA Directive. For a diverse interpretation of this provision, see Scott (1998) 125, who argues that '... the language of 'be taken into consideration' exemplifies starkly the pure procedural nature of EIA obligations'. With due respect, such an interpretation of the provision at stake falls short from perceiving its meaning in the realm of the EIA procedure. First, because the procedural nature of the said provision is not incompatible with it enshrining substantive values. But to perceive such values, a systematic and teleological interpretation of the EIA Directive must be put forward, instead of an interpretation confined to that provision. Second, because the expression 'be taken into consideration' must be perceived, in the context of pluralism, as a legislative *indirizzo* given to the consent development authorities to engage in a reasonable balancing of the different visions voiced through the EIA procedure when deciding on the grant of the development consent.

²⁶ See Prieur (1996) 101.

²⁷ See [1995] OJ C138/27, 72-3 and 81.

²⁸ See Chiti (1996) 373.

²⁹ To assess how the claim for 'external' validity, namely through the resort to science-based criteria, is especially intense and relevant in the environmental law field, see Case C-284/95 *Safety Hi-Tech Srl and S.&T. Srl*, judgement of the ECJ held on 14 July 1998, not yet reported, concerning the preliminary reference under Article 177 of the EC Treaty on the interpretation and validity of Council Regulation (EC) No. 3093/94 of 15 December 1994 on substances that deplete the ozone layer (see [1994] OJ L333/1). Those questions were raised in proceedings between Safety Hi-Tech Srl and S.&T. Srl concerning the performance of a contract between them for the sale of product known as 'NAF S III', composed of hydrochlorofluorocarbons (generally known as HCFCs), which is used for firefighting. The litigation between both parties arose after the latter refused to take delivery of the product, contesting the validity of the contract on the ground that the use, and therefore the marketing, of HCFCs for firefighting was prohibited by Article 5 of the mentioned Regulation.

³⁰ See Renn (1992) 54.

³¹ See Hildebrand (1993) 25-26; Chalmers (1999) 660-661. It is worth quoting this latter author on this matter: '..., the narrow ecological focus,

cost-benefit approaches to risk assessment and management, inclined to incorporate dominantly objective and expert perceptions of risk based on the best available scientific evidence.³²

This is not surprisingly if one thinks of the environment as an open-ended system, '... in which the vagaries of both the natural environment and human behaviour must be taken into account. The natural environment is a *holistic* system made up of numerous complex and little understood interrelationships'.³³ If the Community constitutional drafters have chosen to grant environmental protection a constitutional status, premised on a high level of protection,³⁴ then such a choice can only involve a holistic approach. As pointed out by Susan Rose-Ackerman, the legal challenge of environmental policy is to make 'democratic values operational in modern states where hierarchy and expertise cannot be avoided'.³⁵ In this context, Community environmental decision-making cannot dispense the participation of individuals and groups in the legislative and administrative procedures for their participatory input is associated with granting more information and alternatives to the decision-maker, enhancing the opportunity to mesh public values and concerns with individual interests.³⁶ In addition, broader participation gives credibility to the entire decision-making process, since private and unsophisticated people speak to values rather than clouded issues lost in technical evidence.³⁷ Briefly, the interactive communication between general and specific interests generated by the individual or associative participation in the environmental decision-making procedure renders the final decision to be better perceived by the people who are eventually affected and thus legitimise it. Otherwise, the

heavy reliance on scientific expertise may lead Community environmental decision-making to the same deadlock that Martin Shapiro describes when analysing the American experience with science-based decision-making:³⁸

'American agencies have come to invest enormous time and effort in erecting enormous bodies of scientific and technological findings, and analysis of those findings, marshalled to demonstrate that the rule that they write is not chosen but rather is dictated by the analysis. All of this leads to the paradoxical result that American agencies have become so skilled at camouflaging policy as science that their rule making processes have become more opaque to both citizen and the judge than they ever were'.

From what has been said one infers that the EIA Directive introduces a procedural model founded on a *co-operative* vision of the information at whose collection it aims. If the EIA procedure is co-operatively valued, procedural participation becomes its core for it is the means by which the information provided by the developer is complemented or contradicted. In this sense, procedural participation follows a co-operative model of exercising the administrative powers in which the environmental actors concerned other than the developer are asked to collaborate in the administrative fact-finding process concerning the project under assessment as well as in bringing to the procedure value-based statements. As such, procedural participation under the EIA procedure does not serve primarily the objective of bringing the environmental actors to the procedure in order to defend their subjective positions, thus anticipating an eventual litigation and defence before the courts. On the contrary, the choice of the Community legislator was to associate the environmental authorities and the public concerned to the task of gathering information during the EIA procedure, independently of their subjective placement before the project.

Ultimately, the EIA Directive's detachment from a jurisdictional-inspired procedural model to a co-operative one shatters the traditional reliance on the giving reasons requirement as the sole procedural guarantee to enhance democratic control on administration by making government more transparent.³⁹ For the giving reasons requirement has been interpreted by the ECJ as a right of defence, dependent on the right of access to a court.⁴⁰ Besides, this

both in perspective and in terms of actors, allowed a process of *icon construction* to develop, whereby bureaucrats with limited resources acted reactively to a series of popular images. Popular concerns about the quality of beaches in France lead the French government to develop a regime based around World Health Authority (WHO) levels. It then pressed for an EC regime on bathing standards, which was tougher event than its own. The Major Accidents Directive was developed as a result of the shocking scenes which followed the dioxins disaster at Seveso in Italy. The Wild Birds Directive was pushed forward by the British government following television documentaries on birds migrating to Britain being shot at during the French and Italian hunting seasons' (emphasis added).

³² See Ogus (1997) 145-152; Farber (1999) Chs. 2 and 3.

³³ See Fisher (2000) 116 (emphasis added).

³⁴ See Article 174(2) [ex-Article 130-R(2)] EC Treaty.

³⁵ See Rose-Ackerman (1995) 1.

³⁶ See Winter (1989) 42-43; Koppen and Ladeur (1991) 38-39.

³⁷ See Tilleman (1995) 343; Fiorino (1996) 196-197. This latter author refuses the 'technical' model of policy making, which relies on the assumption that technical and administrative elites should make decisions with minimal participation by the lay public. By laying down arguments related to the improvement of social choice, risk perception, participatory democracy and legitimacy, he consistently argues for democratic participation in environmental policy-making.

³⁸ See Shapiro (1997) 340.

³⁹ See Shapiro (1992) 180-184; Majone (1998) 20-22.

⁴⁰ See Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, para. 15. For a characterisation of the Court's approach to reasoned decisions in a trial process-type, see Harlow (1996) 8-9.

explains why the ECJ has been more deferent to enforcing the giving reasons requirement than procedural participatory rights.⁴¹ Yet, the EIA procedure, being moulded upon co-operation, demands the dialogue requirement, originally developed by the American courts to enforce participation in the regulatory process,⁴² to be a compelling procedural value⁴³ and therefore enforced by the Community courts in the realm of EIA litigation.

2 Procedural participation under the EIA Directive

The integration of eventually discrepant interests related to environmental protection in the development procedures marks a change in the way national authorities used to perceive actions potentially dangerous to the environment. By departing from the concept of danger as established in police law, national authorities tended to evaluate environmental dangerous activities by reference to an idea of normality against which danger appears as a deviation.⁴⁴ Experience became thus the decisive parameter to accede to knowledge of danger.⁴⁵ However, actions affecting the environment cannot be referred to stable assumptions about the resilience of nature following fixed standards drawn from past experience.⁴⁶ Indeed, experience no longer provides a sufficient basis for the necessary prevention of environmental damage.⁴⁷ Thus, as stated by Ladeur, 'the threshold of reaction is no longer determined by danger ... , and it is thereby disconnected from suppositions of probability'.⁴⁸ Political, legislative and administrative choices affecting the environment are thus condemned to be taken within scientifically controversial contexts. In a nutshell, uncertainty *predominantly* dominates environmental decision-making.⁴⁹

Within the backdrop of uncertainty associated with environmental choices and risk, the EIA Directive copes with it by establishing a co-operative procedure. Under this procedure, environmental actors are called to transmit information to the development authorities about the project under assessment.

Environmental authorities consulted under Article 6(1) of the EIA Directive express their vision of the project pursuant to their specific environmental responsibilities. Likewise, the public is given the opportunity to intervene in the EIA procedure to voice their opinion about the project, which can amount to the grant of new information to the development authorities. And the information brought in this manner to the procedure supplements and/or even contradicts the one previously provided by the developer. In a nutshell, the actors involved in the EIA procedure become producers and products of a 'common knowledge'⁵⁰ shaped *within that procedure*. The actors advance with information, but at the same time learn from the information provided by the other actors. For instance, the developer can learn through the public consultation in the EIA procedure about the deep importance a local community bestows on a particular natural good – e.g., because it is profoundly linked with the history of that particular community in that specific place – which will be irremediably affected by the project the first intends to be approved. Thus, he may opt for a more expensive alternative that does not damage the said local good, but that avoids future social protests against his project. And it is by fostering mutual learning that the EIA procedure becomes a *co-operative* arena, where the environmental actors become involved in working out a mutually acceptable solution to a project that may affect the public interests to whose commitment they are entrusted or their community and personal lives. In other words, the environmental actors involved in an EIA procedure become engaged in a *social learning process*.⁵¹

As the *locus* where environmental knowledge is exposed and simultaneously created, the EIA procedure amounts to a potentially *controversial locus*. The way in which the EIA procedure is structured soon reveals a predominance of the scientific and technical construction of issues over people's direct perceptions. As stated above, the technical-scientific discourse tends to dominate the EIA procedure for, even in those procedures preceded by a

⁴¹ See Harlow (1996) 9.

⁴² See Shapiro (1992) 204-205.

⁴³ For a characterisation of the administrative procedure as allowing dialogue between the parties involved, see Schmidt-Aßmann (1984) 9.

⁴⁴ See Ladeur (1994) 299-303.

⁴⁵ *Ibid.* 301-302.

⁴⁶ See Koppen and Ladeur (1991) 10-12; Ladeur (1998) 43-46.

⁴⁷ For instance, many effects of pollution causing disease to human individuals manifest their impact on the scale of human values and goods only at a moment when measures demand high expenditure.

⁴⁸ See Ladeur (1994) 303.

⁴⁹ With concrete examples of the level of ignorance and controversy associated with environmental risk, see Farber (1999) 165-168.

⁵⁰ In this sense, see Ladeur (1995) 31.

⁵¹ See Webler, et al. (1995) 444-445. As proposed by these authors, '... , social learning means more than merely individuals learning in a social situation. We envision a community of people with diverse personal interests, but also common interests, who must come together to reach agreement on collective action to solve a mutual problem. *Social learning refers to the process by which changes in the social condition occur – particularly changes in popular awareness and changes in how individuals see their private interests linked with the shared interests of their fellow citizens*' (emphasis added). Applied to the EIA procedure, an expanded perspective of this concept is proposed, whereby not only the public concerned is engaged in a social learning process through the participation in that procedure, but also the environmental and development authorities as well as the developer become active parties of such a cognitive process.

scoping process,⁵² the public is usually not given an opportunity to voice their concerns until the consultation stage.⁵³ Yet, as has been stressed by cognitive psychologists, their empirical studies reveal significant differences between expert and lay perceptions.⁵⁴ Ogus offers the following synthesis:⁵⁵

'The evidence shows that individuals regard risks as qualitatively more serious in the following situations (qualitative differentiation of risks):

- (i) *the risk arises from circumstances outside the victims' control;*
- (ii) *the risks arises from human activity, rather than a natural phenomenon;*
- (iii) *the risk arises in circumstances of secrecy;*
- (iv) *exposure to risk is involuntary;*
- (v) *the risk is concentrated on a particular location or group of people;*
- (vi) *the individuals exposed to the risk are identified or identifiable ex ante;*
- (vii) *the risk primarily benefits persons other than the victims;*
- (viii) *the risk, if it materializes, gives rise to irremediable or permanent harm'.*

This may lead to the existence of two different and eventually conflicting levels of *perception of risks*. As better summarised by Philippopoulos-Mihalopoulos, 'two conceptual stages in theoretical of risk can be discerned: the first is the *perception* of risk, which refers to the definition of risk (generic and partially specific), and the second is the *comprehension* of risk, which should be understood as the further definitional steps that target the pragmatic positioning [in terms of scientific, political, scientific and social acceptance] of a risk, and will normally be in the direction of preventing risk or remedying the materialisation of risk, after having confronted it with cost, political stati, other risks, and other relevant consideration – a truly 'compre-

hensive' comprehension'.⁵⁶ Given this conceptualisation, even if lay people do not comprehend the extent of environmental risk, they may be able to have a perception of it. For instance, even if the extent of the risks posed by asbestos is not complete or uncontroversial, lay people may relate it immediately to carcinogen risk. And such a concern may constitute a relevant parameter for grounding a decision on a development request. Two main reasons may be advanced in this respect.

First, in the domain of uncertainty, it seems implausible to pretend to justify decisions that may pose significant risks to the environment on the basis of the comprehension of those risks. This amounts to a science-based decision-making pattern which has been shattered by the uncertainty linked to environmental risks. Put differently, the adoption of decisions which may affect the environment can no longer rest on full knowledge (deterministic or probabilistic) within the scientific community, simply because environmental decisions are always taken under conditions of scientific controversy/uncertainty (causation chains, consequences for human activities and welfare, time profile of expected changes, etc.).⁵⁷

Second, following this argumentative path, it is the traditional claim of rationality associated with science that is hampered. Scientific rationality was possible in the context of closed systems, like early engineering, but it is only remotely possible in the context of the uncertainties it is confronted with when dealing with health and environmental matters. The environment is, it must be stressed again, a system inescapably permeable to the actions of its components the influence of which may lead to unpredictable outcomes. In such conditions of scientific controversy the development authority appears dressed with the garment of the arbitrator, and its final decision becomes thus necessarily a policy driven one. Given the co-operative vision enshrined in the EIA Directive, it is thus desirable that the development decision should incorporate value judgements according to the different perceptions of risks voiced during the procedure, be they science-based or non-scientific. The decision can even be exclusively science-based, but it is issued following a reasonable balance of the diverse 'visions of the world' presented during the decision-making procedure, and not because the decision-maker has a

⁵² Scoping aims at the determination of the parameters of the EIA procedure, the identification of the significant issues related to the project under assessment and the alternatives to be considered. On this issue, see Beanlands (1988) 33; Sheate (1997) 238-239.

⁵³ This exclusion of public participation in the scoping phase is problematic for the utility and effectiveness of scoping in EIA procedures, for that stage rests on the assumption that any consideration of the significance of environmental effects must acknowledge that environmental impact assessment is inherently an anthropocentric concept. It is centred on the effects of human activities and ultimately involves a value judgement by society concerning the significance or importance of these effects. Such judgements, often based on social and economic criteria, reflect the political reality of impact assessment in which significance is translated into public acceptability and desirability. In this sense, see Beanlands (1988) 35.

⁵⁴ See Ogus (1997) 146; Sunstein (1997) 115.

⁵⁵ *Ibid.*

⁵⁶ With pertinent bibliography on fear and risk, see Philippopoulos-Mihalopoulos (1999) 176-177 (emphasis in the text). On the distinction between the perception and assessment of risks, see also Baldwin (1997) 3-10.

⁵⁷ See Godard (1997) 40-42.

priori narrowed such balance to the alternative scientific 'perceptions of reality'.

Given the structure of the EIA procedure, one can consider it as tending to privilege a technical-scientific discourse. Either in the case of EIA procedures lacking a scoping phase or in the opposite case, the technical-scientific information may dominate the procedure, at least in its early stage, and therefore determine its course. The posterior information brought to the EIA procedure, namely the one resulting from the consultation phase, is most likely to be of a reactive nature in relation to the information provided by the developer. However, by entrusting the development authorities with the duty to strike a balance between the information gathered pursuant to the EIA procedure's initial and consultative stages,⁵⁸ the Community legislator favoured the co-operative dimension of the decision to be taken by the development authorities in detriment of an exclusively science-based decision.

This said, it should also be stressed that the procedure laid down by the EIA Directive is not shaped upon a sceptical posture related to the technical-scientific information therein gathered. Although such an information is imbued with uncertainty, it does not follow that the development authorities should disregard the merit or value of it and, consequently, consider it with an *aprioristic* scepticism. On the contrary, the perspective underlying the EIA procedure gives credit to the scientific-technical discourse. Yet, it gives room for other kind of information to be expressed in the EIA procedure, namely the one brought to the procedure by actors other than the developer involved or concerned by the project under assessment. Thus, the EIA procedure lies on the acknowledgement that environmental risks associated with a concrete development project correspond also to social and cultural value judgements, and that those value judgements may supplement or even question the information based on scientific and technical grounds.

Moreover, co-operative participation under the EIA procedure amounts to a strategy to cope with environmental decisions taken within scientifically controversial contexts. In this sense, the EIA procedure becomes the arena where not only several contradictory explanations and theories coexisting in any one given moment are presented, but also the changing equilibrium between these theories as well as emerging new views which alter the whole scientific landscape.⁵⁹ The consultation phases in the EIA procedure serve thus as the adequate forums where

different scientific and social 'visions of the world' can be exposed. Ultimately, this co-operative strategy to cope with uncertainty enshrined in the EIA Directive implies a shift of public environmental action from the scientific field to the political arena, turning therefore the development authorities practically into *arbitrators of scientific controversies within the background of the social perception and acceptability of the risks at stake*. But this is the inevitable result of the precautionary approach upon which EC environmental policy is shaped, and under which the rational paradigm of public action, according to which public authorities are only allowed to take action under conditions of stabilised scientific knowledge or precise cost-benefit analyses, is shattered. After all, the precautionary principle conceals a paradoxical vision of science: on the one hand, public authorities depend on science to *perceive* environmental risks, but on the other, scientific knowledge is accepted as intrinsically limited to *comprehend* such risks, thus necessarily permeable to social criticism.⁶⁰ And it is within these contradictory boundaries that the EIA procedure deals with uncertainty.

Since in a democracy public decisions are supposed to be suitable to the people who will be affected by them, the EIA procedure serves furthermore as a principal means to ensure an acceptable solution in environmental issues and development projects.⁶¹ By establishing a specific procedure destined to assess the significant effects a project may have on the environment, leaving then to the Member States' discretion the option of setting it up as a sub-procedure grafted in the development request procedure or, on the contrary, as an autonomous procedure preceding this latter one, the Community legislator has established a complex procedural paradigm, by which the environmental interests are confronted with private and public interests regarding a certain development project. Indeed, it is not only the private interest of the developer that is confronted with the environmental concerns associated with his project. In the EIA procedure two public interests may stand in opposition: on one side, the public development interest; on the other, the public environmental interest. This explains the intervention in the EIA procedure of both development and environmental authorities.

The underpinning logic of the EIA procedure based on co-operative participation amounts thus to a

⁵⁸ See again Article 8 of the EIA Directive.

⁵⁹ See Godard (1997) 41.

⁶⁰ See Philippopoulos-Mihalopoulos (1999) 178; Godard (1997) 65-66. For the original conceptualisations of the precautionary principle, see Cameron and Abouchar (1991) 2; O'Riordan and Cameron (1994) 17; de Sadeleer (1999) 137-167.

⁶¹ See Shepherd and Bowler (1997) 728.

model of legitimisation of administrative decisions related to development projects, under which such decisions become legitimate by being the outcome of a procedure allowing for the environmental interests and concerns to be integrated in its *ratio decidendi*. From this perspective, the legitimising *ratio* of the EIA procedure lies in the unacceptability of a model of spatial development under which the administrative decisions implementing the general development options are taken without the environmental interests at stake being previously pondered. The EIA procedure becomes, still under this perspective, the suitable arena for the conflicting interests between development and environment to be voiced and a reasonable balance, if possible, to be struck.

Put in this context, the EIA procedure constitutes the full expression of the commitment enshrined in Article 2 of the EC Treaty to grant the environment a high level of protection, for it imbues one of the most important facets of the Member States' public administrative branch, namely the one of development, with such an environmental deep commitment. And this constitutes a vital step towards broadening and consolidating the legitimacy of the Member States' administrations. Put differently, through a Community legislative act the national administrations see their traditional legitimacy pattern change, for the administrative decisions taken upon development requests made by private developers or related to public projects become not only the result of the exercise of the statutory development competencies, but also the outcome of the information brought to the EIA procedure. Thus, it is the exercise of the discretionary powers granted to the Member States' administrations regarding a certain development project that becomes restricted through the pertinent environmental information at whose unfolding the EIA procedure aims. For the uncertainty associated with the effects a certain project might have on the environment shatters the traditional legitimacy source of administrative decisions, namely the statutory law enacted by national parliaments or by the Member States' governments pursuant to previous parliamentary delegations. In the impossibility of having the development (administrative) decisions supported by reasonably precise and complete legislative commands or even by the granting of wide discretionary powers, the EIA procedure becomes the legitimacy source of those decisions by allowing for the pertinent environmental information to be communicated to the development authorities. And such legitimacy becomes reinforced by the association of the public in

the gathering of the pertinent environmental information.⁶²

This amounts to a new paradigm in administrative decision-making by which those development decisions likely to have significant implications on the environment must correspond to the outcome of a procedure destined to generate knowledge. The administration, when dealing with environmental risks, is no longer supposed to dispose the average knowledge (experience) – which by itself does not exclude the consultation of experts who themselves had to interpret a common knowledge potentially accessible to everybody.⁶³ In the same vein, the granting of discretionary powers to the administration in order to assess the significant effects a project might have on the environment is not suitable to cope with the uncertainty associated with those effects, for administrative discretion is still oriented at a state of equilibrium presupposing shared and general public knowledge and values.⁶⁴ More concretely, discretion rests on the experience accumulated by administrations on a case-to-case basis and on the privileged knowledge derived from that experience. On the contrary, the EIA procedure breaks such an administrative decision-making paradigm, for expertise and experience are alone unsuitable to cope with uncertainty. Since knowledge is no longer a shared attribute between the actors involved in the EIA procedure, proceduralisation appears as the arena where the pertinent knowledge will be generated within a set of pluralistic 'visions of the world'. And it is from this cognitive perspective, grounded on its co-operative participatory dimension, that the EIA procedure becomes a suitable instrument to render development decisions *politically* legitimate. For, in contexts of uncertainty and complexity, the faculty of developing concepts which can be converted into common visions amounts to the possibility of exercising policy leadership.⁶⁵

3 Conclusion

To sum up within a discursive theoretical backdrop, 'participation is *interaction among individuals through the medium of language*'. Thus, it makes

⁶² On this issue, but in general terms, see Galligan (1996) 282.

⁶³ See Ladeur (1996) 9. As stressed by this author when analysing the traditional paradigm of administrative decision-making, '... even though judgements are open to discussion, they have normally to relate to some common representation of a state of normality open to slow social evolution which are not called into question by even serious accidents. The attribution rules themselves are considered to be stable whereas in detail one could quarrel about whether cattle-grazing on the rails is 'normal' or whether thatched roofs catching fire sparks emitted by railway locomotives are harm to be attributed to railway companies or just bad luck to be borne by owners' (underlined in the text).

⁶⁴ See again Ladeur (1996) 9.

⁶⁵ On a similar approach, see Wallace and Young (1997) 249.

sense to ground a normative model of [procedural] ... participation in a theory of how language is used – also known as pragmatics'.⁶⁶ Implicit in this claim stands the assumption that knowledge is socially constructed, thus grounding the right of individuals to make political arguments about how their interests and values are affected by a proposed consensus.⁶⁷ But the exercise of the participatory right by relevant actors involves the rising of a *normative* sphere in which consensus as well disagreement can be *equally* achieved as well voiced.

Put differently, the procedure allowing for participation must be structured upon rules promoting *equal and competent constructions of understanding*.⁶⁸ In this respect, the EIA procedure must be carried out upon the premise of the different level of knowledge possessed and brought by the involved actors when participating. This amounts then to inferring that procedural participation under the EIA procedure demands the norms upon which is shaped to be interpreted and applied in order to allow such actors to learn and to bring new knowledge into the procedure. And it is under this procedural parameter that the transposition of the EIA Directive into the EC Member States' legal orders must be assessed.

References

- Baldwin, R. (1997) 'Introduction - Risk: The Legal Contribution', in R. Baldwin (ed) *Law and Uncertainty: Risks and Legal Processes*, London: Kluwer.
- Beanlands, G. (1988) 'Scoping methods and baseline studies in EIA', in P. Wathern (ed) *Environmental Impact Assessment - Theory and Practice*, London: Unwin Hyman.
- Cameron, J. and Abouchar, J. (1991) 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment', *Boston College International & Comparative Law Review* XIV(1): 1-27.
- Chalmers, D. (1999) 'Inhabitants in the Field of EC Environmental Law', in P. Craig and G. de Búrca (eds) *The Evolution of EU Law*, Oxford: Oxford University Press.
- Chiti, E. (1996) 'The Right of Access to Community Information Under the Code of Practice: the Implications for Administrative Development', *European Public Law* 2(3): 363-373.
- de Sadeleer, N. (1999) *Les Principes du Pollueur-Payeur, de Prévention et de Précaution*, Brussels: Bruylant.
- Ely, J. H. (1980) *Democracy and Distrust*, Cambridge/London: Harvard University Press.
- Farber, D. (1999) *Eco-Pragmatism: Making Sensible Decisions in an Uncertain World*, Chicago and London: The University of Chicago Press.
- Fiorino, D. J. (1989) 'Environmental Risk and Democratic Process: A Critical Review', *Columbia Journal of Environmental Law* 14: 501-547.
- Fiorino, D. J. (1996) 'Environmental policy and the participation gap', in W. M. Lafferty and J. Meadowcroft (eds) *Democracy and the Environment: Problems and Prospects*, Cheltenham: Edward Elgar.
- Fisher, E. (2000) 'Drowning by Numbers: Standard Setting in Risk Regulation and the Pursuit of Accountable Public Administration', *Oxford Journal of Legal Studies* 20(1): 109-130.
- Galligan, D. J. (1996) *Due Process and Fair Procedures*, Oxford: Clarendon Press.
- Godard, O. (1997) 'Social Decision-Making Under Conditions of Scientific Controversy, Expertise and the Precautionary Principle', in C. Joerges, K.-H. Ladeur and E. Vos (eds) *Integrating Scientific Expertise into Regulatory Decision-Making*, Baden-Baden: Nomos.
- Greco, N. (1996) *La Costituzione dell'Ambiente*, Bologna: il Mulino.
- Harlow, C. (1996) 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot', *European Law Journal* 2(1): 3-25.
- Hildebrand, P. M. (1993) 'The European Community's Environmental Policy, 1957 to '1992': From Incidental Measures to an International Regime?', in D. Judge (ed) *A Green Dimension for the European Community: Political Issues and Processes*, London: Frank Cass.
- Hoffmann-Riem, W. (1994) 'Ökologisch orientiertes Verwaltungsverfahren - recht - Vorklärungen', *Archiv des öffentlichen Rechts* 119: 590-626.
- Koppen, I. and Ladeur, K.-H. (1991) 'Environmental Rights', in S. Cassese, A. Clapham and J. H. H. Weiler (eds) *European Union - The Human Rights Challenge*, Vol. III, Baden-Baden: Nomos.
- Ladeur, K.-H. (1994) 'Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law', in G. Teubner, L. Farmer and D. Murphy (eds) *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization*, London: John Wiley & Sons Ltd.
- Ladeur, K.-H. (1995) *Das Umweltrecht in der Wissensgesellschaft: von der Gefahrenabwehr zum Risikomanagement*, Berlin: Duncker & Humblot.
- Ladeur, K.-H. (1996) *Proceduralization and its Use in Post-Modern Legal Theory*, S. Domenico di Fiesole: EUI Working Paper/Law Department 96/5.
- Ladeur, K.-H. (1998) 'Deregulating Environmental Law in a Perspective of Stimulating Knowledge Generation', in U. Collier (ed) *Deregulation in the European Union: Environmental Perspectives*, London/New York: Routledge.
- Ladeur, K.-H. and Prella, R. (1999) 'The German Conception of Administrative Procedure and Court Control of Procedural Mistakes - The Example of Environmental Impact Assessments', in K.-H. Ladeur (ed) *Workshop on Member States Administrative Procedure Law and its Impact on the European Harmonization Process*, European University Institute/Florence.
- Majone, G. (1998) 'Europe's 'Democratic Deficit': The Question of Standards', *European Law Journal* 4(1): 5-28.
- Mannori, L. and Sordi, B. (2001) *Storia del diritto amministrativo*, Rome/Bari: Laterza.
- Mashaw, J. L. (1990) 'Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development', *Journal of Law, Economics and Organization* VI: 266-306.
- Nehl, H. P. (1999) *Principles of Administrative Procedure in EC Law*, Oxford: Hart Publishing.
- Ogus, A. (1997) 'Risk Management and 'Rational' Social Regulation', in R. Baldwin (ed) *Law and Uncertainty: Risks and Legal Processes*, London: Kluwer.
- O'Riordan, T. and Cameron, J. (eds) (1994) *Interpreting the Precautionary Principle*, London: Earthscan.
- Philippopoulos-Mihalopoulos, A. (1999) 'The Silence of the Sirens - Environmental Risk and the Precautionary Principle', *Law and Critique* 10(2): 175-197.
- Prieur, M. (1996) *Droit de l'Environnement*, 3rd Edition, Paris: Dalloz.
- Reich, R. B. (1985) 'Public Administration and Public Deliberation: An Interpretative Essay', *Yale Law Journal* 94: 1617-1641.
- Renn, O. (1992) 'Concepts of Risk: A Classification', in S. Krimsky and D. Golding (eds) *Social Theories of Risk*, Westport-London: Praeger.
- Rose-Ackerman, S. (1995) *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States*, New Haven: Yale University Press.
- Schmidt-Aßmann, E. (1984) 'Der Verfahrensgedanke in der Dogmatik des Öffentlichen Rechts', in P. Lerche, W. S. Glaeser and E. Schmidt-Aßmann (eds) *Verfahren als Staats- und Verwaltungsrechtliche Kategorie*, Heidelberg: R. v. Decker & C. F. Müller.
- Schmidt-Aßmann, E. (1993) 'El Procedimiento Administrativo entre el Principio del Estado de Derecho y el Principio Democrático', in J. Barnes Vasquez (ed) *El Procedimiento Administrativo en el Derecho Comparado*, Madrid: Civitas.

⁶⁶ See Webler (1995) 40 (emphasis in the text).

⁶⁷ See Webler (1995) 47.

⁶⁸ On the issue of procedural competence, see Webler (1995) 53-61. The author defines procedural competence in discourse as the *construction of the most valid understandings and agreements possible given what is reasonably knowable at the time*.

- Scott, J. (1998) *EC Environmental Law*, London: Longman.
- Shapiro, M. (1992) 'The Giving Reasons Requirement in European Community Law', *University of Chicago Legal Forum*: 179-220.
- Shapiro, M. (1997) 'The Frontiers of Science Doctrine: American Experiences with the Judicial Control of Science-Based Decision-Making', in C. Joerges, K.-H. Ladeur and E. Vos (eds) *Integrating Scientific Expertise into Regulatory Decision-Making*, Baden-Baden: Nomos.
- Shapiro, M. (1999) 'Two Transformations in Administrative Law: American or European?', in K.-H. Ladeur (ed) *Workshop on Member States Administrative Procedure Law and its Impact on the European Harmonization Process*, European University Institute/Florence.
- Sheate, W. R. (1997) 'The Environmental Impact Assessment Directive 97/11/EC - A Small Step Forward?', *European Environmental Law Review* 6(8/9): 235-243.
- Shepherd, A. and Bowler, C. (1997) 'Beyond the Requirements: Improving Public Participation in EIA', *Journal of Environmental Planning and Management* 40(6): 725-738.
- Sifakis, R. (1998) 'Precaution, Prevention and the Environmental Impact Assessment Directive', *European Environmental Law Review*(December): 349-352.
- Somsen, H. (1998) 'Dynamics, Process, and Instruments of Environmental Decision-Making in the European Union', in T. Jewell and J. Steele (eds) *Law in Environmental Decision-Making*, Oxford: Clarendon Press.
- Sunstein, C. R. (1997) 'Which Risks First?', *The University of Chicago Legal Forum*: 101-142.
- Tilleman, W. A. (1995) 'Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community', *Columbia Journal of Transnational Law* 33: 337-439.
- Wallace, H. and Young, A. R. (1997) 'The Kaleidoscope of European Policy-Making: Shifting Patterns of Participation and Influence', in H. Wallace and A. R. Young (eds) *Participation and Policy-Making in the European Union*, Oxford: Clarendon Press.
- Wathern, P. (1988) 'An introductory guide to EIA', in P. Wathern (ed) *Environmental Impact Assessment - Theory and Practice*, London: Unwin Hyman.
- Webler, T. (1995) "Right" Discourse in Citizen Participation: An Evaluative Yardstick', in O. Renn, T. Webler and P. Wiedemann (eds) *Fairness and Competence in Citizen Participation*, Dordrecht: Kluwer.
- Webler, T., Kastlenholz, H. and Renn, O. (1995) 'Public Participation in Impact Assessment: A Social Learning Perspective', *Environmental Impact Assessment Review*: 443-463.
- Winter, G. (1989) 'Perspectives for Environmental Law - Entering the Fourth Phase', *Journal of Environmental Law* 1(1): 38-47.

The New Directive on Strategic Environmental Assessment*

Jan De Mulder

When the permanent representatives of the Member States during the COREPER of March 16th 2001 finally agreed on the last bits of it, it became clear that the *acquis communautaire* would soon be enriched with an important piece of environmental legislation: the Directive on the assessment of the effects of certain plans and programmes on the environment, the so-called SEA Directive. This article aims to introduce the main elements of this new directive.

1 What is Strategic Environmental Assessment?

Strategic Environmental Assessment (SEA) has been defined as:

*"The formalised, systematic and comprehensive process of evaluating the environmental effects of a policy, plan or programme and its alternatives, including the preparation of a written report on the findings of that evaluation, and using the findings in publicly accountable decision-making."*¹

* This paper reflects the views of its author and is not written for or on behalf of the European Commission or the Environment Directorate-General.

Jan De Mulder, European Commission, DG Environment, Unit Territorial Dimension

¹ THERIVEL, R., & PARTIDARIO, M.R. (1996), *The practice of Strategic Environmental Assessment*, Earthscan, London, p. 4.: Another definition says: "SEA is a systematic process for evaluating the environmental consequences of proposed policy, plan or programme initiatives in order to pursue they are fully included and appropriately addressed at the earliest

2 Why Strategic Environmental Assessment?

In the literature², one usually finds the following two main reasons for doing an SEA.

(a) SEA should counteract some of the limitations of project EIA.

In general these limitations concern mainly the following observations based on the evaluation of the effectiveness of the project EIA-practice:

- project EIA is more reactive to a given project proposal than pro-active by having an input in the project-design
- project EIA addresses a limited range of alternatives and mitigating measures
- project EIA has limited opportunities regarding public consultation and influencing the decision making

(b) SEA should promote sustainable development

More in particular, SEA can play a significant role in enhancing the integration of environmental concerns in planning processes. A more integrated system of planning means that environmental criteria are incorporated throughout the planning proc-

stage of decision-making on par with economic and social considerations", in SADLER, B., & VERHEEM, R. (1996), *Strategic Environmental Assessment: Status, Challenges and Future Directions*, Ministry of Housing, Spatial Planning and the Environment/DHV, Amersfoort-The Hague.

² THERIVEL, R., & PARTIDARIO, M.R. (1996), o.c., p 8.

ess, which could help to implement the concept of sustainable development.

3 The development of the SEA Directive

Already more than a decade ago proposals were drafted³ and discussed but only in December 1996 the Commission agreed on a proposal.⁴ After the Economic and Social Committee and the Committee of the Regions had given their opinions, the European Parliament held its 1st reading (20 October 1998)⁵. The EP's amendments reflected its concerns about the scope of the proposed directive, the information and participation of the public, as well as the need for studying alternatives and establishing monitoring systems.

The Commission accepted fully, in principle or in part 15 of the 29 (during the vote the 33 amendments were merged to 29) amendments and modified its proposal accordingly⁶.

After intensive negotiations under the Finnish presidency, the Council agreed on a Common Position⁷ (March 30th 2000) under the German Presidency. The Common Position incorporated fully or in part 14 of the EP's amendments. Regarding the scope of the future directive the Common Position introduced two categories of plans and programmes (for which an SEA is mandatory or non-mandatory). The Commission could not support⁸ the Common Position as it found that the scope of the future directive had been too much limited in comparison to the initial approach of the Commission's proposal. As a result of its 2nd reading (6 September 2000)⁹ the EP formulated a number of amendments to the Common Position. They were mainly focused on widening the scope, limiting the number of exemptions, the possible inclusion of policies in the future review of the directive, improving the information requirements and transparency, improving consultation with countries outside the Community and improving the effectiveness of the SEA instrument through monitoring require-

ments and quality assurance for the future SEA reports.

As the EP -amendments and the positions of a number of Member States in the Council were quite opposing and resulted in rather difficult negotiations, these subsequent final rounds including some informal trilogues, were however successfully completed under the Swedish Presidency without the need of a formal conciliation.

In the course of this process the following main improvements have been added:

- insertion of the integration principle
- transposition of the main provisions of the Aarhus Convention on public participation
- transposition of the main provisions of the Espoo Convention on transboundary consultations
- provision to clarify the relationship to other Community instruments
- provision to avoid duplication of assessments
- clarification of the scope of application
- introduction of monitoring requirements
- provision to introduce the quality assurance of environmental reports

4 Main Characteristics and major elements of the SEA Directive

The SEA Directive¹⁰ is a horizontal directive which introduces procedural requirements. Its structure is similar to the project EIA-Directive (Directive 85/337/EEC as amended by Directive 97/11/EC). Given the broad scope of the latter Directive and the structural link between both directives, it is hard to describe the SEA Directive as a stand alone instrument but the SEA Directive offers undoubtedly a crucial policy instrument in the necessary range from environmental planning to voluntary agreements.

The SEA Directive contains 20 recitals, 15 articles and 2 annexes, dealing with:

- objectives (Art. 1)
- definitions (Art. 2)
- scope (Art. 3 and Annex II)
- general obligations (Art. 4)
- environmental report (Art. 5 and Annex I)
- consultations at MS-level (Art. 6)
- transboundary consultations (Art. 7)
- decision making (Art. 8)
- information on the decision (Art. 9)

³ BOCKEN, H. & RYCKBOST, D. (1996), *Codification of Environmental Law – Draft Decree on Environmental Policy*, Kluwer, London, 176.

⁴ COM (96)511, OJ C 129 of 25.04.1997, p. 14.

⁵ OJ C341 of 09.11.98, p. 10.

⁶ COM (99)073, OJ C 83 of 25.03.1999, p. 13.

⁷ OJ C 137 of 16.05.2000, p. 11. For a commentary, see: FELDMANN, L. (2000), *Strategische Umweltprüfung (SUP) - Zwei Drittel des Weges zur EG-Richtlinie geschafft, UVP-report 2/2000*, 109-110.

⁸ SEC (2000) 0568: "(...) the scope of the Directive (...) does not live up to the principles and objectives on environmental integration as launched at the Cardiff Council (...) nor with the broad scope of application requested by the European Parliament at the first reading (...) there is no justification for legally exempting the EU Structural Funds from the scope of this Directive (...)."

⁹ Not yet published in the OJ.

¹⁰ For the not yet official text, see:
<http://www.europa.eu.int/comm/environment/eia/full-legal-text/>

- monitoring (Art. 10)
- relationship with other EC law (Art. 11)
- information, reporting, review (Art. 12)
- implementation (Art. 13-15)

5 Overview of the articles

Article 1 concerns the Objectives of the SEA Directive

This article makes clear that the objective (singular!) of this directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation of plans and programmes with a view to promoting sustainable development. How this ambition which reflects also Article 6 of the Treaty, should be tackled is made explicit in the second part of the article, namely "by ensuring that an SEA is carried out of certain plans and programmes with likely significant effects on the environment".

Article 2 contains the 4 Definitions: "plans and programmes", "environmental assessment", "environmental report" and "the public".

In the Common Position the definition of plans and programmes concerned not only new plans and programmes but also their modifications and these plans/programmes had to fulfil 2 conditions: (1) being subject to preparation/adoption by an authority or through a legislative procedure, and (2) being required by legislative, regulatory or administrative provisions. The EP wanted to include as a 3rd possibility: plans/programmes which are funded by the European Union. The final text contains now plans/programmes "including those CO-FINANCED BY THE EC" which have to fulfil both above-mentioned conditions.

The definition of "environmental assessment"¹¹ refers to procedural aspects, whilst "environmental report" as a kind of intermediate product of the SEA process, is part of the plan/programme-documentation.

The definition of "the public" has been brought in line with the definition in Article 2, par. 4 of the Aarhus Convention¹².

Article 3 concerns the Scope of application of the Directive

This article contains several approaches.

First of all it makes clear that for certain plans/programmes an SEA is mandatory, namely plans/programmes which fulfil certain conditions, and these are **all plans/programmes**:

- in the **areas/sectors**: agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use AND which set the **framework for future projects** as listed in the project EIA Directive (85/337 as amended by 97/11)

or

- with likely significant effects on **Natura 2000 sites**, pursuant to Art . 6 / 7 of the Habitats Directive (92/43/EC)¹³

Furthermore and similar to the project EIA-Directive, a **screening-approach** is introduced.

Member States have to determine whether plans/programmes - other than the above-mentioned - are likely to have significant environmental effects. More in particular it concerns plans/programmes which set the framework for future projects, but which are not included in the mandatory list; plans/programmes covered by the mandatory list which determine the use of small areas at the local level and minor modifications to plans/programmes which are covered in the mandatory list.

The screening approach is identical to the project EIA-screening approach: (1) case by case examination, or (2) specifying types of plans/programmes, or (3) combining both approaches.

When applying one of these approaches the relevant selection criteria set out in Annex II have always to be used. Anyhow the SEA Directive still offers the Member States to exempt certain classes of plans/programmes from an assessment as the Council did not want to take over the EP's amendment which intended to have only a case by case examination.

Finally, this article lists the plans/programmes which are **exempted**. They concern the following areas: national defence, civil emergency, finance

¹¹ The original COM-proposal contained 5 definitions: plan/programme which was exclusively focused on town and country planning; competent authority; development consent; project; and environmental assessment which included the preparation of an environmental statement. The SEA Directive no longer refers to competent authorities as the decision making context regarding plans/programmes is difficult to compare with the project development consent or permit/authorization approaches being applied in Member States.

¹² Convention on access to information, public participation in decision making and access to justice in environmental matters; see: <http://www.unece.org/env/pp/ctreaty.htm>

¹³ The original COM-proposal contained in its art. 10, par. 2 the following provision: " 2. This Directive shall not apply to management plans specifically designed for special areas of conservation and adopted pursuant to Article 6 (1) of Council Directive 92/43/EEC (3)". See also: European Commission, Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, Luxembourg, 2000. Recital 13 says now: "Some plans and programmes are not subject to this Directive because of their particular characteristics".

and the budget as well as the Structural Funds regulations¹⁴. Concerning the latter only plans/programmes under the current programming periods of these regulations are not subject to the Directive.

A reading of the subsequent texts on the scope of a future SEA Directive reveals that "policies" were dropped (however the EP tried to pick them up again, and wanted to submit all the Community policies referred in Article 3 of the Treaty to SEA) and that the idea - in the original COM-proposal - to work only with town and country (framework) planning was left. The inclusion of the other sectors/areas gives the impression that the scope is broad but the fact that the additional requirement for framework setting for future authorization is a cumulative one (and which the EP tried to alter), may have a rather restrictive effect to the initial intention. The EP was also not successful to get financial plans in the mandatory list.

Article 4 concerns the General obligations.

The SEA has to be carried out early: during the preparation of the plan/programme and before its adoption. The Member States have the choice concerning the transposition of the requirements of the SEA Directive. They can decide to amending existing procedures for plans/programmes or they may prefer to establish new procedures.

This article reflects also the clear link between SEA and planning approaches which should be seen as an iterative process. From this perspective the 3rd paragraph stipulates that in order to avoid duplication of assessment, Member States shall take into account that SEA has to be done at different planning levels if plans/programmes form part of a hierarchy. This paragraph refers also to the 2nd and 3rd paragraphs of Article 5 - but according to the wording, not only for efficiency reasons ("for the purpose of, inter alia, avoiding duplication of assessment") which is however rather superfluous as it should be obvious to apply the relevant provisions of Article 5.

The insertion of the words "avoiding duplication of assessment" which are included in the Articles 4 (3), 5 (2), 10 (2) and 11 (2), shows the preoccupation not to burden planners with too stringent requirements. In addition Articles 4 (2), 5 (2, 3), 11 (2) and 12 (4) illustrate also the concern for efficient legislation.

¹⁴ Council Regulation (EC) No 1257/99 of 17 May on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations, OJ L 160, 26.06.1999, p. 80; and Council Regulation (EC) No 1260/99 of 21 June 1999 laying down general provisions on the Structural Funds, OJ L 161, 26.06.1999, p. 1.

Article 5 and Annex I on The Environmental Report

Strategic Environmental Assessment includes the preparation of an environmental report, which identifies, describes and evaluates the likely significant effects of implementing the plan/programme and its **reasonable alternatives**, taking into account objectives and geographical scope of the plan/programme.

Annex I to the Directive lists the detailed requirements concerning the contents of the report.

This annex contains inter alia the requirement to provide information on "the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme", which leads to the conclusion that concerning the reasonable alternatives at least the so-called zero-option always has to be dealt with. An effort by the EP to insert as well the requirement that the report should indicate which of the reasonable alternatives has to be considered as the best environmental option did not succeed.

Paragraphs 2 and 3 indicate that there is a degree of **flexibility (information that may reasonably required)**: the precise contents of a report will depend on the current knowledge and SEA methodology, the contents and level of detail of the plan/programme, the stage of the decision making process and the feasibility/usefulness of the SEA given the hierarchy of the plan/programme. Furthermore relevant information obtained at other decision making levels or through other EC legislation may be used.

In order to find out in the scoping phase what should be part of the report, environmental authorities shall be consulted (par. 4).

Articles 6 and 7 concern the issue of Consultations

The SEA Directive makes a difference between consulting **authorities** and the **public**.

Member States have to designate authorities (para. 3) to be consulted and these are the authorities which, by reason of their specific environmental authorities, are likely to be concerned by the environmental effects of implementing the plans/programmes.

The Directive stipulates that authorities are to be consulted in different situations: in the screening phase (Art. 3 (6)); in the scoping phase (Art. 5 (4)) and on the draft p/p and the environmental report (Art. 6 (2)).

Member States have also to identify the public (par. 4). The public is to be consulted - only - on the draft p/p and the environmental report. The concept of

the public in Art. 6 (4) is a more limited one than in par. 1 of Art. 6, as this paragraph 4 is linked to Paragraph 2 which is focused on the consultative aspect. So it is no surprise to find in paragraph 4 elements of the definition of "the public concerned" from the Aarhus Convention (Art. 2). Furthermore the SEA directive transposes the public participation requirements of Article 7 of the Aarhus Convention. The more precise wording in par. 4 was introduced further to the EP's amendment. The EP could not however convince the Council to drop the word "relevant" (before NGOs), which was not in the original COM-proposal but was in the Common Position.

The SEA Directive makes a difference between consultations at Member State level (Art. 6) and transboundary consultations (Art. 7). Article 7 transposes the principles of the Espoo Convention¹⁵. Recital 7 deals also with the implementation of this Convention. The EP's amendment to broaden the transboundary consultations from a Member State to an affected (non Member) State was not kept.

Both articles contain provisions which require detailed arrangements to be developed at the Member State level.

Article 8 concerns the Decision making

This brief but important article which remained essentially unchanged during the legislative drafting and negotiating process stipulates that the final version of the plan/programme has to take into account, BEFORE its adoption: (1) the environmental report and (2) the opinions expressed pursuant to the consultations, including if applicable, transboundary consultations. It is obvious that the implementation of this provision is crucial for the effectiveness of the SEA instrument.

Article 9 Information on the decision

The SEA Directive contains in different articles a range of information requirements. According to this Directive, the following information has to be made available:

- The **screening decision** has to be made available to the public including the reasons for not requiring an environmental assessment (Art. 3 (7))¹⁶

¹⁵ Convention on Environmental Impact Assessment in a Transboundary Context, see: <http://www.unece.org/env/eja>.

However this convention is focused on project EIA, art. 2 (7) stipulates: "7. Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes."

¹⁶ See also Art. 13 (3) on the transitory regime.

- the **environmental report and the draft plan/programme** have to be made available to the public and the authorities in order to give them the opportunity to express their opinions (Art. 6 (1))
- the **final decision, in particular**: (1) the adopted plan/programme; (2) an explanatory statement concerning the integration of environmental considerations as a result of the SEA process including the reasoning on the final choice in the light of the other reasonable alternatives; and (3) the monitoring measures have to be made available to the public and the authorities (Art. 9 (1)).

Member States have to determine the detailed arrangements. Also this article remained largely unchanged since the original COM-proposal with the exception of the insertion of the "measures decided concerning monitoring in accordance with Article 10".

Article 10 Monitoring

Neither the original COM-proposal, nor the Common position contained any monitoring provision. For this major improvement to the final text of the SEA Directive credit has to be given to the EP. During its 2nd reading the EP stuck to its opinion of the 1st reading. This institution justified its preoccupation with monitoring as follows: "Monitoring of plans and programmes is essential for testing predictions and ensuring a consistent improvement in policy and prediction at subsequent cycles. The SEA provides the opportunity for substantially avoiding or mitigating environmental damage, both in terms of changes to policies, abandonment of particularly damaging elements and early modification of projects. The effectiveness of such measures can only be assessed if the implementation of the plan or programme is monitored." The Commission accepted these amendments subject to rewording.

The article requires that Member States shall monitor the significant environmental effects of the implementation of plans/programmes in order to, inter alia: (1) the early identification of unforeseen adverse effects and (2) the undertaking of the appropriate remedial actions. For this Member States may use existing monitoring arrangements¹⁷.

Further to this provision it is obvious that Annex I contains also the requirement that a description of the monitoring measures have to be part of the environmental report.

¹⁷ An example of an existing monitoring mechanism could be the ones required by Article 8 of Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1-73.

Article 11 concerns the Relationship with other EC legislation

Three categories of future relationships with existing EC legislations are envisaged in this article:

- The SEA Directive shall not lead to any prejudice to the requirements of the project EIA Directive or any other EC legislation;
- In case other EC legislation requires also environmental assessments of plans/programmes simultaneously with the SEA Directive, Member States may provide for coordinated/joint procedures;
- In case of a plan/programme co-financed by the EC, the SEA has to be carried out in conformity with the particular relevant EC legislation.

The link between the project EIA-Directive and the future is of course very direct given article 3, and some delegations feared that by applying an SEA, subsequent EIAs could be avoided which might lead to an undermining of the EIA-Directive.

Member States could introduce a coordinated/joint procedure with respect to the requirement of Article 6 (3) of the Habitats Directive as this directive requires an assessment for certain plans.

The last category is the result of the concern of some Member States that the existing ex ante evaluation requirements in the Structural Funds regulations¹⁸ have to be considered as a kind of SEA...

Article 12 concerns the issues of Information, reporting, review

This article reflects a major concern: how to safeguard the EFFECTIVENESS of the SEA Directive? The 1st and 3^d paragraphs contain rather classical provisions, namely the information exchange between the Member States and the Commission on the experience gained with the SEA Directive as well as the 5-year review which may lead to amendments, e.g. on the scope of the Directive.

More interesting is paragraph 2 which stipulates that Member States have to ensure the appropriate quality of the environmental reports, at the least to meet the requirements of the SEA Directive, and have to communicate any quality measure being taken. When looking for quality requirements in the Directive one thinks at first about the required information which should be included in the environmental reports (article 5 / annex I). Procedural aspects may however not be overlooked, e.g. in particular how effectively the necessary consulta-

tion with the environmental authorities may be organized or more general how the environmental information (state of the environment reports; monitoring data etc...) are made available.

The last paragraph of this article concerns - again - the delicate issue of the relationship with the Structural Funds regulations and requires the Commission to report on this in particular regarding the coherence between these EC laws. The future will make clear what the meaning of "ensuring a coherent approach between this Directive and the subsequent Community Regulations" will be.

The Articles 13, 14 and 15 concern the implementation of the SEA Directive

The transposition date of this Directive will be 3 years after the entry into force of this Directive.

Article 13 (3) stipulates that an SEA is obligatory for:

- plans/programmes of which the 1st formal preparatory act is subsequent to the transposition date
- plans/programmes of which the 1st formal preparatory act is before the transposition date and which are adopted/submitted after more than 2 years after the transposition date **unless** the Member State decides this is not feasible.

6 Some conclusions and what about the future?

The SEA Directive is an important step towards the realization of a concrete integration approach. It may be considered as an effort to address the missing link between environmental planning at the policy level and EIA at the project level. Also the NGO-world has welcomed this Directive¹⁹.

Undoubtedly the EP has played a crucial role in improving the potential effectiveness of this Directive. The ongoing classical tension between economic development priorities and environmental concerns was the driving force for keeping some rather weak provisions.

The EP and the Council are expected to adopt the Directive in the course of the coming weeks.

Regarding the implementation of this Directive it is obvious that a huge challenge is waiting for the environmental administrations in the Member States. Some have already done some trial exercises or research projects have been initiated to prepare the implementation²⁰. A recent study-project²¹ fi-

¹⁸ Article 43 (1) of Council Regulation (EC) No 1257/99 and Article 41 (2, b) of Council Regulation (EC) No 1260/99 of 21 June 1999.

¹⁹ See: <http://www.ends.co.uk/envdaily> of 3 May 2001.

²⁰ For a few interesting publications, see: KLEINSCHMIDT, V. & WAGNER, D. (eds.) (1998) SEA in Europe, Kluwer, London; SHEATE, W. (ed.), Making the Links between Tools, special issue of Journal of Environmental

nanced by DG Environment of the Commission offers valuable background information for addressing implementation issues at Member State level.

Assessment Policy and Management, Vol 1 No 4, December 1999, London; JACOBY, C., Strategische Umweltprüfung (SUP), UVP-report 1/2001, 28-32.

²¹ SHEATE, W. & DAGG, S. and others (2001), SEA and Integration of the Environment into Strategic Decision-Making, London, will be available on <http://www.europa.eu.int/comm/environment/eia>

Finally it is important that the negotiations on this Directive were finalized in a successful way as the 2nd Meeting of the Parties to the Espoo-Convention which took place in Sofia, last February, agreed to start negotiations for an SEA Protocol²² to the Espoo-Convention. The European Community is now definitely in a better negotiation position.

²² See: <http://www.unece.org/env/eia/ad-hocwg.htm>.

The Integration of Voluntary Agreements into Existing Legal Systems

Regine Barth and Birgit Dette

1 Introduction

In recent years the number of voluntary agreements has increased significantly, covering aspects of environmental policy like climate protection, the prevention of pollution and the management of the waste sector. Since mentioning the use of voluntary agreements in the 5th Environmental Action Programme (1992), the EU has continuously encouraged the use of voluntary agreements. The EU End-of-Life Vehicles Directive (2000) even proposes to use voluntary agreements as an instrument for its implementation on national level. While the instrument at first was used without a formal institutional framework, several EU member states now have enacted regulations regarding voluntary agreements. In fact, today voluntary agreements must be seen as an established instrument for environmental policy. There are a number of legal constraints that limit the use of voluntary agreements. These constraints may be found in EU law with issues such as free trade and open competition, and in the constitutional law of the member states with issues such as division of powers, democratic legitimisation, and the state's duty to protect health and safety of individuals, and third party rights. In addition to these constraints, the implementation of voluntary agreements raises a number of other important legal issues, including procedural questions, monitoring and enforcement.

2 Forms of Voluntary Agreements

Shape, content and impact of voluntary agreements vary widely. But they all have some basic characteristics in common. In summary one can define a voluntary agreement as an agreement or an action of self regulation which is voluntary in character, that involves stakeholders of which at least one is the state, that is either a substitute or that is a device

for implementing or going beyond environmental law and policy and that is aimed at sustainable development (elni, 1998:27). In order to be able to assess the legal requirements and problems, a rough grouping is necessary. These groups are whether voluntary agreements are unilateral or multilateral, how they correspond to respective legal norms, whether they are legally binding or not and whether they are concluded under civil law or public law. In order to illustrate the different forms, first a few practical examples of voluntary agreements are given, which then will be subsumed to the different categories.

2.1 Practical Examples for Different Forms of Voluntary Agreements

No. 1 Voluntary Agreement of the German Aluminium Industry for the Protection of the Climate, 1997

The Sectoral Association of Primary Aluminium committed itself to reduce the emissions of the greenhouse gases Tetrafluoromethane (CF₄) and Hexafluoroethane (C₂F₆) by no less than 50% by the year 2005 on the basis of 1990. The five associated aluminium works will optimise their process management and use up-to-date techniques of metallurgical engineering to reach the goal. The progress shall be reported to the Ministry for Environment every year on the basis of independently conducted surveys.

No. 2 The Dutch Benchmarking Covenant, 1999

The covenant was concluded by the Minister of Environment, the Minister of Economic Affairs and the provinces on the one side and the general employers' organisation as well as organisations of energy-intensive industries such as electricity companies and refineries on the other side. The goal is to reduce CO₂ so that as many process-installations

as possible will belong to the best-of-the-world in the area of energy efficiency by 2012 at the latest. How the goal is to be reached lies within the responsibility of the companies, but intermediate steps and independent monitoring is foreseen. The state is obligated not to take any additional specific measures as to energy saving and the reduction of CO₂, with the reservation though, that general energy taxes may be levied.

2.2 No.3 *The French "accord cadre" on the treatment of end-of-life vehicles, 1993*

The agreement was concluded by the Ministers of Industry and Environment on the state's side, Peugeot/Citroën, Renault and the federations of the major industries producing material for cars. The joint environmental goal is to reach a recovery rate of 85% of the total weight of end of life vehicles by 2002. The industry is free in the choice among recycling, reutilization and recovering energy.

2.3 No.4 *The Agreement of the German Federal Government and the Nuclear Industry on Phasing out Nuclear*

Energy ("Atomkonsens"), 2000

The Agreement was initialled by the Chief of the Chancellor's Office and the state secretaries of the Ministry for Environment and Nuclear Safety as well as the Ministry of Economic Affairs as representatives of the Federal Government and by the four German companies producing nuclear energy. Its goal is to terminate the production of nuclear energy and it also contains provisions on storage and disposal of nuclear waste. The content of the required amendments to German nuclear law are described. The most important provisions are that the amount of electricity which may still be produced by nuclear means has been fixed. The state will not raise undue obstacles regarding permits etc, but no new nuclear plants can be permitted. Also special instruments of monitoring are established.

No.5 *The Municipality of Faenza's (Italy) voluntary agreement on air quality, 1997*

The agreement was concluded between the Municipality of Faenza and some distilleries and oil mill companies (Ditta Neri, Tamperi, Caviro, Distercoop, Villa Pana). It aims at reducing air pollution. All participating companies are committed to improve the quality of the air with specific actions in the places where they work.

No. 6 *The Establishment of the Dual System for Packaging Waste ("Green Dot") in Germany, 1992*

An agreement was concluded in every regional state with the "Dual System Germany" a corporation founded by the packaging industry, to establish a general system for collection and recycling of pack-

aging waste in cooperation with the municipalities. The aim is to allow the implementation of the "polluter pays" principle while granting the producers discretion on the organisation. Only some basic rules and quotas for the system are laid down in the German Directive for Packaging Waste (version of 1998). All producers of packages who pay licence fees are relieved from their legal obligation according to § 6 para. 1 German Packaging Directive, which would oblige them to collect and recycle distributed packages individually. In case the system does not function any more, the basic requirements are not met or licence fees are not paid, the individual obligation of taking back all packages will come back into force automatically.

2.4 *Unilateral and Multilateral Voluntary Agreements*

Unilateral agreements are one form of voluntary agreements. They are unilateral in the sense that technically they are not concluded by two parties, but directed at or related to the state in some way. Usually these are self-commitments initiated by the industry with preceding negotiations between business associations and the government, resulting in some kind of relief by the government [Ex. 1].

Multilateral voluntary agreements are concluded by the state with business organisations or individual companies or with a combination of both. It is also possible to include more parties such as environmental groups, trade unions, local authorities in order to enhance the efficiency, acceptance or legal safety of the agreement [Ex. 2, 3, 4, 5, 6].

2.5 *Voluntary Agreements in Correspondence to Respective Legal Norms*

Voluntary agreements can also be categorised in regard of their relation to legal norms. Among these categories are those voluntary agreements **preventing** legal norms. They are used in a situation where no regulation exists at all on a specific topic and the state wants to use a voluntary agreement instead of enacting a legal norm to reach the proposed environmental goal (Ex. No. 2, 3). Voluntary agreements **preceding** legal norms contain certain stipulations concerning the content of a new law to be enacted or an amendment in the near future (Ex. No. 4). This method enables the parties to use some of the benefits of a voluntary agreement even for those matters which must be dealt with exclusively by law for constitutional reasons. The impact of a voluntary agreement can also be that of **substituting** a legal norm, such as when the state decides not to pursue an environmental goal by enacting a legal norm, but with the provisions of a voluntary agreement. After the voluntary agreement has been concluded successfully, the legal norm will either be

de-enacted or not be enforced as long as the VA is complied with. It has to be noted that this form of voluntary agreement can only be used if the relevant law is formally being de-enacted or if the non-enforcement and substitution is foreseen in the law itself.

2.6 Legally Binding or not Legally Binding Voluntary Agreements

One of the major distinctions of voluntary agreements is whether they are legally binding (Ex. No. 2, 5, 6) or not (Ex. No. 1, 3, 4). Whereas voluntary agreements in the beginning mostly were legally unbinding, the number of legally binding agreements has increased significantly. The reasoning for non-binding agreements usually is that they fit better into the concept of voluntariness, with easier negotiations and less formalities needed. But in case of non-compliance, legally unbinding voluntary agreements cannot be enforced. This has given way to much criticism towards the effectiveness and legality of certain voluntary agreements. Binding agreements, though, are enforceable, in principle, and allow both parties to plan future steps on a more reliable background. The European Commission has suggested to use legally binding agreements if possible in its Communication (1996: No. 19).

The fact whether the voluntary agreement is binding or not has great influence on legal consequences, especially for aspects such as the dissolution of the agreement, sanctions and enforcement. These differences will be addressed in sections 6 and 7 of this paper.

There are different ways to determine whether a voluntary agreement is legally binding or not. One possibility is an obligatory provision in an existing legal framework stating that the voluntary agreement has to be binding, as for example in the Flemish Decree. Therefore all voluntary agreements under such a rule must be concluded as legally binding. If no such rule exists, it is within the discretion of the parties to determine whether the voluntary agreement is meant to be binding or not, as long as specific constitutional restraints are not violated. The determination can for example be done by a respective stipulation in the voluntary agreement itself.

If it is unclear whether a voluntary agreement is legally binding or not, the classic rules of interpreting contracts must be applied, possibly in combination with aspects of administrative law. This would include scrutinising the exact wording, analysing documents of the negotiation period or methods for assessing the potential will of both parties, all from the viewpoint of good faith.

2.7 Voluntary Agreements as a construct under civil law or public law

Voluntary agreements can be concluded under the regime of civil law (Ex. No. 2) or of public law (Ex. No. 5). It depends on the country's legal traditions. Both regimes entail important consequences, especially regarding the procedure and jurisdiction. In civil law only very few rules exist, leaving procedural aspects almost completely to the discretion of the parties. Rules of administrative procedure are very formal on the exact steps the competent authority and its counterpart have to take, including time limits, specified written forms or specified procedures for submitting and publishing data. Voluntary agreements under civil law fall within the jurisdiction of civil courts and their respective procedural rules, while voluntary agreements under administrative law can only be challenged or enforced before administrative courts. But one cannot apply all the classic distinctions between civil and public law to voluntary agreements. They can be characterised as hybrids between civil and public law: Procedural rules which are following certain elements of administrative law, such as public participation, can also be applied in a regime of civil law.

Vice versa, the flexibility when negotiating a civil law contract can be, at least partly, transmitted into the regime of administrative law. And all voluntary agreements which are concluded as civil law contracts, such as covenants in the Netherlands, do comprise elements of public law (Hazewindus 2000:6). This becomes evident when considering that, in comparison to the usual situation with civil law contracts, there is no equality between the parties of voluntary agreements due to the state power. For example, the competent authority can, in principle, issue a stricter permit if a company does not comply with the agreement and thus enforce the environmental goal by means of state power. To have this choice is unique in the context of civil law contracts.

3 Voluntary Agreements and the EU

The possibility for EU member states to use voluntary agreements as an instrument of environmental policy has been acknowledged by the EU as long as they do not violate community law. In its Communication (1996) the Commission has given its opinion and guidelines on voluntary agreements. This includes the use of voluntary agreements by the member states as an instrument of implementing EU directives, subject to the reservation on two major aspects. According to the European Court of Justice the instrument can only be used if the directive does not create rights and obligations for individuals. Also the character of the voluntary agree-

ment must be that of a legally binding agreement. The choice to use a voluntary agreement for implementing EU law is explicitly foreseen in the End-of-Life Vehicles Directive (1999).

The use of voluntary agreements is not restricted to the EU member states. They can also be concluded on European level by the EU-level itself, then called Community Environmental Agreements (CEAs). In the present legal situation, though, the EU Commission can only enter into legally non-binding voluntary agreements e.g. in form of unilateral commitments or mutual understandings (Lefèvre, 2000). Due to the pan-European scope of many industries and environmental problems, and in addition, as a possible option to avoid distortion of free trade and competition, the use of CEAs could be a valuable element of effective environmental policy. The scope of potential CEAs would be enhanced, if the necessary provisions for legally binding CEAs were introduced into EU law. The relevant legal aspects to be addressed are similar to those in the member states. For example the role of the European Parliament when concluding CEAs must be clarified and the requirements on public participation, transparency, monitoring etc, which are demanded from the member states are no less relevant on the European level.

3.1 *Voluntary Agreements and the Rules of Free Trade, Competition and Illegal State Aid*

When concluding voluntary agreements, the EU member states must not violate the principles of the single market. According to Art. 28 of the EU Treaty the creation of tariffs or non tariff barriers is prohibited. These may occur if a technology or marketing symbol is used or when benefits are granted as incentives for the compliance of a voluntary agreement. Exemptions for environmental protection are possible, though, according to Art.30.

As for the rules on competition voluntary agreements must not prevent, restrict or distort the internal market (Art. 81 par 1). Exemptions for environmental protection are not mentioned literally (Art. 81 par 3), but case law of the European Court of Justice has clarified that environmental protection can be perceived as an element of the stated exemptions. The Commission would then apply the proportionality principle and would weigh the restrictions of competition that would ensue from the agreement against the value of the environmental goals of the agreement.

The situation is similar with state aids. They become an issue for voluntary agreements if the participating businesses are granted financial aid from public authorities in order to attain the goals of the agreement. Generally state aids are prohibited (Art.87 par 1) if they would result in the distortion

of competition or free trade. But an exception is also possible in this field if the aid would result in improved environmental protection or a substantial reduction of pollution. State aid is normally only justified if adverse effects on competition are outweighed by the benefits for the environment.

3.2 *Voluntary Agreements and EU Directives on Environmental Issues*

The rules on free trade, competition and state aid are not the only restrictions by EU law which limit the use of voluntary agreements in EU member states. EU law often contains stipulations on the instruments which must be used to execute EU environmental law implemented into national law. In those cases a voluntary agreement may not be concluded on the issue. A prominent example is the IPPC Directive (1996). The purpose of this directive is to achieve integrated prevention and control of pollution. According to the directive, certain polluting activities must be permitted by the competent authority. The permit must contain provisions to ensure that the operation takes place according to the standards of the IPPC Directive. Voluntary agreements may not be used instead of permits here. Such restrictions can be found in other directives, too, e.g. the EU Directive on Waste (1975) where respective installations and undertakings must be permitted by the competent authorities. This directive also lays down that the authorities must draw up plans for waste management. European law would therefore be violated if the authorities would conclude a voluntary agreement on a subject which should have been addressed to by the foreseen instrument. In general it can be stated that EU law mostly subjects dangerous or potentially dangerous activities to strict regulations of classic command and control instruments.

4 *Voluntary Agreements and Constitutional Law*

In contrast to the classic rules of legislation and administration, voluntary agreements enable private parties to influence the setting, defining or enforcement of laws. It has to be examined to what extent constitutional law can restrain the use of voluntary agreements or limit their authority, especially considering the division of powers, the principle of democracy and the state's obligation to protect health and safety of individuals.

The constitutional principle of division of powers requires the passing of laws by parliament. Therefore legal uncertainties occur if voluntary agreements are being concluded instead of a legal norm. One method to omit these uncertainties and to ensure democratic legitimisation, is to involve the parliament in this process. According to the Flemish

Decree on Environmental Covenants (1994) for example, the Parliament can veto an environmental agreement within 45 days, stopping its coming into force. Another possibility is legitimising the administration to conclude a voluntary agreement by a respective *passus* in a law passed by parliament.

Another result of the principle of democratic legitimisation and the division of powers is that a law passed by parliament and case law by courts is binding for the administration. This may not be circumvented by a mere administrative decision or action. Therefore the content of a voluntary agreement may not contradict existing public law. Most European constitutions stress the state's obligation to protect the health and safety of individuals, some include the protection of the environment. Regarding the choice of instruments to carry out this protection though, there is generally no constitutional obligation to use classic command and control instruments. Hence the scope of action for public authorities principally includes alternative instruments such as voluntary agreements.

The above mentioned constitutional requirements of the division of powers, democratic legitimisation and the state's duties of protecting its subjects do not forbid voluntary agreements, but they limit the area of their application. Very significant environmental matters such as basic principles and citizens' rights must be dealt with through legislation. For example it was ruled by the French Administrative Court (Conseil d'Etat) in 1975, that a voluntary agreement was illegal because it restricted the state authority and the required protection of third parties.

4.1 Voluntary Agreements in Federal Structures

States with a strong federal structure must ensure that the competencies of their regions are respected. This implies that no voluntary agreements can be concluded on national level if its content would violate the legislative or administrative sovereignty of the regions. This can be dealt with by involving the second chamber representing the regions and thus obtaining the consent of the regions.

In addition, voluntary agreements must take law at the local level into account. For example it could happen that a government agency has concluded a voluntary agreement with the respective body of a branch of industry and, at a later date, the individual companies are confronted with more stringent requirements by the local authority. This must be prevented by adequately choosing the procedure for the conclusion and the voluntary agreement's content for both legally binding and non-binding agreements. It has to be ensured that the local authorities are successfully committed to the regulations in the voluntary agreement and that this takes

place in accordance with the country's administrative law. It should be considered that local authorities can only be forced to comply with an agreement if the superior authority (which has concluded the agreement) otherwise would have been entitled to influence the local authority's scope of decision by a directive or instruction.

The use of voluntary agreements is not reserved to superior authorities. Naturally, local authorities can conclude voluntary agreements within their administrative competencies. Such voluntary agreements then must certainly be coherent to regulations on national or regional level.

4.2 The Flemish Decree: An example for a Legal Framework for Voluntary Agreements

With the Decree on Environmental Policy Agreements (June 15th 1994) the Flemish Region in Belgium has established a legal framework for voluntary agreements. Some of the main issues will be illustrated here. Per definition an "environmental covenant" is

"Any agreement between the Flemish Region, represented by the Flemish Government, on the one hand and one or several umbrella organisations representing enterprises on the other, for the purpose of preventing environmental pollution, limiting or removing the consequences thereof, or of promoting effective conservation of the environment" (Art. 2).

Only organisations which can prove that they have been delegated by their members can enter into such a covenant. The summary of the draft of the covenant must be published in the Belgian Official Journal and the complete draft must be available for inspection for a period of 30 days. Within 30 days after publication of the summary any person can submit objections in writing to the designated authority, which after an assessment by the authority will be communicated to the other party. The draft covenant is also communicated to the Flemish Social and Economic Council and the Flemish Council for the Environment and Nature, who then issue a will-reasoned opinion within 30 days after receipt, which is not binding. After that the draft including the above mentioned opinions will be sent to the President of the Flemish Parliament. If the Parliament objects to the draft within 45 days by resolution of well-reasoned motion the covenant will not be concluded.

Otherwise the covenant will be concluded and published in the Belgian Official Journal. The covenants are concluded under administrative law and are legally binding, with the reservation of cases of urgency or obligations imposed by EU or international law. The Flemish Region can convert a cove-

nant into regulations even before the time limit is up, and thus include non-affiliated enterprises.

It has to be noted that this special framework can only be applied to those agreements which are covered by the legal definition, therefore agreements on local level or with single enterprises are excluded.

5 The Rights of Third Parties

The rights of third parties play an important role in the context of voluntary agreements. Public law requires that with all external activities of state authorities, the rights of third parties must be considered, and it is a basic principle of civil law that contracts must not be on the expense of rights of third parties.

Thus voluntary agreements may not be concluded if they would imply the disregard of legally protected interests of third parties. Examples in the context of voluntary agreements could be the violation of the individual right to health, if an agreement's limit of toxic emissions is too low to protect neighbours effectively, or the violation of the right to fair competition if cartels would be featured. A number of measures are necessary to prevent such violations. These include the hearing of possibly affected third parties and public participation prior to decisions. If the potential of voluntary agreements is being used properly, the addressing of third parties' rights can bear advantages in comparison to classic command and control instruments. The relative freedom concerning the procedure allows to integrate third parties in multiple states and forms.

In case of a dispute, the legal situation depends on whether the voluntary agreement is legally binding or not. If a binding agreement violates the rights of a third party, the law must provide the aggrieved parties with access to means of legal redress, which could mean nullification of the agreement, amendment, or compensation for harm.

For non-binding voluntary agreements the situation is different. They do not bind anyone in a legal sense, therefore they cannot violate the rights of third parties directly. Therefore it is not possible for the third party to fight the unfavourable voluntary agreement itself, even if it affects legally protected interests. In some situations, though, legal redress against a non-binding voluntary agreement can be possible indirectly. For instance, if the meeting of requirements of public law can only be ensured by a classic command and control decision, and if the lack of such a decision violates the right of a third party (e.g. the right to health), the harmed party may seek legal redress. In this constellation the third party can have the right to legally force the authority to refrain from the voluntary agreement and use classic, legally binding instruments.

Otherwise there is only the possibility of fighting the agreement by political means. Securing the principle of equality and preventing informal, but potentially powerful structures, can be achieved by concluding legally binding voluntary agreements whenever it is possible. One other very important aspect of third party rights must be addressed here - the right of acknowledged environmental groups to legal redress on behalf of the environment. By using voluntary agreements, the form of actions of public authorities is shifted toward steering processes. The individual decisions then are taken outside the sphere of the state, e.g. within the companies participating in the agreement. This reduces the possibilities of judicial control of the administration, especially in those countries which restrict the access to legal redress against an illegal action of a public authority to those individuals who can prove the violation of their own individual rights. This can be addressed by providing for the possibility of acknowledged environmental groups to legal redress against actions related to the environment by a public authority which are not compatible with existing public law. Then the conclusion of such an illegal voluntary agreement could be revised judicially.

6 Procedure and Design of Voluntary Agreements Procedure

In recent years several procedural rules have been established. Some states now have codified basic rules (Denmark, Flanders), some have elaborated official recommendations (Portugal, The Netherlands). Among the main aspects to be considered is the determination of who the parties are and if they are entitled to conclude voluntary agreements. Also it must be ensured that possibly affected third parties are being heard properly and whether public participation is realised according to the rules. If necessary for constitutional reasons or because it is foreseen by law, the parliament must be engaged. Finally, the requirements for due publication must be met.

6.1 *Public Participation, Transparency and Publicity*

Especially in the initial period, with no legal framework established, voluntary agreements mostly were concluded without any kind of public participation. This has always been perceived as one of the weak spots of voluntary agreements, because no interests besides those of the industry and the government have been considered. The concept of a modern and democratic administration, which includes public participation and transparency, is being backed by the Aarhus Convention (1998). Also the Communication of the Commis-

sion (1996: No. 18) emphasises the necessity for participation and transparency. Even though today regulations exist which make forms of public participation for voluntary agreements obligatory in some EU member states, there are still examples where the procedure takes place behind closed doors. Public participation is relevant not only from a democratic point of view, but also would enable the parties to take suggestions by interest groups like environmental NGOs or trade unions into consideration. It would also consolidate the acceptance of an agreement in the public. Public participation, though, also entails some disadvantages for the instrument of voluntary agreements. It affects the attractiveness of the instrument especially for the industry. Business strategies may have to be revealed, more interests have to be considered and the process of negotiation may take longer. But one should bear in mind that both classic legislation and command and control systems are no less subject to forms of public participation. It must be seen as an advantage of voluntary agreements, that both parties can influence how well public participation is included into the process of negotiation, while retaining the instrument's benefits such as promptness and flexibility. In addition, more transparency could be reached by explaining in the agreement, why the parties chose this instrument.

Another requirement to increase transparency of voluntary agreements is the obligation to publish them in the acknowledged way, which means to use the same form foreseen for respective legal norms.

Monitoring is an important factor for the effectiveness of voluntary agreements. In order to inform the public, the results of monitoring should also be published.

6.2 *Criteria for the Content of Voluntary Agreements*

Voluntary agreements grant the parties more flexibility than classic command and control instruments. This does not mean though, that the discretion of public authorities concerning their content is unlimited. Due to the above mentioned constitutional obligations, the final responsibility for securing public interest lies with the state. If public authorities choose to use a voluntary agreement, they partly shift the execution of their obligation to private parties. It must therefore be a precondition that some minimum standards within the entangling of public and private interests are being guaranteed. These standards include the duty of properly fulfilling the given tasks, the equal consideration of interests and the sufficient institutional securing of neutrality. In respect of future democratic changes, voluntary agreements also should be limited in time.

6.3 *Voluntary agreements should include provisions on the following issues:*

- Who are the parties of the voluntary agreement?
- Can new participants join later or leave earlier?
- What is the environmental goal of the voluntary agreement?
- How shall it be reached?
- In what period?
- What are the intermediate steps?
- To what extent may authorities demand access to information?
- How is the agreement being monitored and who does it?
- Who will be affected by the agreement?
- What are the liabilities of business organisations, its members and the state?
- Are there incentives by the state to fulfil or exceed the goal?
- What are the sanctions for non compliance?
- If in discretion of parties: should it be legally binding?

If it is binding

- How can the agreement be altered?
- Under which circumstances can the voluntary agreement be terminated?
- How can the voluntary agreement be enforced?
- Is a form of arbitration provided?

7 **Monitoring and Enforcement**

Monitoring and enforcement of voluntary agreements are important for the successful implementation of the pursued environmental policy. From a legal point of view a number of questions have to be addressed concerning incentives and sanctions, liability, arbitration and litigability. The possibilities and legal conditions for these aspects vary according to the form of voluntary agreement, especially according to whether they are legally binding or not and whether they are concluded under civil or administrative law.

7.1 *Monitoring*

Monitoring is essential to secure the effectiveness of voluntary agreements, to gain knowledge for future planning and to portray progress publicly. Monitoring is also required as an instrument of counter-control. As far as the state relinquishes part of its competencies of surveillance inherent to classic instruments of command and control, this must be compensated in regard to the state's obligation to guarantee public safety. Thus, monitoring is not only crucial for the proper functioning of the agreement, it is also demanded by principles of

public law even for those agreements concluded under the regime of civil law. Monitoring can either be regulated by law or official recommendation on the procedural rules of voluntary agreements or it can be foreseen through provisions in the agreement itself. Intermediate goals should be included. The monitoring by independent institutions has proven to be quite effective, especially in controversial situations. The concrete methods which should be used and the extent of monitoring cannot be generalised for all voluntary agreements. Basic rules are that the results of monitoring must give the state authority and the public an overview of the status quo, and the progress made toward reaching the environmental goal. Information provided by monitoring, in addition to the information gained by the remaining means of surveillance from public authorities, must also enable the public authority to secure general environmental standards and to guide further steps. Finally, the results must provide information that will facilitate officials in bringing possible enforcement actions.

The monitoring process can bear the danger of business secrets being disclosed to corporate bodies and thus be transmitted to competitors. This might unfortunately also be used as a pretext. In order to ensure the required intensity and accuracy, it is essential to take great care when designing the concrete monitoring systems, especially with respect to aspects of confidentiality and independence.

7.2 Incentives and Sanctions

Beside the pending threat that public authorities might resort to command and control instruments, the effectivity of voluntary agreements can be enhanced tremendously if tools to ensure a better enforcement are included.

One of them is compliance incentives such as the access to subsidies, tax exemptions, certification, public advertisement or other benefits. When proposing such positive incentives, one must always bear in mind the restrictions by EU law concerning the distortion of the single market.

Sanctions are another method in case of non-compliance that can make voluntary agreements a more credible instrument of environmental policy. Forms of sanctions are fines, subsidies withheld, exclusion from the agreement of the violating party, or less co-operation on the part of the environmental agency. Sanctions can either be imposed by law or be included in the agreement itself.

7.3 Liability in Relation to Third Parties

With all activities, one has to ask for the liability if damage to persons or goods occurs. Actually, this question is especially important for voluntary agreements. The enlarged scope of self-regulation

and self-administration often inherent to voluntary agreements must have its counter-balance in a consequent rule of liability. On the side of the companies it is evident that they are liable for deliberate or reckless damages. A different situation exists if the damage occurs even though the company has acted completely in accordance with the voluntary agreement and the fault lies within the voluntary agreement itself. As an example this could be the case if an agreement is concluded with the aim to reduce the emission of a specific material step by step. The company fulfils its obligations by the agreement, but later it is shown, that the reduction was not sufficient to prevent health damages to neighbours. It then depends on the laws of liability in the member states to determine whether this company would still be liable or not. Apart from the liability of the company, one also has to take the liability of the state into account. The Flemish Decree on Voluntary Covenants (1994), for example, provides for the possibility of suing the state for damages or specific performances if the rights of third parties are violated due to a voluntary agreement. But liability of the state in the context of a faulty voluntary agreement is also possible without a specific regulation. It can derive from the general rules of state liability in case of negligence by the authority or a single civil servant, which are quite different among the member states. Generally, liability law should be designed in a way that neither the company nor the state should be able to rid itself from liability for damages by using a voluntary agreement instead of another instrument.

7.4 Liability between the parties

Apart from the moral responsibility for both parties and the usual bona fide rules, several aspects of legal liability must be considered. Depending on the content of the agreement, collective and individual liability have to be discerned. Collective liability comprises those provisions which are in the responsibility of the business associations, whereas individual liability is related to the individual companies either as members of the association or as an individual party. In this context, members of an association which has concluded a voluntary agreement must not be allowed to circumvent their obligations by leaving the association. Liability naturally is not limited to the industry. The state is liable to its partners in the agreement. Exemptions may be applicable in case of international obligations or a state of emergency.

7.5 Dealing with "Freeriders"

Problems may occur if a voluntary agreement has been concluded between public authorities and an association representing a field of industry. If the membership of the association does not include all

active companies and thus not all are bound to participate, unwanted results could be the consequence. Among these unintended consequences are the possibility that all the potential benefits to the environment may not be met, or that imbalances may occur in the allocation of burden between firms in an association. This problem can be avoided by enabling the state by law to lay down similar requirements for enterprises not covered by the agreement or to declare a voluntary agreement as generally binding. Another way to deal with the problem is to deny freeriders usually granted benefits or to use mechanisms of publicity to expose the company as a freerider. In some cases the identity of freeriders is unknown. Here it would be the responsibility of both the state and business organisations to use all adequate means to identify and confront any freeriders.

7.6 Arbitration

The functioning of voluntary agreements also depends on the capability to settle disputes. As a very useful instrument for resolving conflicts, arbitration fits perfectly into the concept of cooperativity rather than supremacy of the state. It must be settled in advance which circumstances allow a call for arbitration, as well as the line-up of the arbitration panel, which ideally should include independent persons. Arbitration can either be installed as the final instance. Disputes on legally binding agreements, though, usually cannot be resolved by arbitration once and for all. The banning of courts, depending on the actual case, could conflict with constitutional law. It is very useful and fits well in the concept of co-operation, to make the arbitration process a precondition for the litigability of voluntary agreements.

7.7 Litigability

The hybrid character of voluntary agreements brings up several questions concerning their coming to court. Naturally this only concerns legally binding agreements. First of all, there is the question of jurisdiction, whether the civil court or the administrative court is relevant. If not provided otherwise by law, the voluntary agreements concluded under the regime of civil law are in the jurisdiction of civil courts, and, respectively, those concluded under the regime of public law are in the jurisdiction of administrative courts. One of the major consequences of jurisdiction are the applied rules on procedure. For example in some member states civil courts may only base their decision on those aspects which have been brought forward and proved by one of the parties, while the procedural rules for administrative courts demand the court exploring all relevant aspects, even if they were not brought up by either of the party.

Exemplary constellations for the litigation of a voluntary agreements are, that the state is suing the association of a single business for not complying the agreement. Usually the aim would be to enforce sanctions or even have the agreement or parts of it nullified. On the other hand a respective member or an association can sue the state for breaking the agreement in order to get protection from the state enacting a legal norm or commanding a measure which is contrary to the agreement. Also benefits which should have been granted might be claimed that way. Finally there could be a third party trying to pursue its rights. The hybrid and mainly uncodified character of voluntary agreements arises many important questions of detail, such as legal methods to nullify a voluntary agreement (*ex tunc* or *ex nunc*) or the amount in dispute. It has to be noted that these details differ extremely between the legal systems of the member states. Hardly any cases of litigation of voluntary agreements have occurred so far. Apart from legal uncertainties, which might lead to the abstention from bringing voluntary agreements to court, the infrequency of this kind of enforcement can also be attributed to the benefits of the instrument. In the process of negotiating the agreement, many potentially disputable aspects are likely to turn up and thus can be settled in advance.

8 Policy Conclusions and Recommendations

- Voluntary agreements can be performed legally if certain rules are applied.
- Currently legally binding voluntary agreements may not be concluded on EU level. To change this, the EU would have to establish the respective legal conditions.
- Legal safety of voluntary agreements can be improved if states develop a legal framework for voluntary agreements, either by law or recommendation.
- With such a framework possible breach of constitutional law could be prevented by including major aspects such as the role of parliaments and restraints in respect of the division of powers and the basic rights of individuals.
- Limiting the framework to basic rules would prevent suffocating the flexibility of the instrument. Such basic rules can include the need for hearing third parties, public participation, publication, monitoring, sanctions and jurisdiction.
- States using legally binding agreements wherever useful and legally possible would have the advantage to be able to enforce the voluntary agreements and to enhance the acceptance.

9 Summary

This policy paper gives an overview of the aspects which have to be considered when integrating voluntary agreements into existing legal systems.

Various forms of voluntary agreements exist. Their legal conditions and consequences depend on whether they are unilateral or multilateral, on their proportion to legal norms, whether they are legally binding or not and whether they belong to civil or public law.

EU law still lacks provisions on voluntary agreements on EU level. Voluntary agreements in member states are encouraged by the EU, but the rules of free trade, competition and illegal state aid as well as EU directives on environmental issues must be observed and limit the use and restrict the content of voluntary agreements.

Special attention must be given to questions of constitutional law. The principles of division of powers, democratic legitimisation and effective protection of individuals from harm require the respect of certain limitations and procedural rules. One way to prevent constitutional violations is to implement or recommend rules on the conclusion and content of voluntary agreements.

Voluntary agreements can be concluded on national, regional or local level. The competencies of the different levels in federal structured states must be respected.

Voluntary agreements may not contradict existing public law. Rights of third parties must not be ignored. This includes involving possibly affected third parties or environmental interest groups in the process of negotiating and concluding a voluntary agreement.

Public participation, transparency and publicity are important factors for effective voluntary agreements. Much of the past criticism on voluntary

agreements was due to the lack of public participation and transparency.

Concerning the content of a voluntary agreement, it is very useful to set an environmental goal and a date by which the goal has to be achieved, to foresee intermediate steps and to determine the obligations of both parties as exactly as possible.

The success of voluntary agreements also depends on monitoring, incentives and sanctions for non-compliance. These features enhance the impact of voluntary agreements and can lead to a better acceptance.

An effective voluntary agreement also depends on whether the state can force the opposite party to comply with its stipulations. In this context questions of liability, arbitration and litigability play an important role, although, few practical cases can be cited and the legal conditions are very different in the member states concerning those questions.

References

- Bailey, Patricia M.: Environmental Agreements and Compliance with the Treaty: Issues of Free Trade, Competition and State Aid, CAVA Working Paper, 2000
- Commission of the EU, Communication from the Commission to the Council and the European Parliament on Environmental Agreements; COM (96) 561 (final)
- Hazewindus, Pim: The Integration of Covenants in the Dutch Legal System, CAVA Working Paper 2000
- Lavrysen, Prof. Dr. Luc: Legal Framework for the Conclusion of Environmental Covenants in Belgium at the Federal Level and at the Level of the Flemish Region, CAVA Working Paper 2000
- Lefèvre, Pascal: "Voluntary Agreements in EU Environmental Policy - Critical Review and Perspectives", CAVA Working Paper 2000
- Lévéque, François [Ed.]: "Environmental Policy in Europe - Industry, Competition and the Policy Process", Cheltenham 1996
- Rehbinder, Prof. Dr. Eckard: „Environmental Agreements - A New Instrument of Environmental Policy“, Jean Monnet Chair papers No.45, 1997
- Trute, Prof. Dr. Hans Heinrich: „Vom Obrigkeitsstaat zur Kooperation - Zur Entwicklung des Instrumentariums zwischen klassischem Ordnungsrecht und moderner Verwaltung“ in „Rückzug des Ordnungsrechts im Umweltschutz“, Hendlar, Marburger, Reinhardt, Schröder [Editors], Berlin 1999

The EU and Climate Change: Is a Clarification of EU Legal Competence possible?

Frédéric Jaquemont

Climate Change: A Controversial Political Issue

In this article, a brief overview of the relevant legal questions concerning the EU competences in the international regime on climate change will be given.

The collapse of the negotiations for the implementation of the Kyoto Climate Change Protocol in the Hague, November 2000, together with the statement by President Bush that the US will not ratify the Kyoto Protocol (KP), raises the question of the international community's ability to respond to global warming. The talks are to be resumed in Bonn in July 2001. Since the Hague, the European Union as a party to the Climate Change Convention¹ and signatory to the KP has undertaken intense diplomatic activity to develop alliances in order to bring the KP into force. However, one may question the capacity of the EU, as a group of fifteen States and an entity of legal mixed competence, to contribute to the complex issue of a successful revival of the negotiations². At the Hague, while the European countries dedicated a considerable amount of time reaching consensus amongst themselves, climate negotiations were proceeding among the other participants.

The complexity of the issue lies in the Protocol itself. Indeed, the KP to the Climate Change Convention requires industrialised countries³ to ensure their emission of greenhouse gases does not exceed their Assigned Amounts (AAs) as listed in Annex B of the Protocol. This should lead to an overall reduction of greenhouse gases emissions to 5% below 1990 levels, which should be achieved by the end of the first commitment period (2008-2012). In order to help these countries fulfil their emission reduc-

tion commitments at a lower compliance cost by means other than domestic abatement, the KP provides a series of tools. These instruments are 'sinks'⁵, and economic based mechanisms (known as the flexible mechanisms) such as Joint Implementation (JI)⁶, Clean Development Mechanism (CDM)⁷, and International Emission Trading (IET)⁸. In accordance with the principle of common but differentiated responsibility, the Protocol requires from industrialised countries to reach their binding targets, whereas from developing countries no quantitative commitments to limit or reduce their Greenhouse gases emissions are demanded⁹.

The American argument is that in the face of the uncertainty of scientific evidence base concerning climate change, Kyoto targets are too ambitious and measures to achieve them too costly for the American economy. Therefore, these targets should be renegotiated and extended to developing countries. The EU will have to keep a strong unity in order to maintain the integrity of the Protocol in Bonn. Indeed, by taking this position, the US challenges two major principles upon which the Climate Change Convention and the KP are based – the precautionary principle¹⁰ and the principle of common but

⁵ Article 3.3 KP (Sinks refer to take credit for carbon sequestration activities such as forest and agricultural management).

⁶ Article 6 KP (Joint Implementation allows for Annex I countries to transfer to or acquire from other Annex I countries "Emission Reduction Units" (ERUs) associated with certain Greenhouse gases mitigation projects in transferring countries.)

⁷ Article 12 KP (Clean Development Mechanisms are similar to JI as they allow for Annex I countries to finance emission reduction projects in developing countries or non-Annex I countries in order to use the created certified emission reduction units (CERs) for domestic compliance).

⁸ Article 17 KP (Emission Trading enables an Annex B country to the KP to sell some of Assigned Amounts Units to another Annex B countries.).

⁹ This principle states in the Preamble, art 3.1 and 4.1 of the Climate Change Convention (United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849). It emphasizes the historical responsibility of developed countries for climate change that generated the most greenhouse gases since the advent of the Industrial Revolution. When all countries should suffer from global warming, it is likely that poor countries will suffer most, due to their vulnerable geographies and economies. See Paul G. HARRIS: "Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy", New York University Environmental Law Journal 7 (1999) 27-48.

¹⁰ Article 3.3 of the Convention: "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic

Frédéric Jaquemont, Researcher, EEP Network, Environmental Law Research Centre, Frankfurt University, Germany

¹ The European Community (94/69EC: Council Decision of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change) doc 394D0069) and all Member States have signed and ratified the Climate Change Convention.

² For an analysis of The Hague negotiations see Michael GRUPP and Farhana YAMIN: "Climatic collapse at The Hague: what happened, why, and where do we go from here?" International Affairs 7, (2001) 261-276. See also: Christian EGENHOER and Jan CORNEILLIE: "Reinventing the Climate Negotiations: An Analysis of COP6", CEPS Policy Brief No.1, 23 March 2001.

³ Countries listed in Annex I of the Climate Change Convention.

⁴ Article 3.1 of the KP.

differentiated responsibility. It is hardly imaginable that developing countries will renounce the second principle. This creates an opportunity for the EU to be in line with the Group 77/China. Further, in order to attract the members of the Umbrella Group¹¹, American allies, to ratify the KP, the EU would have to give in to some of their demands, such as caps and sinks¹². Finally, to make the KP a success, the EU would need to show leadership by implementing serious domestic policies and ratifying the Protocol.

Before the Bonn talks, an examination of the EU competences and responsibilities on climate change, especially in regard to the KP, is of significance.

The EU: A misleading entity

As a group of fifteen nation-states, the EU is a confusing entity for international partners. It has neither a legal personality internally to take legally binding measures, nor internationally to conclude international agreements¹³. Part of the EU is the European Community (EC), comprising the same Member States, which in contrast has legal personality¹⁴. However, the question of the international capacity of the EC was unclear until the European Court of Justice stated that the EC has the international legal personality as well as internally¹⁵. Therefore, the most appropriate terminology is the EC to designate the proper legal entity of competence.

In contrast to a sovereign state, the EC has not a general competence on all matters. Indeed, the Community has only the power given to it by its constituting treaty. The other power remain with its

Member States. This principle of specific attribution of competence is reflected in Article 5 EC Treaty, which states that: *"the Community shall act within the limits of the powers conferred upon it by this Treaty and of objectives assigned to it."*¹⁶ Following this principle, the Community has competence when expressly given to it through the provisions of the Treaty and implied competence in order to carry out the tasks assigned to it by the objectives of the EC Treaty¹⁷. Thus, in order for the EC to act, it needs to make reference to the specific legal basis to justify its actions¹⁸.

As regards external competence, the same rule applies: the Community has the capacity to conclude international agreements in areas where the EC Treaty has explicitly given authority to it. Where the Treaty is silent, the Community has implied external competence in areas in which it has acted internally¹⁹. Furthermore, this competence extends to the case where no internal legislation was enacted²⁰. This was the case when the Council declared that the Community as a whole would limit emissions of carbon dioxide as stated under the Convention on Climate Change²¹. At that time, there was no internal legislation on which the Community competence to implement such international commitment could have been based²². However, external competence under the Community law is not sufficient for the EC to conclude international agreements. Such instruments must provide a *clause of accession* which allows 'regional economic integration organizations' to become a party. The Climate Change Convention and KP contain such a clause²³.

On environmental policy, the EC has the task *"to promote throughout the Community ... a high level of protection and improvement of the quality of the environment..."*²⁴. In addition to this general task,

contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse and adaptation and comprise all economic sectors."

¹¹ Negotiating group of Annex I Parties aiming for flexibility. The group consists of Japan, the US, New Zealand, Canada, Australia, Russia, and Ukraine.

¹² The EU had the position to restrict/or to put caps on the use of the Kyoto flexible mechanisms, as they should be supplemental to domestic actions. It proposed quantitative limitations, in such a way that only 50% of the reductions could be achieved through the use of flexible mechanisms to accomplish the national targets. They were also cautious to credit sinks before real scientific evidence on the capacity of absorption of land and forest and how permanent are the sequestration of CO₂ by the forests. The introduction of caps was opposed by the countries of the Umbrella Group.

In order to enter into force, the KP shall be ratified by Parties included in Annex I, which accounted in total for at least 55% of CO₂ emissions of all the Parties included in this Annex I. Article 25.1 KP.

¹³ For further information see, Philippe MANIN: «Les Communautés Européennes», PEDONE (1997); Damian CHALMERS: «European Union Law», V.1, DARTMOUTH (1998).

¹⁴ The EC became the EU by the Treaty on European Union, which was signed in Maastricht on 10 December 1991. The EU also includes the European Coal and Steel Community and the European Atomic Energy Community created in 1957, which form the first pillar of the EU, the second pillar is formed by the Common Foreign and Security Policy, and the third by the Justice and Home Affairs. See supra note 13. The legal capacity of the EC lies in Art. 210 and 211 of EC Treaty.

¹⁵ ECJ Case 22/70, (AETR 31 March 1971).

¹⁶ *"As the Community can only act through its institutions, this provision must be placed alongside Article 7.1 EC, which requires that each institution must act within the limits of the powers conferred upon it by the Treaty"*, D CHALMERS, see supra note 13.

¹⁷ See Case 22/70 (AETR 1971), Joined Cases 281, 283-5, 287/85 (Germany, France, the Netherlands, Denmark and the United Kingdom v Commission 1988).

¹⁸ See Case 300/89 (Titanium dioxide), Case G155/91 (Commission v Council).

¹⁹ See Case 22/70 (AETR 1971), Case 3,4 and 6/76 (Kramer 1976), Advisory Opinions 1-76 and 1-94 in which the Court has developed the doctrine *"in foro interno, in foro externo"*, providing that the Community is externally competent in areas in which it has internal competence.

²⁰ ECJ Opinion 1/76 (Laying-up fund) 1977.

²¹ Article 4(2) Climate Change Convention. Council decision of 15 December 1993, OJ 1994 L 33/13.

²² See Jan H. JANS: *"European External Environmental Policy"*, in European Environmental Law, European Law Publishing (2000), p.81.

²³ Article 22.3 Climate Change Convention and article 24.3 KP.

²⁴ Article 2 EC Treaty.

the Community environmental policy shall promote measures at an international level to deal with regional or worldwide environmental problems²⁵. In order to implement these objectives into legal binding instruments, Article 175 allows the Council to take environmental decisions. Thus, the Community through the EC Treaty has explicit powers at its disposal to take actions in environmental matters²⁶. In regard to global warming, a worldwide environmental problem, the Council took the decision to adhere to the Convention on Climate Change by virtue of Articles 175 and 300 of the EC Treaty²⁷, a procedure that should be used for the KP.

Article 174(4) EC Treaty underlines that environmental policy is a shared competence. Member States share the capacity to act with the EC in this field, both externally and internally²⁸. This additional difficulty muddles other states in respect of the EC's capacity to undertake actions under the Climate Change Convention. Additionally, it may prevent the Community from using some of the possibilities laid down in the KP.

Climate Change: A shared competence

Climate Change is a typical area of shared competence. As a result, negotiations are conducted by both, the EC and the Member States. By the same token, the Climate Change Convention was ratified by both the Community and its Member States²⁹.

²⁵ Article 174.1 EC Treaty: "The Community environmental policy shall contribute to -preserving, protecting and improving the quality of the environment-protecting human health- prudent and rational utilization of natural resources- promoting measures at international level to deal with regional or worldwide environmental problems."

²⁶ As broadly formulated, the environmental objectives seem to allow any initiative at an EC level which the political institutions of the Community consider appropriate. Furthermore, Article 6 of the EC Treaty, provides that environmental protection requirements be integrated into the definition and implementation of all Community policies. See Ludwig KRÄMER: "Environmental Law in the European Union", in International, Regional and National Environmental Law, Fred L. MORISSON and Rüdiger WOLFRUM, Kluwer Law International (2000), p.459.

²⁷ Council decision 94/69, OJ (L 33).

²⁸ On the external competence Article 174(4) EC Treaty provides: "Within their respective spheres of competence, the Community and the member States shall cooperate with third countries and with the competent international organizations.

The arrangements for Community co-operation may be subject of agreement between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.

The previous subparagraph shall without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements." Internally, shared competence implies that as long as the Community has not enacted legislation, Member States are free to adopt measures for the protection of the environment, provided that these measures are neither discriminating nor disproportionate. Where the Community has enacted legislation, based on Article 175, competence is shared between Member States and the Community, since Member States have maintained the possibilities to legislate more stringent environmental protective measures under Article 176. See L.KRÄMER supra note 26.

²⁹ When a Convention falls partly within the competence of the Member States and partly within the competence of the Member States, it can be implemented by means of "close association between the institutions of

However, international partners often raised concerns over the lack of clarity in the definition of legal competence between the EC and its Member States³⁰. Indeed, to what extent does this internal division of powers affect the legal position of other parties since neither the Community nor the Member States has exclusive competence³¹? In order to clarify this cumbersome situation, choices have to be made on whether specific areas of the Convention fall within the competence of the EC or its Member States. These choices will determine who is allowed to negotiate or to vote under the Convention when decisions have to be taken on specific issues³².

The Climate Change Convention and the KP include provisions that in case the Community becomes a party without its Member States, it shall be bound by all the obligations under these instruments. When one or more of the Member States together with the Community are parties, the EC and its Member States must decide on their respective responsibilities for the performance of their commitments under the Convention and the Protocol³³. In ratifying the Climate Change Convention, the EC added to its instruments of ratification a Declaration of Competence, which should demonstrate to the other parties to the convention the extent of its responsibilities under the Convention³⁴.

However, such a declaration does not define a precise division of competences under the Convention between the Community and its Member States. In this document, the EC recalls its competence to protect the environment and it lists the most relevant legal instruments that the Community has taken in relation to the matters covered by the Convention. Thus, the document reflects the outlines of the internal delineation of competence³⁵. Therefore, the Community competences under the Convention cover the areas where it has already enacted internally. However, for other parties to the Convention,

the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into", ECJ Opinion 2/91 ILO-convention no.170 (1993). See also H. JANS supra note 22.

³⁰ See Joanna DEPLEDGE: "Tracing the Origins of the Kyoto Protocol: an article-by-article textual history", August 99/August 2000, DHG.00-187.

³¹ H. JANS supra note 22.

³² Articles 18.2 Climate Change Convention and 22.2 KP provide that: "Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their Member States that are parties to the Convention/Protocol. Such an organization shall not exercise its right to vote if any of its Member States exercises its right, and vice versa."

³³ Articles 22.2 Climate Change Convention and 24.2 KP.

³⁴ This declaration of competence is required by Article 22.3 Climate Change Convention and Article 24.3 KP.

³⁵ See Jan H. JANS supra note 22.

it is still vague who they can call on for fulfilling the obligations under the Treaty.

Responsibility of the Community under the Climate Change and the KP

As a Party to the Convention, the EC has adopted an important instrument listed in its Declaration, Directive 93/389. This Directive, as amended in 1999 to encompass the new requirements under the KP, establishes a Community monitoring mechanism for greenhouse gas emissions. It is a framework directive which requires Member States to implement national programmes for limiting or reducing their greenhouse gas emissions and to report to the Commission. It will allow the Commission to assess the progress of its individual Member States towards the fulfilment of their commitments under the Climate Change Convention and the KP. It will also allow the Commission to fulfil its obligation to present an inventory of Community greenhouse gases to the Secretariat of the Climate Change Convention³⁶. This directive reproduces the requirements and guidelines as stated in the Convention and the KP.

This instrument is significant for two reasons. First, under Article 4.6 of the KP, the Community is jointly committed with its Member States to achieve its target of an 8% reduction of its greenhouse gases emissions (the European bubble concept)³⁷. If the overall target is not met, the EC will still remain responsible for its 8% reduction target, while each Member State individually will be liable for its own target, as set out in the Burden Sharing Agreement. Should a Member State fail to reach its target, meaning that the EC falls into a status of non-compliance, both, that Member State and the Community will be held liable. Therefore, the Commission needs to track the progress of the Member States in order to assess how well the EC as a whole is implementing its commitments.

Finally, under the KP the annual inventories will be used by the Compliance Committee to assess compliance with emission reduction commitments at the end of the first commitment period. Furthermore, compliance with guidelines for producing and reporting greenhouse gases inventories will be an eligibility criteria for the participation in the Kyoto mechanisms, and will fall under the authority of the

enforcement branch of the Compliance Committee³⁸.

Two important conclusions can be drawn. First, the EC as a whole is exclusively responsible for reporting its greenhouse gases emissions and to demonstrate progress towards reducing its emissions under the Climate Change Convention. Such a Community's responsibility is a result of two facts, because it has acted internally and because the Community will be jointly committed with its Member States under the KP.

Finally, when the EC and its Member States are parties to the KP and the Protocol enters into force, the Burden Sharing Agreement will be legally binding. In this context, it will place a particular demand on the EC, because the Community will be held responsible under the KP for its Member States. In the situation of non-compliance, the EC would face heavy penalties under Article 18 of the Protocol. Lately, the Commission realized that it should take further measures ensuring that Member States will fulfil their commitments. Although a reliable monitoring system is necessary to assess Member States' compliance with their targets, it may not be sufficient. An enforcement system may be desirable. One step could be to make the Burden Sharing Agreement legally binding within the Community law system. Thus, Member States would be liable under two systems of law for meeting their targets, the international regime under the KP and the Community law.

As stated earlier, the KP provides flexible mechanisms which allow parties to comply with their emission reduction commitments at lower economic costs. This raises the question of the eligibility of the EC to participate in the Kyoto Mechanisms. Although the EC will be a Party to the Protocol, it remains unclear whether the Community will have the competence to use such mechanisms in relation to the shared competence problem.

The EC in relation to the Kyoto Mechanisms: a series of ambiguities

The Commission is willing to implement a domestic Emissions Trading System (ETS) within the Community³⁹ and is currently working on designing a directive. It should be a limited emission trading scheme to start by 2005 to enable a learning-by-doing approach prior to the Kyoto Protocol's emissions trading (2008)⁴⁰. In doing so, the Community

³⁶ Article 4.1(a) Climate Change Convention and Articles 4,5 and 7 KP.

³⁷ The European Bubble concept leaves open the possibility for the EC and its Member States to re-allocate their Assigned Amounts amongst themselves, under the condition that they comply overall with the KP. In Council Environment meeting of 16-17 June 1998, the Member States agreed on their respective targets, this agreement is known as the Burden Sharing Agreement.

³⁸ Articles 5, 7 and 8 KP.

³⁹ See Green Paper on Greenhouse Gas Emissions Trading within the European Union. COM(2000)87.

⁴⁰ Article 17 KP.

will demonstrate progress in achieving its commitments under the Protocol⁴¹.

Meanwhile the United Kingdom and Denmark are implementing their own national schemes. As long as the Community has not enacted legislation, there is nothing that will prevent Member States to take such measures, provided that these measures are neither discriminating nor disproportionate⁴². With respect to the Kyoto Protocol, the implementation of a Community ETS can be questioned. It will depend the status of the EC and its Member States within the KP.

Since the EC is authorised under Article 4 of KP to jointly achieve together with its Member States its overall target, the EC and its Member States can be seen as a single party to the KP. Thus, any trading system established by the EC can be considered to be a 'domestic action' under the KP⁴³, as long as the EC has the competence to implement such measure. The Environmental Council (1998) interprets 'domestic action' along the line of the shared competence that exists between the EC and the Member States in climate change⁴⁴.

Regarding the EC Treaty, the Commission has serious legal grounds and arguments to take action in this field. Such action can be justified by calling upon the need to protect the environment and by the requirement to create equal conditions of competition, which are necessary for the functioning of the internal market⁴⁵.

The second argument falls within the exclusive competence of the EC and imposes on the Community a duty to act. For example, the adoption of different criteria by the Member States for the participation of companies or the coverage of different sectors by their national ETS may entail distortion of competition within the European internal market. These considerations do not imply that the EC has an exclusive competence in implementing an ETS, the example of Denmark and the United Kingdom show the opposite, but they give consequent arguments to support a Community action.

As climate change is a mixed competence, the degree of intervention by the Community will depend on whether its proposal meet the criteria of the subsidiarity principle as laid down in Article 5 EC Treaty and its guidelines. Such criteria will assess

transboundary aspects of a Community ETS that cannot be satisfactorily regulated by Member States actions and the conflicting possibilities with the EC Treaty requirements that a Member State ETS alone or the lack of Community ETS would have and, finally, compare the clear benefits by reason of its scale or effects of a Community ETS in respect with ETS at the Member States level.

In practice, the application of the subsidiary principle is done by finding a politically acceptable level of intervention. The degree of Community intervention is more or less a political compromise between the Commission and the Member States. A Community regulation for an ETS will have to take into account the existing national ETS. Therefore, it will presumably take the form of a framework directive based on Article 175, with the aim of a minimum harmonisation on issues such as: the sector coverage, criteria for participation, the distribution of emission allowance, and the adoption of common unit of trade. The Member States would still have the possibility to legislate within this framework.

With the Member States, the EC shares the competence to implement a domestic ETS in respect with the KP and the Community law, it should therefore enjoy the possibility to trade under Article 17 KP. However, two limits must moderate this affirmation. Firstly, the contemplated Community ETS is limited in time and in scope⁴⁶. It is seen by the Commission as an experiment, a 'learning-by-doing' approach in order to be ready when the KP enters in force. The question of whether a new ETS legislation will be listed in the EC Declaration of Competence under the KP is still open. However, it can be presumed that the Commission will claim such possibility for the EC.

Finally, Article 24.2 KP, which allows regional organisations to become a party to the protocol, states that "*the organisation and the Member States shall not be entitled to exercise rights under this Protocol concurrently.*" Therefore, in case the EC declares its competence to exercise rights under Article 17, it will exclude Member States from trading and vice versa. Will Member States renounce such a possibility of complying at a low cost? Such a possibility is hardly conceivable.

In the situation where the EC is banned from using such a tool, success for the EC in meeting its target would be more difficult. Thus, the EC would be bound to achieve its obligation under the KP, but powerless to achieve them through the flexible mechanisms.

⁴¹ Article 3.2 KP

⁴² The Commission has assessed these national emissions trading schemes and gave green light for their implementation.

⁴³ Article 17 requires that IES "shall be supplemental to domestic actions".

⁴⁴ 2106th Council meeting Environment Luxembourg, 16-17 June 1998, PRES/98/205.

⁴⁵ Articles 2 and 3 EC Treaty.

⁴⁶ Only limited actors are concerned and it will just encompass CO₂ emissions, when the KP has listed 6 gases, and should operate in a period of time between 2005-2008. See Green Paper, COM(2000)84.

The phrasing of Article 24.2 could be interpreted less strictly, meaning that rights between the EC and the Member States could not be exercised concurrently in case of possible conflicts between them. Thus, it would leave the possibility for the EC of exchanging parts of Assigned Amounts along with the Member States, in order to jointly secure compliance with their commitments. However, this ambiguity should be addressed to avoid any dispute on the EC's participation in the flexible mechanisms as set up by the KP.

Another ambiguity exists in relation to 'the European Bubble' and the provisions under Article 3.13 KP. This article provides for a party that has over-complied to bank its allowances for the next commitment periods.

In case a Member State over-complies with respect to its national target under the Burden Sharing Agreement, when another Member State under-complies, the over-complying State would have an obligation to transfer its excess parts of Assigned Amounts to the under-complying state, or to the EC in order for the EC to comply as a whole. In doing so, Member States would renounce the right of banking under the KP. This raises the question to whom the Assigned Amount Units reallocated belong. Do they belong to the EC as a whole, because Member States are jointly committed with the EC or do they belong to Member States individually? The Burden Sharing Agreement that reallocated the targets between European States gives neither an answer, nor sets rules for such a case.

By reading Article 4.6 KP, it could be interpreted that Assigned Amount Units reallocated under the Burden Sharing Agreement belong to the EC, until the Community as a whole has failed to comply with its overall target. From this moment, they will fall into the Member States' responsibility, since Member States will become individually responsible for meeting their agreed targets under the Burden Sharing Agreement. The same argument can be extended to excess Assigned Amount Units.

However, such a situation may create an incentive for a Member State not to comply with their agreed target to a certain extent, when they think that other Member States will over-comply. Therefore, an enforcement regime within the Community is highly desirable.

Finally, the Commission is rather silent in its political documents on reduction emissions projects

under JI and CDM⁴⁷. This silence is rather disappointing with respect to developing countries and Annex I countries such as Russia and the Ukraine. A strong willingness from the EC to invest in such projects could be a good incentive for these countries to join the EC in ratifying the KP.

Should this silence from the Commission be interpreted as leaving the exclusive competence to the Member States to purchase Certified Emission Reduction and Emission Reduction Units: in this case, it would impede the Commission from having a control on the environmental quality of such Certificates introduced within the Community, since the EC failed to impose its positive list of projects for CDM at The Hague. Furthermore, by renouncing such instruments for complying with its commitments, the EC would put a spoke in its own wheel.

Conclusion

The division of competence within the EU between the EC and Member States seems to reach a limit where more clarification is needed. Flexible mechanisms introduced in the KP are a real novelty compared to other international environmental agreements. However, ambiguities remain as regards the role of the EC in relation to such flexible instruments. In strictly reading the KP, shared competence on climate change between the EC and Member States may impede the first from using the opportunities given by the KP to reduce greenhouse gases emissions at lower costs. The European Bubble, which was seen by European countries as a flexible means to achieve their commitments under the KP, entails a heavy burden on the EC: the responsibility of ensuring that all Member States will comply with their Burden Sharing targets. In this field, it would be wise for the Commission to design an enforcement system within the Community. In addition, the issue on banking excess parts of Assigned Amounts should be addressed. Finally, the ambiguous silence from the Commission on its role with respect to CDM and JI should be removed in order to address a clear signal to the developing and Eastern European countries in Bonn.

⁴⁷ Commission political documents on climate change actions, such as the European Climate Change Programme (ECCP), the 6th Environmental Action Programme, do not mention any intention from the Commission to participate in such projects. Meanwhile, countries such as Denmark, Sweden, and the Netherlands are willing to undertake JI and CDM as part of their national policy to comply under the KP.

Overview of the Community Guidelines on State Aid for Protecting the Environment

Mercedes Fernández Armenteros

Introduction

In the field of state aid, the weight of national state aid for environmental protection has been reflected in the new guidelines on State Aid for Protecting the Environment issued in December 2000 by the European Commission¹. Despite other categories of state aid have traditionally held the attention of the Commission, state aid addressed to environmental protection is becoming a fairly widespread matter with which the DG IV has to deal². Not only has it increased in number but simultaneously states have launched extremely innovative types of environmental subsidies, which differ largely from the categories used in the past.

In addition, the fact that state aids for environmental protection are deemed to be one of the future concerns in the state aid area is largely owed to the recent impact of national policies on climate change protection and the incentive mechanisms for renewable energy which are the consequences of the former. Even if it is a relatively recent phenomena, the General Direction on Competition (DG IV) is perceiving the future tensions that climate policies are likely to cause regarding European state aid policy. In this line it is quite illustrative that the Commission has not only the occasion of deciding upon a national scheme implementing a market permit system of CO₂ quotas in Denmark,³ but also its conception on "state aid" has been rebutted in a case concerning the German system of guaranteed prices for renewable energy⁴.

Stemming from the previous observations, the article mainly intends to offer an overview of the juridical framework elaborated by the Commission upon the guidelines on state aid for environmental protection through the comparison with the precedent European framework. In view of its relevance, we will primarily focus on those state aid questions derived from the national climate protection regimes, with the aim of assessing the suitability of the new guidelines vis-à-vis the new environmental economic instruments.

The compatibility between competition and environmental policies

The European legal framework on state aid, established under Chapter I of Title VI of the EC Treaty (Art. 87-89) is characterised not only by the absence of formal legislation, but in particular by its political sensibility, which differentiates the rules on state aid from the competition rules applied to firms (Articles 81 and 82 of the Treaty) where the Treaty sets up a rather broad prohibition. Thus, in the context of state aid, the Commission enjoys a discretionary power to guarantee that the objectives related to the completion of a competitive and single market will not be jeopardised by any state aid regime. Yet, the regime on state aid allows the Commission to recognise that state aid might be addressed towards the achievement of objectives other than the ones required by a full competitive policy. In this context, environmental protection appears recognised as one of those social objectives.

In spite of the growing weight of environmental protection issues linked with the domain of state aid, the relationship between competition and environmental policies has traditionally been confused. Although the polluter-pays principle has been largely recognised at the European level as being part of the environmental policies of the European Community, it is far from clear that such a recognition was indispensable.⁵ Indeed, the polluter pays

Mercedes Fernández Armenteros, Research Associate, EEP Network, Öko-Institut, Darmstadt Office, Germany

¹ Community guidelines on state aid for protecting the environment, JO C 37/03, 03.02. 2001.

² Environmental aid falls within the category of horizontal aid. The Commission understands horizontal aid as aid which lacks regional or sectoral specificity and which is granted regardless of the location of the beneficiary undertakings or their sectoral orientation. Other examples of horizontal aid are R&D aid, investment aid, export aid, aid for the benefit of SMEs, employment aid and rescue and restructuring aid for companies in trouble. Other general categories of state aid under the terminology used by the Commission are sectoral aid - comprising measures aiming at supporting specific crisis-ridden spheres of commercial activity - and regional aid which covers aid granted to regions which are disadvantaged in comparison with other regions of the same Member State. For an overview of the categories of state aid see, Carl Baudenbacher, *A Brief Guide to European State Aid Law*, 1997, Kluwer Law International.

³ The decision on the Danish CO₂ quota system corresponds to State Aid N. 653/99.

⁴ The German case on renewable energy is under Case C-379/98 ECJ, 13 March 2001, Preussen Elektra. The case is considered to be relevant

because of the clarification on the concept of state aid, and the refusal of the ECJ to admit the "extensive definition" of state aid such as proposed by the Commission. However, the reasoning of the Court is also quite interesting - although not fortunate - due to the second part of the ruling, which rises questions regarding the internal market.

⁵ The polluter-pays principle is currently included in Article 174(2) of the Treaty and it was introduced for the first time in a legal text through the

principle by requiring the internalisation of environmental costs is before all a principle of efficiency, and considering that efficiency is at the root of a free market economy, the European Community would have applied it anyhow, even if it was not expressly recognised as an environmental principle. Thereby, the fact that the polluter-pays principle makes part of the logic both of the competition – and free market in general – and environmental policies is in principle a guarantee of the compatibility between the aims pursued by both policies.

Furthermore, it should be also a question of noting that at the European level the evolution of the environmental policies as well as the competition policies tend to converge. On the one hand, both the Member States and the European Commission make more and more use of market instruments for environmental protection at the expenses of the traditional ‘command-and-control’ approach. On the other hand, the public sector starts accepting the active role of the private initiative regarding environmental protection. In this respect, the recent “CEDED⁶ decision” is illustrative, since the Commission has approved for the first time an agreement among several firms, which intended to reduce the production of technically inefficient washing machines so as to reduce energy consumption.⁷ This kind of responses from the part of the Commission confirms not only its openness towards the environmental protection initiatives of the private sector, but equally they imply a direct application of the integration of environmental considerations into the competition area as required by Article 6 of the Treaty.

Does the integration principle influence the new guidelines on state aid for environmental protection?

The new European framework on state aids for environmental protection reflects the legislative development both at the European and national level that came about in this area during the last years.⁸ Especially, it is the reference to the integration of environmental considerations imposed by Article 6 of the Treaty that marks the development

of the new regulatory framework. From this perspective, the Commission will emphasise in paragraph 3 of the new guidelines this duty of integration so as to promote a sustainable development. Undoubtedly, the new guidelines show the willingness of incorporating the environment as a factor to be considered in assessing national state aid measures. Nevertheless, this intention does not imply a total integration. Beyond doubt the Commission has enlarged the number of exemptions in the state aid regime due to environmental reasons so as to foster Member States to adopt environmental protective measures. Nonetheless, the Commission continues to hold the principle that state aids - despite having a role to play within the environmental protection policies - cannot ensure the development of activities whose economic viability is not possible.

Yet, the fact that the environmental integration principle under Article 6 of the EC Treaty makes part of the chapter on principles on which European policies must be based could in the future favour the consideration of environmental issues when assessing state aid measures. As suggested by some authors, it could be thought of the Commission exempting environmental aid or some categories of environmental aid according to what prescribed by Article 89.⁹ As a matter of fact, Regulation 994/98¹⁰ authorised the Commission to exempt by group certain categories of state aid, among which also was the environment. In case the Commission would decide to issue a decision exempting environmental state aid, this would mean to consider automatically state aid with environmental purposes compatible with the single market and competition rules, being furthermore Member States excused from the obligation to notify the Commission as required by Article 88.3. Still, it is interesting to observe that in a previous version of the current approved guidelines on state aid for environmental protection, the Commission admitted quite openly that for new forms of operating aid it would probably be necessary in the future to adopt a regulation exempting state environmental aid from the general current regime.¹¹ It is true though, that even if in the future an exemption by category in favour of state aids for environmental protection would be positive, such an exception is probably not advisable at the present moment. Taking into account that many

Recommendation of the Council on the inclusion of environmental costs by the public authorities in 1974, Council Recommendation, 3 March 1975 OJ (L 194, 1).

⁶ European Council of Domestic Appliance Manufactureres

⁷ OJ L 187, 26.7.2000. See also XXX Report on Competition Policy 2000, SEC (2001) 694 final, 7.5.2001. In the named decision, the Commission considers that the agreement, even if restrictive of competition according to Article 81(1), can be exempted following Article 81(3) since it diminishes energy consumption (environmental positive effect) and benefits consumers by saving energy.

⁸ JO C37, 3-2-2001.

⁹ This observation had already been launched by Jans regarding the framework of 1994: ‘The integration principle provided for in Art. 130 R does not go so far as to exempt environmental aids from the scope of art. 92’. See Jan H. Jans, ‘State aid and Articles 92 and 93 of the Treaty: Does the polluter really pay?’, *European Environmental Law Review*, April, 1995, p. 108.

¹⁰ Regulation 994/98, OJ 1998 L 142.

¹¹ See paragraph 2 of this version, which can be found in www.wind-energie.de/englisch/eu_guidelines_environment.htm.

state policy areas - especially those combating climate change - still in phase of experimentation, it would be precipitated to elaborate in an early time a precise and clear category which would have the negative effect of excluding the development of some of the innovative - and likely environmentally friendly - approaches which are being tested by Member States.

Regarding the integration principle, the declaration introduced by the new guidelines in paragraph 83 by which the Commission is required to consider the environmental aspects when adopting or reviewing other dispositions on state aid should be deemed positive. Likewise, the integration principle reach a more concrete sense with the statement included into 83 paragraph, according to which the Commission will have the possibility of requesting Member States to elaborate environmental impact studies whenever they will notify state aids on different sectors. In case this possibility will be put in practice, it will undoubtedly become one of the most effective completion of the integration principle.

The novelties provided by the new regime on state aid for environmental protection.

The acknowledgement of the necessity to provide exceptions to the polluter-pays principle and as a result accepting state aid for environmental purposes gave origin in 1974 to the adoption by the Commission of a memorandum on state aids for environmental purposes, which suffered several modifications through the eighties.¹² The most remarkable feature of this first framework rested on the transitory admission of state aid for environmental protection, in such a way that the Commission previewed that for the future the full application of the polluter-pays principle would be the rule.

In 1994, after the experience acquired during almost two decades the Commission elaborated a more far-reaching juridical framework on state aid for environmental protection.¹³ The 1994 framework had been in force until 2000 and was substituted by the new guidelines. From a comparative perspective between the three phases, it can be drawn that the first and second phases were characterised both by

an attempt to clarify the cases accepted as exemptions to the state aid rules and by the Commission's reluctance towards the new incentives modalities proposed by the Member States under the form of environmental subsidies. This vision was to a large extent in accordance with the harmonisation of environmental policies practised during this period at Community level. During the last years, especially during the late 90s, the efforts on total harmonisation have decreased, and simultaneously the Commission through its practice has provided broader room for states to adopt new modalities of environmental state aid. This change of philosophy is reflected in the principles presiding the new guidelines, in such a way that the Commission declares in point 18 of the guidelines that state aid could just be justified in two cases: firstly, as a temporary second-best solution, when it is not yet possible to internalise all costs, and secondly when the aid acts as an incentive to firms to improve their standards or to undertake further investment designed to reduce pollution from their plants.

Investment aid rules

The first changes observed in the guidelines of December 2000 are represented by environmental investment aid. This kind of aid under the 1994 framework adopted three modalities:

- environmental aid that aimed at facilitating firms the adaptation towards new environmental standards or at encouraging them toward a more rapid adoption;
- aid which intended to achieve standards superior to the standards imposed legally;
- aid aimed to the attainment of environmental standards derived from environmental agreements and unilateral programs which are not legally mandatory.

Within the new framework, investment aid under the first case has disappeared. That means that whereas in the past firms that were able to adapt to the new legal obligations derived from Community legislation could benefit from 15% of eligible costs and for a limited period (point 3.2.3.A), under the new system firms required to accomplish environmental standards established by law cannot benefit from any kind of aid to achieve their obligations. Still, the small and medium enterprises are granted an exception to this rule, and according to point of the guidelines they might benefit from aid so as to adapt themselves to Community standards during a period of 3 years - from the moment these standards become compulsory and up to a 15% of eligible costs. Logically, paragraph 3 of point 3.2.2 A of the old guidelines dedicated to the relocation of firms has also disappeared, under which firms existing during 10 years and deciding to build a new

¹² Memorandum, 6 November 1974, Letter to the Member States SEC(74) 4264; IV Report on Competition Policy, paragraphs 175-182; Letter to Member States SG (80) D/8287 of 7 July 1987 and Letter SG (87) D/3795, 23 March 1987.

¹³ For general view of the evolution of the rules on state aid for environmental protection until 1995 see, Jan H. Jans, 'State aid and Articles 92 and 93 of the EC Treaty: Does the polluter really pay?' *European Environmental Law Review*, 1995, p.108 and ss. For a deep analysis of the state aid rules in the context of environmental policy, see Eberhard Grabitz and Christian Zacker, *Scope for action by the EC Member States for the improvement of environmental protection under EEC law: the example of environmental taxes and subsidies*, Vol. 26, *Common Market Law Review*, 1989, (423-447).

plant instead of adapting the new compulsory standards to their plants, were considered not as new firms but as old ones. On this basis, these firms were allowed to receive an aid that should not exceed the costs of adaptation to the new plant. In contrast, the new framework has established that the relocation of firms does not constitute environmental protection and is consequently excluded. There is an exception to this rule: the granting of aid is justified when the relocation is undertaken by a firm established in an urban area or in a Natura 2000-designated area. In this case, aid to relocation might be granted when the firm lawfully carries on an activity that creates major pollution and, on account of this location, must move from its place of establishment to a more suitable area, having the change of location been imposed by an administrative or judicial decision.

Akin to the past, the new guidelines consider essential a positive treatment for those cases in which national standards are more stringent than those at the European level. Hence, the possibility of awarding investment aid is admitted (point 20-29) whenever Community environmental standards are exceeded either as a consequence of more strict national legal standards or as derived from voluntary commitments of the firms.

Consequently, the Commission has considerably extended the concept of internalisation of costs by denying state aid when its purpose is to provide help for accomplishing mandatory standards, and by limiting the cases of investment aid to those represented by small and medium enterprises. From this perspective, it is quite meaningful the declaration that the declaration of the Commission stated in point 19 of the new guidelines asserting that after the adoption of the Fifth Action Programme on the Environment, which was already based on the 'polluter-pays' principle and cost internalisation, "firms had disposed of seven years for adapting gradually to the application of the principle". By the same token, under point 21 the Commission insists on the evidence that compulsory environmental standards constitute the ordinary law with which firms must comply, therefore implying that it is not necessary to provide with aid in order to encourage them to obey the law.

Another innovation, this time related with the definition of investment state aid is provided by the new rules. It should be noticed that the new framework already stems from a broad definition of environmental protection in which not only remedies and prevention of physical damages but also energy-saving measures and use of renewable sources of

energy are included.¹⁴ Although the 1994 guidelines already considered aid for energy conservation and renewable energy (point 2.3), the Commission amplifies the granting of investment aid to the renewable energy sector (point 32), accepting even to overcome the general 40% of normal authorised costs up to 100% under certain conditions. Again, another novelty is represented by the inclusion of a category within the state aid guidelines, namely, investment aid in the field of combined production of electric power and heat. In assessing the investment aid for combined production of electric power and heat, the Commission will take into account the particular kind of primary energy used.

Aid for advisory/consultancy services in the environment field

A second category of aid that undergoes modifications under the guidelines 2000 is the advisory and consultancy services in the field of environment. These are public aid aiming at disseminating knowledge, subsidising audits and consultancy services as well as at the dissemination of information. Under the new scheme and in contrast to the past, only small and medium-sized enterprises can benefit from these kinds of aid.

Operating aid

By far, operating aid – which is in fact the aid having a direct effect on the costs of production and in turn on prices – are the schemes which have undergone most of the amendments under the new guidelines for environmental state aid. It is in the domain of operating aid that the Commission will finally accept many of the legal solutions introduced in recent times at national level, providing at the same time with a set of clear and structured rules. This blatantly contrasts with the previous legal scenario dominantly embedded with scarce and vaguely defined cases of acceptable operating aid. To be sure, the 1994 guidelines only pointed out as cases of investment aid potentially accepted those in the field of waste management as well as exemptions to environmental taxes. The reluctance of the old guidelines towards environmental operating aid is easily perceived all over the text. In this sense, for instance, whereas the point 2.3 of the old guidelines admitted that state aid to renewable energy could fall under the category of investment aid, operating aid for production of renewable energies should rather be judged on its merits. Under the new rules of December 2000, not only specific rules for the general category of operation aid are provided, but equally the guidelines contain concrete and differ-

¹⁴ See point 6 of the guidelines.

entiated clauses in the domain of operating aid in the case of combined production and sale of electric power and heat (points 66-67), in the case of renewable energies (points 54-65) and operating aid in the form of reductions or exemption from taxes (points 47-53).

Briefly, two features can be derived from the new guidelines on state aid for environmental protection. Firstly, it is the energy sector and in particular renewable energies which acquire a large favourable treatment both under the categories of investment and operating aid. The second conclusion is that the new framework rests on the increase of acceptable modalities of operating aid, what is to a large extent surprising given the traditional reluctance of the Commission towards the admission of new types of operating aid.¹⁵

In view of the relevance of renewable energies and exemption of taxes regarding climate change policies, the rules applicable to operating aid relating to both categories will be briefly described in the following.

Rules applicable to operating aid for renewable energies

During the last decade, a large number of Member States have set up different legislative frameworks so as to promote the development of renewable energies through the provision of mechanisms that correct the failures which prevent renewable energies from competing with other traditional energies. The main reasons for the lack of non-competitiveness of renewable vis-à-vis traditional energies are derived from the fact that “the technical processes available do not allow energy (from renewable) to be produced at unit costs comparable to those of conventional sources” (point 55 of the guidelines). Thus, by scrutinizing national legislation on renewable energies, the Commission will consider whether the objective is basically to cover the difference between production costs of renewable energies and the market price of that energy, which indirectly implies that the Commission will meticulously examine on the competitive position of the renewable energy at stake.

By echoing the experiences undertaken to promote renewable energies at the member state level, the Commission has finally embraced - apart from the general rules on operating aid (points 45-46) - three different modalities of operating aid for renewable sources of energy. The first option chosen by Member States to promote alternative energies -regulated

under points 58-60- is to grant aid aimed at covering the difference between production costs and market costs. Under the second option, the Commission includes the numerous market instruments which Member States have been using to encourage renewable energy, proposing as examples the case of green certificates and tenders. The receptivity of the Commission towards this kind of operating aid to renewable energy is perceptible by comparing the time duration for general operating aid with the time duration of operating aid for renewable energy: whereas the Commission authorises operating aid for renewable energies during 10 years (point 62), the normal period for operating aid in the case of waste management for instance, is 5 years. Finally, the third option for Member States to introduce state aid for renewable energies is to a certain extent the most coherent with the polluter pays principle, since according to paragraphs 63-64, Member States can grant aid based on the external avoided costs. External costs are understood as those environmental costs that society would have to bear if the same quantity of energy were produced by a production plant operating with conventional forms of energy. This option is by large the most precise one from a cost internalisation viewpoint in view of the fact that it comprises not only negative externalities –environmental damages- but also positive externalities –environmental benefits-, which are rarely accounted for during the design of environmental policy instruments.

- **Rules applicable to all operating aid in the form of tax reductions or exemptions**

The chapter dedicated to operating aid in the form of tax reductions or exemptions is not utterly a novelty since the last paragraph of 3.5 point of the old framework permitted the temporal reduction or exception of environmental taxes. The current framework improves the previous rules by offering a detailed regime upon the way Member States can carry on policies based on reduction or exemption of taxes in favour of their enterprises in order not to damage their international competitive position.

Certainly, rules under this chapter are applicable to any type of environmental taxes, but they gain a particular significance in the context of climate change policies given on the one hand that most of the Member States are currently undertaking or are about to establish fiscal environmental reforms. On the other hand, it should be considered that exemptions and reductions of CO₂ taxes are nowadays a normal practice in many Member States, since the Commission already had the occasion to accept national measures exempting CO₂ taxes.

As stated above, the current rules on the reduction or exemption of taxes are quite detailed. Basically, rules are different depending on whether there ex-

¹⁵ On this issue see, Rose M.D'Sa, *European Community Law on State Aid*, 1998, p. 58

ists an harmonisation at the Community level or not. In the context of climate change policies and considering the absence of harmonisation, the most relevant rules are those included under paragraph 51, which refers to the case when Member States introduce new taxes - or when the national tax is higher than the tax fixed at Community level. In this case, the rules on the reduction or exemption of taxes will depend on whether firms -or groups of firms- have concluded agreements in order to reach environmental objectives.

In the case of an existing voluntary agreement aimed at achieving environmental protection goals - reduction in energy consumption, reduction in emissions and any other environmental measures- the Commission will accept the state aid for a period of ten years. Here, it is remarkable that in an indirect way the Commission is going to define what it understands by a "voluntary agreement" and the conditions it imposes for consenting to the agreement. First of all, the Commission requires that the environmental agreement must be negotiated by the member state, which implicitly excludes some categories of environmental agreements known as "gentle agreement". In other words, informal agreements drawn on a voluntary basis by firms and submitted to the state without the possibility for public authorities of negotiating the clauses of the agreement remain excluded.

Furthermore, Member States have a duty to control the implementation of the agreements since they are obliged to ensure a strict monitoring of the commitments taken on by the firms or associations of firms. As a last condition for the acceptance of agreements, the Commission requires the inclusion within the terms of the agreement of juridical sanctions in case of non-accomplishment of the environmental engagements assumed by firms. With this requisite the Commission intends to avoid a common practice in many countries where environmental agreements cannot be enforced legally since the stipulations of the agreement do not provide with legal sanctions in case of infringement of the provisions of the covenant. Interestingly, the requisites named by the Commission to accept environmental agreements as the basis for reduction or exemption of taxes are in fact the suggestions included by the Environmental Directorate of the Commission in its Recommendation on Voluntary Agreements in 1994. In other words, the guidelines on state aid for environmental protection give a new legal force to the concept of environmental agreements. In this sense and according to the new framework the Commission will be able to assess not only the opportunity but also the environmental effectiveness of the agreement. This entails an ex-ante scrutinising power upon the content of the agreement for the reason that the agreement together with the legal framework which exempts or

reduces the tax must be notified by the member state to the Commission. From this point of view, it could be argued that to a certain extent the Competition Directorate within the Commission might eventually become a new actor in the field of the implementation of environmental policies. For instance, the Commission could refuse an exemption or a reduction of taxes claiming that the environmental goals included in the agreement are not ambitious enough. Put it differently, the Commission would reject the agreement because the environmental benefits derived from the covenant are inferior to the economic aid in the form of a tax reduction or exemption.

Member States can also grant tax reductions or tax exemptions for 10 years even if voluntary agreements between the Member States and the recipient firms do not exist, provided that the recipient firm after the tax reduction will still pay an amount higher than the Community minimum -in case that the reduction or exemption is based on a Community tax. When the reduction concerns a domestic tax in the absence of a Community tax, the firm should still pay a significant proportion of the national tax.

It should be pointed out that in the previous versions of the 2000 guidelines as proposed by the Commission, the conception of operating aid in the form of exemption or reduction of taxes was much more restrictive than the notion finally endorsed¹⁶. This narrow approach was actually coherent with the traditional reluctance of the Commission towards operating aid. Nevertheless, the guidelines were largely criticised by Member States, especially those aspects concerning the degressivity of aid, the limitation of the granting period and the appropriateness regarding climate change policies. From this last perspective, the criticisms on behalf of the states rested on the idea that taking into consideration the lack of CO₂ tax harmonisation and the diverse initiatives at the member state level, the legal framework provided by the guidelines would obstruct the ongoing environmental fiscal reforms at the member state level¹⁷ as well as the different national CO₂ taxes and charges. As a matter of fact, the strict conditions advanced by the Commission regarding both the degressivity and the limits on the granting period were not suitable for environmental fiscal reforms, which hinge on the necessity of continuity and the protection of the international

¹⁶ This old version can be found in www.wind-energie.de/englisch/eu_guidelines_environment.html

¹⁷ For an overview of the different energy taxation systems and environmental fiscal reforms in different Member States see, Kai Schlegelmich, *Energy Taxation in the EU and some Member States: Looking for Opportunities Ahead*, Wuppertal Institute, 1998, Germany.

competitiveness of national firms¹⁸. At length, the Commission accepted some of the objections of Member States in the last version of the guidelines. Accordingly, it can be observed that as stipulated by point 23 of the guidelines, Member States are enabled to continue with their fiscal reforms. Moreover, they are allowed to prolong the duration of the aid after the period of ten years since they "... will remain free to re-notify the measures in question to the Commission, which could adopt the same approach in its analysis while taking into consideration the positive results obtained in environmental terms".

National instruments for the reduction of greenhouse gases

One of the salient chapters under the new guidelines is represented by the title on policies and measures introduced or to be introduced by Member States to conform themselves with climate protection objectives derived from national, European and international obligations. As a proof of the relevance achieved by state aid derived from national policies on climate change, for the first time the VIII Report of on State Aid included a title addressed to the fiscal regime in favour of emission reductions of CO₂ by determining that "The category of state aid for environmental protection includes a sub-category, constituted by the regimes implemented by certain Member States so as to encourage the emission reductions of CO₂ ... and sustain the use of renewable energies" being the main reason for justifying these regimes "... the necessity for the European Union and every member state of respecting the engagements accepted in the framework of the Kyoto Agreement..."¹⁹.

If anything, this chapter is relevant because of what it does not contain, rather than because of what it does contain. Basically, the Commission being aware that measures adopted by Member States in this field might fall into the category of state aid, opted for not prejudging the content of such measures, at least for the time being. Rather, the Commission will confer a large margin of manoeuvring to Member States by promoting the adoption and implementation of climate change policies²⁰. A

closer look at the wording of the chapter illustrates the flexibility with which the Commission intends to deal with national climate policies. Primarily, despite its awareness of the future concerns derived from the use of new instruments in the context of climate change, the Commission does not seem to have the intention of interfering with the fostering process initiated by the Environmental Directorate in order to encourage Member States to adopt new market instruments for climate change protection. By the same token, while admitting that certain of the modalities adopted by Member States to comply with the objectives of the Protocol might constitute state aid the Commission will consider prematurely to lay down conditions for delimiting the features of such an aid. These statements lead to two main consequences. Firstly, even if the Commission already had the occasion to analyse some national programmes - the Danish CO₂ quota system, for instance - and considering further its remark about the future tensions between the regime of state aid and the new economic instruments for climate protection, the Commission opts for allowing Member States to behave as laboratories of policies, given both the lack of legislation at the EU level, as well as the requirement of innovation concerning policies on climate change²¹. Moreover, the adopted framework remains silent - in contrast with the previous versions of the guidelines - regarding the modalities and steps according to which Member States should design their market instruments to face climate change²². Undoubtedly, the amendment incorporated into the definitive guidelines text was the result of the reticences on behalf of Member States toward the Commission's proposal imposing a single European model of market instruments.

In conclusion, the new guidelines on state aid for environmental protection acknowledge the relevance of policies aimed at combating climate change. For such a purpose, many of the novelties introduced by the new framework rest on the necessity of providing Member States with the legal legitimacy for the experimentation of new economic and market instruments. Additionally, the guidelines represent an improvement regarding the internalisation of costs - especially in the category of investment aid - and contribute to the strength of the principle of environmental integration within state aid and competition policies in general.

¹⁸ For a view of the position of the German government regarding state aid for environmental purposes, see, www.wind-energie.de/englisch/c_guideline_env.htm.

¹⁹ COM (2000) 205 final, 11-4-2000.

²⁰ Also, one should observe that climate policies are intimately linked to energy policies and these latter ones remain as Member States competence to a large extent. In this respect it should be observed that as stated in the first Declaration of the Governmental Conference in 1985 on art. 130R - currently art. 174. energy policies of Member States will have a priority on environmental policies of the Commission. Declaration 9. "The Conference confirm that the action of the Community related to the environment will not interfere with national policies of exploitation of energetic resources".

²¹ Despite the leader role assumed by the EU as an actor in the context of climate change policies, all documents issued by the DGXVI stress the importance of the subsidiarity principle and the need to encourage Member States to adopt innovative tools in the framework of climate change policies. See, for instance, COM (1999) 230, 19 May 1999.

²² In the old guidelines the Commission was quite explicit, for instance, upon the way in which Member States should distribute market permits within a system of tradable permits.

The Environmental Interest of Private Injunction Proceedings against the Owner of Cross-Border Air Polluting Plants before his National Court

Janna Lehmann

Several legal approaches can be taken in order to protect the earth against air pollution. Among these are international, regional and bilateral agreements and declarations. These measures, that transcend the national sphere, should undoubtedly be considered the most appropriate ones since air pollution itself is a problem that, in general, transcends national borders. Although not necessarily a global problem, air pollution most often concerns several countries in the same region. This is particularly true in Western Europe, as it consists of many relatively small countries that are densely populated and highly industrialised. In spite of all this, the approach of fighting cross-border pollution through international agreements has so far not proved to be very successful. Few agreements actually entered into force, others have not been fully applied as such. Also the "new instruments and mechanisms", proposed in the Kyoto Protocol on climate change, and which are measures of economic rather than a legal nature, such as e.g. emission trade and clean development mechanisms (transfer of technology), are for the moment only in the very early stages of their development.

In general, most countries therefore continue to use "classical measures" – i.e. general regulatory measures – in order to protect the atmosphere. This means that national legislation for industrial plants is applied on a local level, leaving the local authorities the final say on questions of interpretation and intervention. These forms of national legislation are normally implemented through a licensing system with matching administrative regulations and local jurisdictions verifying the validity of these "polluting permits". Thus, these classical licences play a crucial role in the current system of protecting the atmosphere. In spite of the considerable effects the granting of these licences can have on the neighbouring countries, these states do not play a large role in their enforcement.

The purpose of this article is to raise awareness of the *problems* and *possible merits* connected to injunction proceeding brought against cross-border polluting plants by foreign adjoining owners in

order to protect the atmosphere. The article does not, however, deal with the legal difficulties of cross-border private injunctions sought by cross-border neighbours in an exhaustive way, but will focus instead on analysing the possibilities available to a foreign judge in reviewing the validity of a foreign operating licence.

Firstly, I will analyse the main problems connected to injunction proceedings brought by individuals from neighbouring countries in their national courts. (I) Two main questions have to be addressed in the proceedings: which law will be applied to decide the case and how will the judge handle the operating licence? Secondly, I will discuss the possible merits of recognising the foreign licence for the purposes of environmental protection. (II)

I. The Problems related to injunction proceedings initiated by individuals of the neighbouring state in their national courts

A. The existing possibilities to act and their difficulties

1. When to act and through which procedures?

a) Different options are available:

A private individual can act against a licence in different ways and at different stages. Firstly, there is the possibility of trying to intervene in the licensing procedure. Here the question arises of whether the foreign national can intervene on the same basis as the adjoining owners in the country granting the licence. If so this would mean that the intervening party enjoys at least the right to receive information¹ or even the right to participate in a "public investigation", as it is customary in e.g. France, where the general public is consulted in the course of the licensing procedure². These rights should thus be the same for the foreign neighbours, above all the EU, but all too often they are not, or, at least remain entirely theoretical. The problems related to such an intervention will not be elaborated further upon in this context, even though the exact rights of

Janna Lehmann, Research Associate at the Centre d'Etude et de Recherche sur le Droit de l'Environnement, de l'Aménagement et de l'Urbanisme (CERDEAU), Paris I-Sorbonne, currently a Ph.D. candidate at the University of Aix-Marseille III.

¹ For EC countries, these conditions have been created by the 1985 Directive on environmental impact assessment.

² Enquête public, décret n°77-1141 du 12 octobre 1977, JO 13 octobre, M.Prieur; Droit de l'environnement, n°97.

foreign adjoining owners intervening in licence procedures are not fully clear in every country.³

Another possibility for the foreign national is to act against a licence that has already been approved. Several options exist: judicial proceedings can be brought in one's national courts, in the courts of the country granting the licence or in the courts of a third state. The latter possibility is of a more theoretical nature and has little relevance in practice. The second possibility does not differ from the situation where an adjoining owner in the licensing state brings proceedings, in the sense that there will be no review by a *foreign* judge of the licence.⁴ Therefore, this option will not be addressed in any detail. Instead, I will concentrate on proceedings brought before one's national courts. This is indeed the option most often used by the parties concerned⁵.

b) Basic Procedural Rules

Within the EU, a private person is authorised to sue in his national court on the basis of Art. 5 of the Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters⁶. According to widespread opinion, Art. 5, sub 3, includes also injunction proceedings brought by owners and holders of properties.⁷ This possibility has, however, so far not been confirmed by the Court of Justice of the European Communities.⁸ In respect of the EFTA countries, the question has been resolved by the Lugano Convention⁹. Some bilateral conventions addressing this question also exist¹⁰. For third states, the relevant international civil procedure rules regulate such a possibility. According to the Brussels Convention and some national legislation, this implies that injunction proceedings are based on a tort claim.¹¹ The possibility for a foreign national of bringing proceedings before his own court against a plant in the neighbouring country will thus necessarily constitute a

civil action¹² against the owner of the plant, based on a claim for damages and on an injunction decree. In terms of environmental protection, only the prohibitory action is of any interest in this context. In Germany e.g., the question is resolved by the new law of "Gesetz für außervertragliche Schuldverhältnisse und für Sachen" of 1 June 1999 (Law on extra-contractual liability and liability for commodities). Article 44 EGBGB provides that claims for injunctions and damages are expressly linked to liability on tort.¹³ In other countries this qualification raises some problems, as will be discussed below.

2. Qualification and applied law

The answer to this question of qualification and of the applicable law differs from country to country and can even differ from judge to judge. It depends on a state's private international law, or "conflict of laws" system. Two questions need to be distinguished: the problem of qualification and the problem of deciding the applicable law on the basis of the given qualification.

a) How is the claim to be qualified¹⁴? Are the injunction proceedings based on a tort claim or do they depend on another concept? In most European countries - e.g., in Germany¹⁵, in Switzerland¹⁶, Liechtenstein¹⁷, Italy¹⁸ and France¹⁹ - the claim will be qualified as a tort claim. In Austria, the qualification is not as straightforward, as the claim can be based on the law of tort or the law of property.²⁰ Below we will discuss to which solution this qualification will lead.

b) The qualification determines which law will be applicable. If one supposes that the adequate qualification is that of tort law, the *lex delicti commissi* will be applicable in most countries. Both the place of the tortious activity²¹ and the place of effect²² are considered to be the location of the tort.²³ In our case, the place of the damages does not coincide

³ See for this subject among others: Nassr-Esfahani, pp.84f; M. Prieur, *Droit de l'environnement*, Dalloz, 2001, 4^e Ed., pp.67-129.

⁴ This case is also of interest as there is the possibility for the cross-border adjoining owner to refuse the validity of the licence as a justifying objection for the plant owner. M.Prieur, "La reconnaissance des autorisations étrangères"; p.215. Nassr-Esfahani, p.22. However, this case is practical for damages, but it will not be applicable in injunction proceedings.

⁵ Nassr-Esfahani, pp.23f.

⁶ 27. September 1969, O.J. 1990, C, 189/2.

⁷ C.Köhler, *Zivilrechtliche Schadensersatz- und Unterlassungsklagen - Gerichtliche Zuständigkeit und Verfahrensfragen*, p.160.

⁸ M. Wandt, *VerR*, 1998, p.529.

⁹ Lugano Convention of 16 September on jurisdiction and the enforcement of judgements, O.J., L, 319/9.

¹⁰ E.g. the bilateral convention between France and Switzerland, 15. Juin 1869; see Bischoff, *Zivilrechtliche Schadens- und Unterlassungsansprüche - Gerichtliche Zuständigkeit*, p.173 (in french).

¹¹ Nassr-Esfahani, p.30.

¹² Proceedings before administrative courts are excluded, as administrative jurisdictions have no competence to judge facts occurring outside their territorial jurisdiction.

¹³ T. Pfeiffer, p.265.

¹⁴ Concerning the discussion of which law should be applied in order to determine the qualification, see inter alia Loussouarn/Bourel, *Droit International Privé*, 5^e éd. p.195ff

¹⁵ see above.

¹⁶ Switzerland is the only country with a special conflict regulation on environmental liability, Art. 138 IPRG; M. Wandt, *VerR*, 1998, p.530.

¹⁷ Art. 52 I IPL (1997); M. Wandt, *VerR*, 1998, p.531.

¹⁸ Italy codified its private international law in 1995. Art. 62 provides for a general conflict regulation in respect of tortious acts.

¹⁹ Loussouarn/Bourel, *Droit International Privé*, 5^e éd. p.455ff.

²⁰ M. Wandt, *VerR*, 1998, p.531.

²¹ The so-called *Handlungsort*

²² *Erfolgort* (place of the damaging impact)

²³ R.Lummert, *NuR*, 1982, p.241; G.Betlem, *Civil liability for transfrontier pollution*, p.93.

with the place where the tortfeasor acted²⁴, but the places are situated in two different countries. Which law should be applicable, the *lex loci executionis*²⁵ or the *lex loci actus*²⁶? Once more, this question is answered in different ways in different countries depending on the national conflict of laws system.

In France, the law of tort has not been codified. The judiciary is in principle in favour of applying the *lex loci delicti*²⁷, the judge thus applying the law of the country in which the plant is situated.²⁸ French doctrinal opinion, however, defends the principle of optionality²⁹. Some defend the theory of choice³⁰. In Germany, the new "Gesetz für außervertägliche Schuldverhältnisse und für Sachen" ³¹ is no longer based on the principle of ubiquity and instead leaves the choice of the applicable law to the plaintiff.³² Italian³³ and Swiss³⁴ law equally leave this choice to the plaintiff, whereas Austria, in the case of a tortious qualification, opts for the *lex loci delicti* and in the case of law of property qualification for the *lex rei sitae*³⁵. Liechtenstein³⁶ generally chooses the *lex loci actus*, with a possible exception for the case of a plaintiff who has a closer connection to the *lex loci executionis*.

As can be seen from this small overview of solutions, the choice of the applicable law is most often left to the plaintiff, which is quite advantageous. A further question needs to be addressed in this context. Indeed, the most crucial question is the one concerning the actual existence of the licence of the plant. In fact, in several respects the case of a foreign adjoining owner has to be clearly distinguished from the case of an adjoining owner within the same state. Firstly, the foreign owner probably did

not enjoy the same possibilities of intervening in the licensing procedure. This clearly hampers the possibility of balancing the contradictory rights in an equitable way. Secondly, the licence does not have the same status in the neighbouring country as in the country where the installation is situated. This brings us to the essential issue: how will a foreign judge consider the licence?

B. Problems related to the recognition of foreign licences

The granting of a licence is an act of a local authority based on a process governed by public law, and thus constitutes a sovereign act within the national territory. What status will it therefore have in another state and in what way will it be considered by the foreign judge? Should a foreign judge respect or recognise³⁷ it, or not?

1. Characterisation of the licence:

To start with, the character of operating licences is not the same in every country, not even within the EU. The cases of Germany and France illustrate the difference:

a) In France

In France, a licence is granted while reserving the rights of third persons³⁸. This means, that the licence does not provide a preclusion objection for the owner of the plant, as a French judge can award damages in spite of the existing licence. The licence has no effect on third private persons as it merely regulates the relation between the plant owner and the authorities. This is one of the consequences of the clear-cut distinction between the public and civil jurisdictions. Another consequence of this, however, is that the French civil judge does not accept injunction proceedings. Therefore injunction proceedings constitute a real preclusion objection.³⁹

b) In Germany

Once a licence has been granted and an installation has been approved, the plant owner enjoys the protection add to the validity of his licence⁴⁰. The right of the adjoining owner to intervene in the licensing

²⁴ Case of offence committed over a distance ("Distanzdelikt).

²⁵ Law of the place where the prejudice occurred.

²⁶ Law of the place, where the tortious activity has occurred.

²⁷ The law of the place where the tort has been committed.

²⁸ Loussouarn/Bourel, *Droit International Privé*, 5^e éd. p.187; Tribunal Civil de Sarraquemes, 30.10.1957.

²⁹ The tort should exclusively be localised in function of the elements, which are most characteristic of the act. For the majority of cases, this will be the place where the pollution is produced. A. Huet, *Zivilrechtliche Schadensersatz- und Unterlassungsklagen* (in french), p.193f.

³⁰ Système „cumul“: Two options exist: firstly, the plaintiff has the choice or, secondly, the licity will be judged on the law of the place where the pollution was realized and only for the remainder, can the plaintiff choose the law (the last one is the majority opinion).

³¹ See supra, IA1b.

³² § 40 EGBGB.

³³ The Italian IPRG law of 31 May 1995 does not specially regulate for the liability in environmental law. Therefore Art. 62, on general conflict law concerning torts, provides the possibility of choosing between the *lex loci delicti* and the *lex fori*. A renvoi is excluded (Art. 13 II c IPRG).

³⁴ Switzerland has a distinct system of conflict of laws for environmental liability law. A renvoi is excluded: See Wandt, *VerR*, pp.530ff.

³⁵ Theory according to which the law of the place where the property is situated is competent.

³⁶ See M. Wandt, *VerR*, 1998, p.531.

³⁷ The use of the term "recognition", does not imply any jurisdictional appreciation in this context, as the applicable law should be designated without prejudice.

³⁸ Art. 8 de la Loi de 1976 sur les installations classées, Art. 6 de la Loi de 1964 sur la pollution des eaux, Art. 11 du décret du 20 septembre 1977 sur les carrières.

³⁹ Tribunal des conflits, Décision du 23 mai 1927; Cass Civ., 5 nov 1964; M. Prieur, „La reconnaissance des autorisations étrangères“, p.214.

⁴⁰ The licence is often also protected by the doctrine of rights of individuals: in Germany, e.g. this is assured through public law, in the Netherlands and in Austria by regulations of private law in a large sense. In France, the clear-cut separation between the competence of public and civil jurisdictions blocks civil injunction proceedings in the case of a licence no longer being subject appeal proceedings. We will discuss this question below.

procedure entails the corresponding obligation to tolerate the pollution once the licence has been approved. Only in exceptional circumstances can a licence be revoked by the authorities. In Germany, therefore, the licence has an effect on third private parties and constitutes a preclusion objection. All injunction proceedings against the plant owner will be met by the objection of the existence of the operating licence as a preclusion objection. In this situation the rights of the owner of the plant – who should be able to rely on the licence – and the rights of the adjoining owner – i.e. his property rights – are in clear contradiction with each other.⁴¹ The civil judge, however, can order the installation of an additional protection device. *In somma*, the German system is more favourable than the French with regard to injunction proceedings.

2) Handling the licence.

Theoretically, the judge has several options in how to consider the foreign operating licence. We will briefly analyse some of these.

a) The judge can totally ignore the licence

This first option, the most radical one, is that of total rejection of every form of recognition of the licence. As the licence is a sovereign act based on national public law, its legal value stops at the national border. This conclusion can be drawn from the territoriality principle as recognised in public international law. It has already on several occasions served as an argument for national judges to refuse the recognition of foreign licences⁴². The application of the territoriality principle in this context is crucial and has indeed been heavily criticised.

b) The judge can consider the licence as a "factum"⁴³.

According to this theory, the judge considers the licence not as a "point of law" but as a simple fact, comparable to every other factual circumstance of the case. Two conditions have to be fulfilled. Firstly, the provision of substantive law⁴⁴ concerned has to be applicable to the foreign state of facts⁴⁵. Secondly, the statutory definition of the offence⁴⁶ has to be comparable to the one in the country of the forum. This implies that the foreign licence

should be comparable to the licences in the forum state.

c) Substitution

Some authors support another thesis, close to that of the factum – the theory of substitution⁴⁷. Here the judge applies a norm of his own legal system. This norm contains a statutory definition that is related to the system of the forum. However, the elements of the statutory definition have been developed under a foreign norm system. The question is therefore whether the judge can substitute the elements of a statutory definition given in the norm of the forum by the corresponding legal definition of the foreign country. In our specific case, this means substituting the statutory elements of the licence in the corresponding domestic norm by those of the licence in the foreign country.⁴⁸

d) Special connecting factor⁴⁹

According to another theory, the evaluation of the licence has to be considered as a special connecting factor. The unlawfulness – solely this question can be addressed – is to be determined following the place of the act, therefore the country granting the licence.

e) Application of the law of the neighbouring country

Another option is that of applying foreign law to all questions concerning the material process. This is, as we have seen, possible in the countries whose conflict of laws system provides for this option.

The application of foreign law can, however, differ from one country to the other. In France a judge applies foreign law as an "element of fact"⁵⁰, which entails the refusal by the *Cour de cassation* to re-view the interpretation of the foreign law given by the lower court⁵¹. Neither can the judge apply the foreign law automatically⁵². The Italian system applies the foreign law based on the theories of the reception of the foreign law⁵³, formally⁵⁴ or materially⁵⁵. The foreign law can also be applied in its

⁴¹ Nassr-Esfahani, pp.18f.

⁴² For the theory of the principle of territoriality see among others: Nassr-Esfahani, pp.26f and pp.52f; K.Siehr, p.387; M.Wandt, VerR, 1998, p.533.

⁴³ Theory described by Ehrenzweig as the "Datumtheorie", see T.Pfeiffer, pp.274f.

⁴⁴ Sachnorm.

⁴⁵ Auslandssachverhalt.

⁴⁶ Tatbestand.

⁴⁷ See among others: T. Pfeiffer, pp.276.

⁴⁸ T. Pfeiffer, p.276.

⁴⁹ See among others: G. Hager, RabelsZ, 1989, pp.330, "Sonderanknüpfung".

⁵⁰ Théorie de l'application de la loi étrangère comme élément de fait: Lous-souarn/Bourel, Droit International Privé, n° 239.

⁵¹ The Cour de Cassation only decides the interpretation of the "law" not the facts.

⁵² See supra footnote 39.

⁵³ Teoria della recezione della legge straniera.

⁵⁴ The foreign law is formally received in the Italian law system. This means that the foreign law is interpreted on the basis of the Italian legal system.

⁵⁵ The foreign law is integrated in the Italian law system materially. This means that the foreign law is interpreted on the basis of the foreign law system. According to the new codification, Art. 55 della legge 218/95 pro-

character of vested rights. This Anglo-American theory of vested rights considers that the foreigner who is sued in court has received vested rights on the basis of the foreign law which should be protected by applying them⁵⁶. The judge can also apply the foreign law as the foreign judge would do, in considering the whole law system of the foreign law (system) concerning the applied foreign law in question.⁵⁷

II. Possible merits of recognising foreign licences in injunction proceedings for the purpose of environmental protection

As we saw above, the moment, the judge is faced with a claim brought against a private person in a foreign country – here the owner of the plant – the problem of deciding the applicable law presents itself. This question can only be decided after having decided on the qualification of the claim. In general, the plaintiff is seeking the award of an injunction decree or at least the indication of an additional protection device. A claim for damages will moreover be presented in parallel to the primary claim. The qualification of these claims – either as tort law or as property law – will decide the applicable law.⁵⁸

We will briefly consider the results of some of the theoretical possibilities and their respective merits (A) and will then defend some propositions (B).

vides that the foreign law should be interpreted in the light of its proper law system; Novelli, *Diritto Internazionale Privato e Processuale*, pp.35f.

⁵⁶ Kropholler, *Internationales Privatrecht*, p.141; Loussouarn/Bourel, *Droit International Privé*, n°239.

⁵⁷ Kropholler, *Internationales Privatrecht*, pp.207f.

⁵⁸ It must be specified, that in some countries, among which France, the judge does not automatically search for the qualification. French jurisdictions e.g. still refuse a compulsory application of foreign law (see the judgement "Bisbal" of the Cour de Cassation, 12 mai 1959, *Pas d'application d'office de la loi étrangère*.) This is the logical result of the French theory of considering the foreign law as a *factum*. Consequently, the fact, that a foreign law may be competent, must be invoked by one of the parties and the burden of proof of the existence of the foreign law falls to the parties invoking the fact during the proceedings. If none of the parties invoke the possible competence of a foreign law, the French judge will apply French law *ex officio* without considering the question of qualification. The result will be negative for the plaintiff, since a civil action on injunction proceedings or on a claim for the indication of additional measures in respect of a plant that already enjoys the protection of the right of a licence, is not admissible in France because of the strict distinction between private and public jurisdictions. However, a recent evolution in case law can be observed in that a judge does have the option of applying foreign law, even without a party invoking it; Cass, 26.5.99; (for the evolution of case law: Loussouarn/Bourel, *DIP*, n°241). Totally different in Italy, where the judge must apply *ex officio* the foreign law; Novelli, *Diritto Internazionale Privato e Processuale*, p.36.

A. Theoretical outcomes of the different handling of the licences by the judge

1. Application of the *lex fori* combined with a non-recognition of the licence:

If the judge applies his national law and totally ignores the existence of the operating licence⁵⁹, he will normally grant the claim. The question, whether the licence can function as a real preclusion in the proceedings, is not even raised as the licence does not even exist, as for him there is no licence anyway. This solution seems quite favourable to the environment, but has no relevance in practice. Since such a judgement will undoubtedly be contrary to the "ordre public" of the licensing country – at least as far as injunction proceedings are concerned – it will not be enforceable in that country.⁶⁰ Unfortunately, this is frequently the solution adopted by countries applying the principle of territoriality in a strict way in respect of foreign licences⁶¹. This outcome may be interesting for claims for damages, but not for injunction proceedings.

2. Application of the *lex fori* combined with a partial recognition of the licence

This solution can be of interest if the judge does not consider the licence as a simple fact, but as a point of law. If, according to his domestic law, a licence is a preclusion objection and if he considers the licence as a factual element, the judge will not verify its legality but will only note its existence as a given fact and reject the claim. If, on the contrary, the judge considers the licence as a point of law, and even if the licence is a preclusion objection in his domestic law, he will proceed to an examination of the legality of the licence.

The judge has two ways of reviewing the validity of the licence: either based on the law of the licensing country⁶² or based on his domestic law concerning licences similar to those of the neighbouring country⁶³. He will opt for the first solution in cases where the licensing systems of the two countries are so divergent that he cannot find a corresponding domestic norm. The second solution can be considered if the two licensing systems are similar. Both solutions have practical relevance, as in both cases the legality of the licence will be reviewed. Obviously, in cases where the licensing procedures are similar, but stricter in the country of the forum, the application of domestic law is beneficial to the legal

⁵⁹ See *infra*, IA3a.

⁶⁰ See among others: Kropholler, *Internationales Privatrecht*, p.622.

⁶¹ See Nassr-Esfahani, pp.52f.

⁶² See *infra*, IA3c.

⁶³ See *infra* IA3b.

means of environmental protection. The same holds true for cases where the licensing country, contrary to the country of the forum, allows for injunction proceedings. Even if there may be a certain risk of unenforceability, this is less problematic than in respect of the first option, where the judge totally ignores the licence.

3.) *Application of the foreign law*

The result will depend on the way in which the judge applies the applicable foreign law. For there to be any merit in judicial control of environmental protection, the foreign law should not be considered as a mere "fact", as in France, but should at least be received in a formal or material way, or even applied in its entirety. The judicial scrutiny by the foreign judge is not likely to extend beyond what the judge of the licensing country would have done, but it is nonetheless a supplementary control by a judge with a different background. The judge should ask which jurisdiction in the foreign country would be competent and adhere to this practice⁶⁴. In some ways, the foreign judge can even contribute to the progressive development of the applicable foreign law, e.g. in cases where it has a deficiency or is clearly out of date.⁶⁵

A judgement of this kind will moreover have the biggest chances of being enforced.

B.) *Propositions concerning the recognising (and enforcement) of operating licences*

1. *Recognition and enforcement of the injunction decree*

The question to be considered firstly, is whether the foreign judgement against the industrial plant holder / owner will have any legal effect outside the court granting the judgement and whether it can be enforced abroad.

In principle, all substantive judicial decisions can be enforced⁶⁶. Several conventions provide for the recognition and enforcement of foreign judgements. The most important of these for the West-European region is the Brussels Convention on jurisdiction and the enforcement in civil and commercial matters, already mentioned. The principles underlying this convention have been extended to the relationship between the EU Member States and the EFTA

Member States by the Lugano Convention, also already mentioned.

a) *Recognition*

Recognition is a necessary step towards enforcement. There may be recognition without enforcement, but no enforcement without recognition. Art. 26 of the Brussels Convention provides for automatic recognition of judgements, which means that special, additional procedures are not required for the enforcement of a foreign judgement. Indeed, there is a sort of "reputable presumption in favour of recognition"⁶⁷.

b) *Enforcement*

According to various national systems of civil procedure law, a special enforcement procedure is required⁶⁸. The Brussels Convention provides for simplified *ex parte* enforcement procedures that are largely identical in all Contracting States. The emphasis with regard to litigation is on the country where the initial proceedings take place, instead of the recognition and enforcement stage.⁶⁹ The court enforcing the judgement is prohibited from reviewing the jurisdiction of the court that passed the initial judgement⁷⁰.

c) *Ordre public*

In principle, the refusal of the recognition of the foreign judgement is only admitted on limited, special grounds. In addition to the question of whether the rights of the defence have been respected and two other additional ones in the Lugano Convention, the refusal can only be based on public policy⁷¹. This "ordre public" escape clause, as foreseen in Art. 27 and in several national systems of civil procedure law⁷², is the only real obstacle in our situation. According to this escape clause, recognition can be refused "if such recognition is contrary to the public policy in the state in which recognition is sought (...)"

2. *Enforceability of injunction decrees and court orders for the installation of additional protective devices against cross-bordered air polluting plants*

In principle, in respect of recognition and enforcement, judgements granting an injunction to refrain from the emission of air polluting substances do not differ from judgements on damages.⁷³ However,

⁶⁴ In the case of French law, e.g., the judge of neighbouring country should consider the fact that the judge in civil cases refuses injunction proceedings. But he can nevertheless consider applying the same rules as the administrative French judge would do in the case of "recours en excess de pouvoir".

⁶⁵ Kropholler, Internationales Privatrecht, p.208.

⁶⁶ Kropholler, Internationales Privatrecht, p.617.

⁶⁷ G.Betlem, Civil liability for transfrontier pollution, p.263.

⁶⁸ E.g. in Germany § 722 ZPO ("Vollstreckungsurteil") or in France, Art. 509 N.C.p.c.).

⁶⁹ G.Betlem, Civil liability for transfrontier pollution, p.264.

⁷⁰ Prohibition of the révision au fond, Art. 28f Brussels Convention.

⁷¹ Art. 27f Brussels Convention, Art. 34 GVO.

⁷² E.g.: In Germany, § 328 I Nr 4 ZPO; In Italy, Art. 16 della Legge 218/95 – "ordine pubblico internazionale".

⁷³ G.Betlem, Civil liability for transfrontier pollution, p.261 and p.282.

one can argue that injunction proceedings may have a wider scope than damages⁷⁴. In fact, recognition can be refused, if the judgement forbids to the defendant *an act* which has been permitted by the authority of the enforcement country⁷⁵.

a) Thus, if the judgement of the neighbouring State totally ignores the existence of the licence granted by the enforcement State, it is out of question that the neighbouring State will refuse the recognition by invoking the clause of *ordre public* in a justified manner. In my view, in injunction proceedings at least a partial recognition of the licence will be necessary if enforcement is to have any practical effect. Indeed, only if the neighbouring country takes into account the foreign licence, may it be obliged to enforce the injunction or the judgement ordering the installation of an additional protective device.

If, therefore, the judge has taken into account the review of the legality of the foreign licence in his judgement, applying either the *lex fori* or the foreign law, will the licensing country hence be obliged to enforce the judgement? No general answer can be given to this question, as it will depend on the circumstances of each individual case, with relevant factors such as the countries involved and the applicable law to take into account. However, some arguments in favour of the enforceability can be put forward.

b) Recognition can only be refused if enforcing the judgement would constitute a violation of an *essential* principle of the national legal system.⁷⁶ As long as the licence has been reviewed, there seems to be no ground to justify such violation. If, however, the licence has been reviewed through application of the *lex fori* (which is in our case also the *lex executionis*), the recognition would be justified by two main reasons: firstly, the licence has been granted on the basis of the licensing procedure of the country in which the plant is situated, but the polluting effects of this plant (and therefore of the licence) transcend the border and affect the judgement-granting-country. The individuals living abroad may not have enjoyed the possibilities of intervening in the licensing procedure in the same way as the domestic adjoining owners have.⁷⁷ Therefore, their obligation to put up with the pollution is less

significant. Secondly, the individuals abroad cannot be expected to tolerate industrial pollution, which would be forbidden in their own country. Therefore, if a country granted a licence, which affects the State on the other side of the border, it cannot refuse the (indirect) review of the licence by this neighbouring state in injunction proceedings. The licence should also take into account the legitimate interests of the neighbouring country, if this country is affected by the pollution.

c) Also in the light of the existing and planned harmonisation of the licensing procedures and the common demands for effective environmental protection, above all within the EU, a judgement of one of the EU Member States in respect of a licence of another EU Member State cannot be rejected on grounds of *ordre public*. Moreover, national rules must be interpreted in the light of the general principles of the Community law.

d) Therefore, the statement can be made, that there is no justification to refuse the enforcement of an injunction decree on grounds of public policy, at least in cases where the judgement has reviewed the existence of the licence. One may even argue that the application of the escape clause of *ordre public* in the case of environmental liability should be refused categorically. In fact, one author⁷⁸ put forward, that a (in this case Dutch) judgement in the field of environmental liability will be recognised and enforced in all Member States of the Community under the Brussels Convention. The author argues that: "The view is taken that there is no place for application of this escape clause in the cases of international tort, such as liability for transfrontier pollution: Recourse to public policy by the enforcement-court would, in my view, amount to abuse of this safety-valve in the types of cases under consideration; thus, victims of pollution do not have to grant any concessions as to jurisdiction in order to prevent non-enforcement. (...) In principle, the free movement of judgements within the Community is guaranteed by the Brussels Convention."⁷⁹

Unfortunately, the EC Commission's White Paper on environmental liability⁸⁰ does not consider any question of private international law such as the determination of the competent jurisdiction or the applicable law.⁸¹

⁷⁴ Which justify the French civil jurisdiction position to accord damages, but to refuse injunction proceedings; for the facility of damage claims in comparison to injunction proceedings, K.Siehr, *RabelsZ*, 1981, p.386.

⁷⁵ M. Wandt, *VerR*, 1998, p.530.

⁷⁶ Kropholler, *Internationales Privatrecht*, p.622.

⁷⁷ See, e.g. the case of "Airport Salzburg", where German individuals sue in court on injunction proceedings. The German adjoining owners didn't enjoy the same rights to participate in the licensing procedure. See K.Siehr, *RabelsZ*, 1981, pp.36f. Nassr-Esfahani, pp.36f.

⁷⁸ G.Betlem, *Civil liability for transfrontier pollution*, pp.282f.

⁷⁹ G.Betlem, *Civil liability for transfrontier pollution*, p.284.

⁸⁰ COM (2000) 66 final, 9 February 2000; <http://www.Europa.eu.int/comm/environment/liability/index.htm>.

⁸¹ G. Betlem, "The EC Commission's White Paper on Environmental Liability: *Towards an EU-Wide Regime*", *Elni* 2/2000, p.30.

References

In general: "Rechtsfragen grenzüberschreitender Umweltbelastungen/Les problèmes juridiques posés par les pollutions transfrontières", Fachtagung/Colloque Saarbrücken, 13.-15. Mai 1982, Gesellschaft für Umweltrecht, Erich Schmidt Verlag, Hrsg. M. Bothe, M. Prieur, G. Ress, 1984, 316 p.

G. Betlem, "Civil Liability for Transfrontier Pollution", Graham&Trotman/Martinus Nijhoff, 1993, 627 p.

G. Betlem, "The EC Commission's White Paper on Environmental Liability: Towards an EU-Wide Regime", *Elni*, 2/2000, pp.28-30

J.M. Bischoff, "Zivilrechtliche Schadensersatz- und Unterlassungsklagen – Gerichtliche Zuständigkeit und Verfahrensfragen", in: Rechtsfragen grenzüberschreitender Umweltbelastungen/Les problèmes juridiques posés par les pollutions transfrontières, pp.173-174 8, op. cit.

G. Hager, "Zur Berücksichtigung öffentlich-rechtlicher Genehmigungen bei Streitigkeiten wegen grenzüberschreitender Immissionen", *RabelsZ*, 53. Jahrgang 1989, 2, pp.293– 319.

A. Huet, "Zivilrechtliche Schadensersatz- und Unterlassungsklagen – Anwendbares Recht (Frankreich)" (in French), in: Rechtsfragen grenzüberschreitender Umweltbelastungen/Les problèmes juridiques posés par les pollutions transfrontières, pp.193-197.

C. Kohler, "Zivilrechtliche Schadensersatz- und Unterlassungsklagen – Gerichtliche Zuständigkeit und Verfahrensfragen", in: Rechtsfragen grenzüberschreitender Umweltbelastungen/Les problèmes juridiques posés par les pollutions transfrontières, pp.159– 171.

J. Kropholler, *Internationales Privatrecht*, 4. Aufl., Mohr Siebeck, 2001, 692 p.

Y. Loussouarn, P. Bourel, *Droit international privé*, 5e Ed., Dalloz, 1996, 754 p.

R. Lummert, "Zur Frage des anwendbaren Rechts bei zivilrechtlichen Schadensersatz- und Unterlassungsklagen wegen grenzüberschreitender Umweltbeeinträchtigung", *Natur und Recht*, 1982, pp.241- 246.

S. Nassr-Esfahani, "Grenzüberschreitender Bestandschutz für unanfechtbar genehmigte Anlagen", *Schriften zum Umweltrecht*, Bd 21, 1991, 199 p.

G. Novelli, *Diritto internazionale Privato e processuale*, IV Ed. Serie Manuali Giuridici, n. 45/1, Esselibri, 1995, 220 p.

T. Pfeiffer, "Öffentlich-rechtliche Anlageneinigungen und deutsches Internationales Privatrecht", in : *Jahrbuch des Umwelt- und Technikrecht*, Erich Schmidt Verlag, 2000, pp.263– 314.

M. Prieur, *Droit de l'environnement*, 4e Ed., Dalloz, 2001, 758p.

M. Prieur, "La reconnaissance des autorisations étrangères", in: Rechtsfragen grenzüberschreitender Umweltbelastungen/Les problèmes juridiques posés par les pollutions transfrontières, pp.213- 217.

K.Siehr, "Grenzüberschreitender Umweltschutz", *RabelsZ*, 1981, pp.377- 398.

M. Wandt, "Deliktstatus und Internationales Umwelthaftungsrecht", *Versicherungsrecht*, 1.Mai 1998, pp.529-572.

European Commissions Proposal for a Directive relating to Environmental Noise - A First Step towards Controlling the Problem

Dirk Teßmer

1 Introduction

The process applied in building the European Community, namely the merger of European countries and the increased free movement of persons and goods, goes hand-in-hand with an extended use of existing transport infrastructure. Roads and railways as with air routes have higher (and increasing) traffic levels than ever before. The world-wide increase in air traffic comes with demands for airport expansions. As a result of this more and more people are suffering from the side effects of increased traffic, especially those problems related to environmental noise. According to the Commission the EU population that is disturbed by environmental noise is about 100 million. At least 20 million of these are seriously disturbed in their sleep and may suffer from various noise-induced illnesses.

Recognising a deficit within EU legislation in this field, the Commission presented a proposal for a Directive relating to the assessment and management of environmental noise¹. Present EU Directives only deal with the limitation of noise emissions at the source and cover for example road

vehicles, aircraft and various types of equipment². With this further proposal the Commission is aiming to control not only the noise produced by certain groups of noise-sources (the emissions) but also the situation of existing immissions. The objective of the proposal is, however, not to prohibit or penalise the exceeding of certain noise limits. In fact the proposal does not even seek to set common noise limits. The objective of the proposed Directive is instead to provide European-wide standardised noise indicators and assessment methods. These will then be utilised by the Member-States to measure and document the noise exposure from various sources and furthermore to inform the EU-administration and the public about the current level of noise exposure. The Commission believes that, once Member-States have published the gathered information, necessary national limits for pollutants and other action to reduce noise immission will be established. The knowledge and awareness of existing noise exposure and its comparison within the EU will therefore be the catalyst for further improvements.

Dirk Teßmer, lawyer, Frankfurt a.M., Germany.

¹ COM(2000) 468 final, 2000/0194(COD).

² For example: Motor vehicles and their exhaust systems (70/157/EEC, 73/350/EEC, 77/212/EEC, 81/334/EEC, 84/372/EEC, 84/424/EEC, 89/491/EEC, 92/97/EEC, 96/20/EC, 1999/101/EC), Aircraft (80/51/EEC, 89/629/EEC, 92/14/EEC), Compressors, Generators a.s.o. (84/533-538/EEC).

Although the proposal has not as yet been passed by parliament, it should be examined and discussed in public to provide useful feedback on whether the proposed provisions will ensure an effective approach to the problem.

2 The health impact of noise

Noise has several effects on humans³. Sleep disturbance and interference with communication are some of the less serious implications, but can be highly irritating (and thus stressful). Continued interruption of sleep can lead to further physical and psychological problems. But even if people do not wake up because of the environmental noise, their sleep might be disturbed and doesn't provide the necessary grade of relaxation needed for the following working-day. Noise can also directly cause more severe medical problems such as high blood pressure, mental stress, heart attacks and hearing damage. Between 5 to 15 % of the EU population at least suffers from serious noise-induced sleep disturbance and at least 25 % is reporting noise-induced annoyance or experience a reduced quality of life⁴. A study by the German Federal Environmental Agency relating the environmental noise caused by airplanes comes to the conclusion, that noise exposure of 55 decibel(A) during daytime and 45 decibel(A) at night shall be regarded as serious annoyance. With a noise exposure of 60 decibel(A) during the day and 50 decibel(A) at night health-damages have to be taken into account under a prophylactic medical view. Health-damages in form of cardiovascular diseases are to be expected if a limit of 65 decibel(A) during daytime and 55 decibel at night is permanently exceeded.⁵ Taking together the medical costs and the reduction of housing prices, reduced possibilities of land use and the cost of lost labour days the annual damage in the EU due to environmental noise estimated range is from EUR 13 billion to 36 billion⁶.

3 The proposal presented by the Commission

As public concern about exposure to noise pollution remains high within the European Community, the Commission presented this proposal as one (and first) step to try and improve the situation. However the Commission refrained to set common European-wide noise limits. The main objective of the pro-

posal is rather to establish a common EC-framework for the harmonisation of assessment methods and management of exposure to environmental noise. As noise from different sources has different levels and effects it needs to be defined as different pollutants. The circumstances under which sound is perceived as noise differ between individuals. The proposal covers sound generated by human activity in the domestic and public environment of people, for example by road traffic, railways, aeroplanes, industry, construction and, recreational activities. Noise produced by animals, by nature or by one's neighbours is excluded as is sound in an individuals work place.

One major problem in assessing noise and its impacts on humans is that the sense of sound and level at which it becomes a nuisance is subjective - at least in view of threshold values - as it varies from person to person. Furthermore, the level of annoyance not only depends on the sound volume, but is also highly dependable on its pitch (frequency), impulse, its content (speech, information, rhythm), it's consistency (whether it maintains a constant level or fluctuates), the existence or mixture of (very) loud single noise eruptions and continuous "background" noise level, the time of day/night and the location of the emission (relative to the individual). Therefore knowledge of the method used to measure the noise level and the impact of a concrete sound event is essential to the accurate assessment of the results.

With the use of standardised indicators and assessment methods the Commission wants to make it possible to compare the noise level and degree of noise exposure within the EC, especially in the most affected regions.

The core of the directive is the definition of the noise indicators and their application (Article 5 and Annex I). The Directive establishes two values, the L_{den} and the L_{night} . The primary noise indicator is the day-evening-night level L_{den} in decibels. In order to refine the approach for the protection of the dominant sleeping period, i.e. the night, the Commission also proposes to establish an overall night-time noise indicator called L_{night} .

The L_{den} indicator is used to prove the long-term noise exposure and its relation to community noise annoyance in particular to the percentage of highly annoyed respondents. In combination with special dose-effect relation indicators it is also possible to record annoyance due to noise with strong tonal components, annoyance due to noise with an impulsive character and the adverse effects on children's learning. L_{den} stands for a day-evening-night average sound level that is determined throughout one year. On the 24 hour day L_{day} covers 12, $L_{evening}$ 4

³ „Guidelines for Community Noise“; WHO 2000.

⁴ „Noise Exposure and Public Health“, W. Passchier-Vermeer and W.F. Vermeer, Environmental Health Perspectives Volume 108, Supplement 1, March 2000.

⁵ „Fluglärmwirkungen“, Umweltbundesamt, J. Ortscheid and H. Wende, Berlin 2000.

⁶ „Green Paper on Future Noise Policy“.

and L_{night} 8 hours. In the evening and more-so the night time hours people are at their most sensitive to noise therefore the values of + 5 and + 10 respectively are to be added to the recorded decibels (dB). The start of the day (and consequently the start of the evening and the night) may be chosen by the Member States. Otherwise the default values of 07.00 - 19.00 hours being day, 19.00 - 23.00 hours being evening and 23.00 - 07.00 hours being night are applicable.

With the L_{night} indicator the average night-time sound level throughout the whole year will be documented. In its methods of assessment it equals the L_{night} calculated as part of the L_{den} . The application of the L_{night} indicator will be useful to illustrate the relationship between long-term noise exposure and sleep disturbance when compared to the percentage of people that report a high level of sleep disturbance. L_{night} could also be a suitable indicator for specific medial or social effects related to noise exposure during the night (quality of sleep, awakenings and problems with falling asleep, etc.). A reduced value of L_{night} should therefore reduce adverse health effects from night-time noise exposure.

While the L_{den} and the L_{night} values are suitable to document long-term noise exposure on an average 24-hour day and an 8-hour night respectively, certain instances of noise exposure will not be recognised. Problems do occur for instance in cases where:

- The relevant noise source is intermittent or a once-off and therefore does not operate regularly throughout the day or year,
- There are, as an average, only a very low number of loud noise events (for example passing trains or aircraft)
- The low-frequency content of sound is strong,
- The noise contains strong tonal components,
- The noise has an impulsive character,
- There is a high noise exposure only at the weekend or in the evening / night-time periods,
- The combination of noise from different sources is an integral factor and needs to be taken into consideration
- Noise occurs in otherwise relatively quiet areas in the open country.

The knowledge of only the average sound level therefore does not provide a sufficient basis to assess the specific noise exposure in all cases. Hence, assessment methods and dose-effect-relations are required that take into account the specific circumstances and characteristics of sound events. The Commission was aware of this fact, but relied on the Member-States to find an appropriate way to add other noise indicators or use dose-effect-

relations, in these specific cases, to adjust the L_{den} if appropriate. This adaptation by each member state is perhaps debatable as it defies the aim of the directive, namely to standardise on methods of indication and assessment. It would seem appropriate to also provide European-wide assessment of 'special' cases as defined above.

Once defined the noise values L_{den} and L_{night} will then be registered in regional "noise maps" (Article 7 and Annex IV).

These noise maps will be a representation of data detailing:

- Previous, existing or predicted noise situations in terms of a noise indicator,
- Instances where the limit value as been exceeded
- The number of dwellings in a certain area that are exposed to specific values of a noise indicator,
- The number of people that are affected by the noise in a certain area,
- Cost-benefit ratios or other applicable economic data on mitigation measures or scenarios.

For each agglomeration separate strategic noise maps shall be made for road traffic noise, rail traffic noise, aircraft noise and industrial noise.

The gathered and documented information on noise exposure must be sent to the Commission (Article 10) and be made accessible to the public (Article 9). On the basis of the information action-plans have to be established on a local level and provide the EC with the opportunity to formulate further strategies and standards of measurement (Article 8 and Annex V). The action plans shall contain a description of the agglomeration (size, location, number of inhabitants, land use, main noise source, type of buildings and their use) and the major roads, railways and airports (location, size, data on traffic, surroundings). Furthermore, information on the responsible authority, the legal context, the noise level values (L_{den} and L_{night}) and a summary of the result of the noise mapping shall be given. Based on the noise maps and the dose-effect relations, an analysis of the health situation and identification of problems and suggestions on actions to improve the situations within the next 5 years shall be made. A long-term strategy has to developed containing, for instance, land use planning, traffic planning, introduction and enforcing of speed limits, promotion of public transport, possibilities on technical measures at sources and a reduction of sound transmission by noise barriers. Other possible actions are to introduce special licences and financial measures such as direct charges and penalties.

Before approving any “action-plan”, the relevant authorities within the member states will be asked to organise a public consultation from which any feedback or results will be taken into account (Article 9 No. 2). Action-plans are to be published on the Internet or other on-line facility within two months of their initial approval (Article 9 No. 3). The availability, to the public, of the collected data, and summaries of the action plans, is to be ensured by the member states.

After receiving the information on noise exposure, the Commission will compile a database of noise maps and related information. On a five yearly basis, a report will be drawn from this database summarising the data being held (Article 10). By 31st December 2007, the Commission must submit a report to the European Parliament and the Council, based on experience/data collected, of the application of the Directive. In this report a review of the need for Community quality objectives related to the control of environmental noise must be included. The Commission will then propose further actions and strategies to ensure achievement of these objectives.

Long-term and medium-term goals for the reduction of the number of persons that are affected by the noise from specific sources (especially road traffic, rail traffic, civil air traffic and industry) and the measures necessary to reach these goals shall be considered (Article 11).

4 Conclusion

The proposed Directive could initiate an important first step for an approach to get in control of the problem of environmental noise by providing a general overview of the present and future situation of environmental noise and its the grade of exposure within the Member-States. For the establishment of European-wide standardised assessment methods and noise-mapping routine it is essential to get comparable data. On this basis priority lists for further actions will be possible. Furthermore, as the

assessment of discovered noise level depends on the knowledge of the used methods of measurement, the setting of common noise limits will not be possible before standardised noise indicators and assessment methods are established. But, since a high percentage of people already suffer from high a level of environmental noise, it is doubtful that the transformation of this proposed Directive will improve the situation of the affected people in the near future. A first EU summary report on received local noise maps and action plans is due in 2007, the deadline for the publication of finished noise maps is in 2010 and action-plans have to be ready not before 2011. Regarding that projects in the near future - like the extensions of airports, building or expansion of roads and railways - will by then be done or at least have the necessary national permissions, the situation on environmental noise is likely to have become even worse then; at least if the Member-States do not find appropriate means to control the problem on their own. As the objective of the proposal for a Directive is an European-wide approach to the problem, it is doubtful that the proposed provisions will provide the intended enforcements. Therefore it rather seems to be necessary to establish common noise limits within the EU much sooner than it is intended by the Commission.

The proposed Directive nevertheless should be regarded as an important first step towards a “quieter” domestic environment and a better life standard for an increasing amount of noise-affected people. At least Member-States are enforced to assess and document the situation on environmental noise, their inhabitants live in. But a tightening of the time-plan to transform and apply the Directive and the development of noise limits that secure a minimum-standard of protection against noise seems to be critical. Though it is unlikely, there is to hope that the European Parliament or Council will find those improvements of the proposal necessary and pass a more effective approach to the problem through their legislation.

Making Choices: The European Commission's Proposal for a Sixth Environment Action Programme ("Environment 2010: Our Future, Our Choices")

Sven Deimann

On 24 January the European Commission made public its proposal for a sixth environmental action programme¹. The last programme, officially adopted by the Council in 1993 and entitled "Towards Sustainability"², expired at the end of 2000, following an extensive review³ and a 'global' assessment⁴. This article will provide a brief overview of the Commission proposal for a sixth environmental action programme. In doing so, it will outline the draft programme's structure (1) before engaging in a discussion of some of its salient features (2). The article will continue by arguing that the draft programme raises the issue of a more precise division of powers with respect to the environment (3). The final part will conclude by summing up some of the criticisms that will be raised in the course of this article (4).

1 Outlining European environmental policy for the coming decade

The Commission proposal (to which is appended a proposal for a formal decision of the European Parliament and the Council adopting and proclaiming the new programme in force) is divided into eight parts. Following an introductory chapter which outlines the legislative background and objectives of the new programme, the Commission sets out the core substantive and procedural issues that it intends to pursue over the coming decade.

Sven Deimann, LL.M., research associate, Johann-Wolfgang-Goethe University, Frankfurt a.M., Germany

¹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the sixth environment action programme of the European Community 'Environment 2010: Our Future, Our Choice'. Proposal for a Decision of the European Parliament and the Council Laying Down the Community Environment Action Programme 2001-2010, COM (2001) 31 final, Brussels 24.1.2001.

² Council Resolution of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development, O.J. No. C 138, 13.5.1993, pp. 1 ff.

³ See the joint decision of the European Parliament and the Council No. 2179/98/EC of 24 September 1998 concerning the review of the fifth environmental action programme, O.J. No. L 275 of 10 October 1998, pp. 1-13 ('Beschluss Nr. 2179/98/EG des Europäischen Parlaments und des Rates vom 24. September 1998 über die Überprüfung des Programms der Europäischen Gemeinschaft für Umweltpolitik und Maßnahmen im Hinblick auf eine dauerhafte und umweltgerechte Entwicklung "Für eine dauerhafte und umweltgerechte Entwicklung", ABl. Nr. L 275 vom 10/10/1998, S. 1-13) (German version consulted).

⁴ European Commission, Global Assessment: Europe's environment: what directions for the future? (Luxembourg: Office for Official Publications of the European Communities, 2000).

The proposal identifies and elaborates on four priority areas (climate change, nature and bio-diversity, environment and health, and, lastly, the sustainable use of natural resources and waste management), which are preceded by what the authors of the proposal have termed a "Strategic Approach" to meeting the programme's environmental objectives. Part seven discusses issues pertaining to the European Union's growing role as an active participant in international environmental policy while the last part examines some of the prerequisites to sound environmental policy-making, namely broad stakeholder participation, well-informed policy- and decision-makers, and compliance with the fundamental principles of EU environmental policy, as set out in Art. 174 of the EC Treaty.

Against the backdrop of the rather mixed results of the fifth environmental action programme⁵, the Commission apparently is of the opinion that priority should be accorded to the implementation and improvement of existing legislation rather than the development and conceptualization of new policy fields. It comes as no surprise, then, that the proposal should dwell at some length on the "Strategic Approach" to meeting the programme's objectives, before addressing the substance of future policy initiatives. The "Strategic Approach" essentially comprises five elements: improving the implementation of existing Community legislative provisions, integrating environmental policy concerns into other policy sectors, reinforcing market incentives for environmentally sound economic growth and development, enhancing citizen participation as well as influencing consumption patterns, and integrating environmental concerns into spatial planning and zoning as well as strategic management decisions.

Apart from spelling out a "Strategic Approach" for pursuing environmental policy objectives at the Community level, the programme also seeks to identify the overall political parameters for developing Community environmental policy over the coming decade. In its explanatory memorandum to the appended draft decision, the Commission thus points to sustainable development, the "inter-

⁵ Ibid. at 7.

reliance between economic progress and a sound environment”, globalization, and enlargement of the EU as the wider policy context within which EU environmental policy must evolve and that it has to take into account.⁶

2 The integration principle and evolving European environmental policy

It is the focus on improved implementation and compliance with Community environmental legislation as well as finally achieving the integration principle, as laid down in Art. 6 of the EC Treaty, that constitutes the real novelty of the Commission proposal. While the fifth environmental action programme sought to lend credence to the concept of sustainable development by spelling out a legislative blueprint for its implementation, the current proposal concentrates on the principle of integrating environmental concerns into other policy sectors as an important, if not in fact *the* most important, prerequisite for successfully pursuing environmental policy objectives at the European level. The Commission thus recognizes the vital role that policy integration can play in remedying significant policy pathologies that prevented full attainment of the objectives set out in the fifth environmental action programme.⁷ Indeed, while most of the substantive policy initiatives in the four priority areas (with a few notable exceptions⁸) appear to be geared towards consolidating existing policies, in particular those regarding the protection of individual media such as water or air quality, realizing the integration principle, as required by Art. 6 of the EC Treaty, constitutes a recurrent theme throughout the Commission proposal that effectively sets it apart from its predecessor.

a) Realizing the integration principle: achieving environmental policy goals under conditions of economic inter-connectedness

Stressing the importance of integrating environmental concerns into other policy sectors lies, of course, in the consequence of what the explanatory memorandum terms the “inter-reliance between economic progress and a sound environment”. Given this inter-reliance and the pervasive influence of EU policies such as the Common Agricultural Policy or the Common Fisheries Policy on important segments of the economy in all of the current (and future) EU member states, moves to realize the full potential of the integration principle have long

been overdue and, hence, deserve unreserved praise from an environmental policy point of view.

Particularly welcome must be the Commission’s declared intention⁹ to screen the EU’s external policies, especially as regards the negotiation and conclusion of trade agreements, with a view to ensuring that environmental concerns are given wider consideration. As globalization has intensified over the last decade with the establishment of the World Trade Organization, the provisions in multi- and bilateral trade agreements concerning foreign direct investment, national treatment, and most favoured nation status set the stage for regional and global economic development. Given the inter-relatedness between economic development and sound environmental protection that the Commission rightly emphasizes¹⁰, it is imperative that possible strategies for economic development which would respect strictures imposed by the ecology of man’s natural environment not be foreclosed by international trade agreements.

The Commission’s draft decision for adopting the new programme accordingly calls for more international cooperation on risk assessment and evaluation that would respect the precautionary principle.¹¹ This will allow policy-makers to err on the side of caution if short-term economic benefit arising from the untrammelled play of market forces - a play which has been given an additional boost in recent years by ‘liberalising’ free trade agreements - threatens to undermine long-term sustainability. The freedom to forego short-term economic gain for the benefit of long-term sustainability would appear to be a crucial prerequisite to any strategy for achieving a more sustainable economic development - development that would be respectful of the requirements for an ecologically healthy environment and the entitlements of future generations¹².

Equally welcome from the vantage point of sustainability, and consistent with the Commission’s stated goal of finally lending teeth to the integration principle, is the idea of greening the financial sector, and here in particular, the Community’s own institutions active in the field. As part of the Commission’s “Strategic Approach” to achieving environ-

⁶ See Communication, supra note 1 at 67.

⁷ Ibid. (explanatory memorandum, pt. 7).

⁸ See below at note 30 and accompanying text.

⁹ Ibid.; see also Art. 8 (4) and (5) of the draft decision appended to the programme.

¹⁰ See supra note 6 and accompanying text; see also European Commission, *Bringing our needs and responsibilities together - Integrating environmental issues with economic policy*, COM (2000) 576 final of 20.9.2000.

¹¹ Communication, supra note 1, Art. 8 (4) and (5).

¹² See E. Brown-Weiss, In *Fairness To Future Generations* (Tokyo: U.N., 1989); see also R. L. Revesz, “Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives” (1999) 99 *Col. L. Rev.* 941 at 1009 for the idea of intergenerational allocation as a “central function” of sustainable development.

mental policy objectives¹³, requiring banks and other lenders to consider the environmental consequences of the development projects they finance reflects the central role played by financial institutions in shaping economic development.

While moves to effectuate the integration principle would certainly appear to be apt in light of the numerous and pervasive policy failures that emerged from the global assessment of the fifth environmental action programme¹⁴, the Commission's current proposal, unfortunately, sheds disappointingly little light on how it intends to bring about a 'greening' of other policy sectors such as transport, fisheries, or agriculture - policy sectors that have a very real and large potential for impinging on strategies to reach a more sustainable form of economic development.

This, of course, is a question that concerns not only the Commission but also the other Community institutions, notably the Council, and the Commission is certainly right in referring to the relevant work that has been undertaken by the Council in the wake of the 1998 Cardiff European Summit.¹⁵

That, however, still leaves wide open the question of how the Commission intends to screen its policy initiatives in environmentally-sensitive policy sectors with a view to realizing the full integration of environmental concerns - a question of considerable importance given the crucial role played by the Commission (who alone enjoys the right of initiative) in the EU/EC legislative process. And on this point, no less important than appropriate measures within the Council, the proposal for a sixth environmental action programme remains vague. The "Strategic Approach" merely holds out the prospect of the Commission reinforcing internal mechanisms to ensure compliance with the integration requirement as set forth in Art. 6.¹⁶ What these mechanisms might be - e.g. the creation of 'sustainability cabinets' in Directorate-Generals other than DG XI¹⁷ or the introduction of self-assessment and reporting requirements to ensure compatibility of policy initiatives with sustainability goals set by each Directorate-General¹⁸ - remains obscure.¹⁹

The same applies with respect to individual instances of realizing the integration principle. Thus the proposal remains silent on how environmental concerns could be integrated into the EU's external policies. In a like manner, while the proposal frequently pays at least lip-service to the idea of integrating environmental concerns into the Common Agricultural and Fisheries Policies, no concrete *quantitative* policy goals in terms of modifying industrial agriculture or, and perhaps more importantly given recent scientific reports indicating considerable and ultimately unsustainable overfishing, reduced catch quotas emerge from the proposal. Quite to the contrary, with respect to fisheries concrete proposals and goals are expressly deferred to 2002 when the Common Fisheries Policy is to be revised.²⁰

Concrete policy goals as well as suggestions for institutional safeguards would have greatly enhanced the credibility of the Commission's "Strategic Approach". The lack of any precise proposal in this regard can only help to raise doubts as to the political will to bring about the institutional changes that would be necessary to facilitate a greater awareness and consideration of environmental concerns in other policy sectors.

Such doubts also arise when the Commission envisages recourse to voluntary agreements, as it does with respect to financial institutions and their lending practices. Bearing the Community's jurisdiction with respect to the Internal Market and its functioning in mind, the draft programme lacks a convincing reason why banks or other lending institutions should not be required - as a matter of *binding community law* rather than *non-binding* voluntary guidelines - to furnish their shareholders or investors with information as to the environmental impact of their lending policies.

Finally, the Commission's reticence in this regard may reflect its overall belief that more progress towards sustainable economic development can be achieved by reorienting market forces and, hence, relying on indirect regulation and market instruments. The draft programme, at any rate, devotes

¹³ Communication, supra note 1 at 21.

¹⁴ See supra note 4.

¹⁵ Communication, supra note 1 at 15 ff.

¹⁶ Ibid.

¹⁷ For a similar and thoughtful suggestion to provide institutional and procedural safeguards that would help implementing strategies to achieve sustainability within the context of the German federal bureaucracy see G. Füllgraff, "Institutionelle Herausforderungen für eine Politik der Nachhaltigkeit", in: H. v. Koller (ed.), *Umweltpolitik mit Augenmaß* (Berlin: Erich Schmidt, 2000) 149-163.

¹⁸ A system which has been in use for a number of years in Canada, albeit with mixed results, see Canada (Auditor-General/Commissioner of the Environment and Sustainable Development), *Report of the Commissioner*

of the Environment and Sustainable Development to the House of Commons 2000 (Ottawa: Public Works & Gov't Services Canada, 2000) 5.

¹⁹ For a survey of different sustainability strategies, including measures aimed at realizing greater policy integration, see the 2000 report by the German Council of Environmental Advisors SRU, *Umweltgutachten 2000*, BTags-Drucks [German federal parliamentary papers] 14/3363 of 14 March 2000, para. 5 ff. (an English abstract and table of contents is available on the Council's web site at <http://www.umweltrat.de>). As the Council points out, the relevance of sustainability strategies and policy integration is to address not only spectacular and headline-making environmental hazards, but also 'creeping' and incremental changes to our natural environment that occur largely without attracting media attention.

²⁰ Communication, supra note 1 at 32 and 35.

considerable space to market incentives and partnership programmes with business.²¹ As part of a “Strategic Approach” to attaining environmental policy objectives, however, greater reliance on market incentives seems problematic for two reasons.

First, in some of the key sectors that the Commission indicates as requiring greater integration of environmental concerns - agriculture and fisheries for example - market mechanisms have only just begun to be reintroduced following adoption of the Agenda 2000. Market incentives will be of limited effect, though, where market forces play only a minor role in determining production processes and quantitative production targets.

Second, the mechanisms of the free-market economy are by their very nature oblivious to the long-term interests of future generations. Future generations cannot participate in today’s market transactions to ensure that consumption of non-renewable resources or an unsustainable rate of depletion of renewable resources occurs only at a ‘price’ that reflects their future needs and preferences as well.²² Moreover, for the ‘sovereign consumer’ - a concept that lies at the heart of much of economic thinking on environmental quality as a public good²³ and that derives from modern economics’ ‘methodological individualism’²⁴ -, it can be rational to maximize his or her utility derived from current consumption by passing the costs on to future generations through unsustainable depletion rates and waste accumulation.²⁵ Many economists, of course, are not overly perturbed by the irretrievable consumption of non-renewable resources or the unsustainable depletion of renewable resources, as they posit the substitutability of most resources.²⁶

Be that as it may (although my own guess would be that with some natural resources their loss cannot be compensated for through the enhanced use of human ‘capital’ or technological innovation, and the

devastating social consequences²⁷ that the virtual elimination of the cod fisheries on the Grand Banks off Newfoundland has wrought on Atlantic Canada’s fishing communities would also militate very strongly against any overly optimistic assumptions regarding substitutability²⁸). But what this admittedly very cursory and brief excursion into the realm of economics and market mechanisms has hopefully demonstrated is that markets, even on the account of most economists, function with an in-built or inherent bias in favour of short-term or present interests to the detriment of the long-term interests of future generations. On any account or definition of sustainability, it is these interests, however, that require strengthening and protection.²⁹ I doubt whether reliance on market incentives will by itself prove sufficient to bring about the changes in the way we satisfy our needs that will lead to long-term sustainability.

b) An evolving environmental policy: differentiated standards

I have already intimated that the overall impression one receives from a careful reading of the Commission’s draft programme is one of continuity when it comes to substantive environmental policy. With respect to air and water quality, for instance, the proposal makes frequent references to legislative measures that are already in place and that were adopted under the fifth environmental action programme or its predecessors.

²¹ Communication, supra note 1 at pt. 2.3.

²² See M. P. Pflüger, “Globalisierung und Nachhaltigkeit” [1/99] Zeitschrift für Umweltrecht und Umweltpolitik 135 at 141 (noting that due to the in-existent representation of future generations any attempt at discounting benefits accruing to future generations must rest upon the valuations of present generations); but see also Revesz, supra note XX at 1016 who argues that with respect to harms arising to future generations from present-day consumption patterns no discounting is ethically justifiable and will inevitably privilege the interests of current generations over those of future generations.

²³ M. Common, *Sustainability and Policy* (Cambridge, U.K.: 1995) 77.

²⁴ Th. Döring, *Subsidiarität und Umweltpolitik in der Europäischen Union* (Marburg, Ger.: Metropolis, 1997) 41, note 43.

²⁵ See, e.g., St. Bayer & D. Cansier, “Methodisch abgesicherte intergenerationale Diskontierung am Beispiel des Klimaschutzes” [1/98] Zeitschrift für Umweltrecht und Umweltpolitik 113 at 114 & 116.

²⁶ Common, supra note 23 at 94 ff. & 182; see also Pflüger, supra note 22 at 138.

²⁷ S. McCorquodale, “The Fisheries Crisis in Newfoundland”, in: D.M. Brown & J. Hieberg (eds.), *Canada: The State of the Federation 1994* (Kingston, Ont.: Institute of Intergovernmental Relations, 1994) 85 ff.

²⁸ Perhaps more than any other phenomenon of environmental degradation in recent years, the decline of the Atlantic cod fisheries provides lurid evidence of the limits of a free market economics-approach to managing a renewable natural resource, see R. MacCallum, “The Community-Based Management of Fisheries in Atlantic Canada: A Legislative Proposal” (1998) 21 Dal. L. J. 48 at 57, note 34 (quoting former Canadian fishing industry lobbyist as saying “Our philosophy in the early 1990s was that we couldn’t just sit here and explain to our brokers and shareholders: ‘Well, the quota went down again and the fishing was bad and I’m sorry. They don’t take that for an answer.’” and arguing that pressure was brought to bear on the Canadian federal Department of Fisheries and Oceans “to make Nature conform to the economic needs of the fishing industry” when setting catch quotas).

²⁹ See, for instance, Wissenschaftlicher Beirat Globale Umweltänderungen, *Welt im Wandel - Strategien zur Bewältigung globaler Umweltrisiken* (BTags-Drucks. [German federal parliamentary papers] 14 /3285 of 5 April 2000) 333 (calling for creation of a U.N. Risk Assessment Panel along the lines of Inter-governmental Panel on Climate Change to advise policy- and decision-makers in particular on long-term risks affecting future generations and to strengthen the international community’s responsibility with respect to future generations); E. Brown-Weiss, “The Imperative for the Twenty-First Century”, in: W. Lang (ed.), *Sustainable Development and International Law* (London: Graham & Trotman, 1995) 17 at 21 f.; see also National Research Council (U.S.), *Our Common Journey. A Transition Toward Sustainability* (Wash., D.C.: N.R.C., 1999) 298 ff. (arguing for long-term research into different paths to sustainability the funding requirements of which would be freed from the short-term electoral horizons of political decision-makers).

In one important respect, however, the proposal for a sixth programme conceptually goes beyond existing provision. The Commission for the first time recognizes that conventional emission limit-values or ambient quality standards largely represent assumptions about what is tolerable for an average (and frequently male) individual - a somewhat unreal concept that ignores particular health risks faced by especially vulnerable groups such as children, the elderly, or people with respiratory diseases³⁰.

The proposal for a sixth environmental action programme promises a review and examination of existing standards in order to assess to what extent they take into account the special health risks faced by vulnerable groups.³¹ Should the Commission act on this promise and come up with concrete proposals for regulatory reform to reflect the need for a more differentiated form of standard-setting, it would represent a welcome instance of environmental justice and equity.

3 The end of subsidiarity and shared responsibility

While the fifth environmental action programme devoted a whole chapter to the concept of 'shared responsibility'³², jurisdictional concerns have largely disappeared from the proposal for a sixth programme. Indeed, the draft programme does not even as much as mention the principle of subsidiarity as one of the guiding principles of Community environmental policy (curiously, though, the relevant passage does refer to the integration principle laid down in Art. 6 of the EC Treaty - a provision directly preceded by the subsidiarity principle in Art. 5³³).

It is only in the explanatory memorandum to the draft decision for adopting the programme that subsidiarity concerns are addressed. The memorandum flatly states that the draft programme satisfies the requirements of the subsidiarity principle because the various policy measures it envisages con-

cern transboundary environmental problems or seek to remedy environmental problems through transboundary solutions.³⁴

This is undoubtedly true with respect to problems such as climate change or transboundary air and water pollution. But as a general statement it appears at best a gratuitous claim that is by no means borne out by all the policy proposals discussed in the draft programme. For instance, the proposal fails to provide even the slightest hint as to the transboundary nature of indoor air quality - a subject that the Commission believes could require remedial measures at the European level³⁵.

The proposed programme thus highlights once again the necessity to clarify roles and jurisdictions with respect to environmental policy. It is curious to note that, while the draft programme has precious little to say on the environmental impact of European air traffic and competition among major airports such as Amsterdam, Frankfurt, or Paris - competition that has just led the German authorities in Frankfurt to decide on yet another major airport extension -, the Commission apparently believes some of the effects of such competition (such as noise from aircraft operations at airports) should become subject to European regulation³⁶.

The inconsistency that the draft programme manifests by, on the one hand, failing to provide an exhaustive treatment of the integration principle (including institutional arrangements for its realization) and by, on the other, extending the scope and purview of European environmental law to yet another area makes environmental policy a prime target for a more specific vertical division of powers between the Community and the Member States. Under the terms of the December 2000 Treaty of Nice and the declarations attached to it, defining in more precise terms the allocation of powers within the Community and the Member States will be the subject of another inter-governmental conference to be held in 2004.³⁷

³⁰ As a particularly problematic example of indiscriminate standard-setting that ignores the special needs of vulnerable groups one might cite the Codex alimentarius's standards for residues in hormone-treated bovine meat which are based on the stereotypical concept of 60-year-old average male consumer; the adequacy of the WHO's Codex alimentarius international standards, especially in light of the precautionary principle, was an important issue in the EU's dispute with the United States and Canada over the use of growth hormones in bovine meat production, see S. Deimann, Case Comment: *EC Measures Concerning Meat and Meat Products (Hormones)*, [2/1997] elni-Newsletter 1-12.

³¹ Communication, supra note 1 at 39.

³² See only U. Collier/J. Golub/A. Kreher (eds.), *Subsidiarity and Shared Responsibility: New Challenges for EU Environmental Policy* (Baden-Baden: Nomos, 1997) for some of the implications of subsidiarity in environmental policy.

³³ Communication, supra note 1 at 65.

³⁴ Ibid. at pt. 6.

³⁵ Ibid. at 47.

³⁶ Ibid. at 48 ff. On this point, however, the Commission appears to be aware of the potential for jurisdictional conflict with the Member States. Hence, it only proposes to establish a European framework for combatting noise (such as developing uniform standards for measuring) without setting concrete noise protection standards at the European level. Still, it is curious to note that, while the Commission is unable to come up with specific policy goals for the preservation of fisheries, it manages to set a precise target of reducing by ten percent until 2010 the number of people affected by unacceptable noise levels which currently, according to the proposal, stands at 100 million - despite the fact that most sources of noise would appear to be of a distinctly local nature.

³⁷ Treaty of Nice, 23rd Declaration, SN 1247/1/01 REVI DOPG, Brussels of 14 February 2001.

The current division of powers encourages the sort of inconsistency that continues to bedevil European environmental policy.³⁸ By relying on a generic term such as *the* environment in the heading of Title XIX of the Treaty and wide definitions of the environment in secondary legislation, Community law essentially allows the Commission to select more or less any aspect of the natural environment and turn it into a subject of European environmental policy.³⁹ It permits an approach of ‘pick and choose’, and that largely in accordance with factors other than policy consistency.

A textually more differentiated division of powers is of course no guarantee for a more consistent use of jurisdiction. As any student of comparative federalism will know, the real division of powers is frequently determined by factors other than the language of constitutional provisions.⁴⁰ Nor will a textually more decentralized division of powers necessarily lead to more decentralized environmental policy.⁴¹

³⁸ See Döring, *supra* note 24 at 140.

³⁹ See, for instance, L. Krämer, *EC Environmental Law*, 3rd ed., (London: Sweet & Maxwell, 1998).

⁴⁰ See R. L. Watts, *Comparing Federal Systems*, 2nd. ed. (Kingston, Ont.: Institute of Intergovernmental Relations, 1999) at 16 for the “social and political balance of forces” as the primary determinant in the evolution of federal systems.

⁴¹ Witness, for instance, the difference in the degree of centralization in environmental policy in the U.S. and Canada: although the text of the U.S. constitution appears to establish, on its face, a rather decentralized system for the division of powers, reserving, in the Tenth Amendment, all powers not specifically allocated to the federal level of government to the States, the actual operation of the system has led to considerable centralization in environmental policy, for a critical assessment see R. L. Revesz, “Federalism and environmental regulation: an overview” in: R. L. Revesz et al. (eds.), *Environmental Law, the Economy, and Sustainable Development* (Cambridge, U.K.: Cambridge U.P., 2000) 37-79. In Canada, the opposite has occurred: a textually very centralizing document (the *Constitution Act, 1867*, formerly known as the British-North-America Act) has given rise to one of the most decentralized federal systems in which the bulk of regulatory powers in relation to the environment are exercised at the provincial level, see F.L. Morton, “The Constitutional Division of Powers with Respect to the Environment in Canada” in: K. M. Holland et al. (eds.), *Federalism and the Environment* (Westport, CT: Greenwood, 1996) 37-54.

Allocating specific aspects of environmental policy rather than conferring powers with respect to *the* environment as such would, however, change the terms of debate. Instead of having to demonstrate compliance with the rather amorphous concept of subsidiarity - an exercise that under the terms of the Amsterdam Treaty’s Subsidiarity Protocol requires rather subjective evaluations of the advantages and disadvantages of Community measures compared to action at by the Member States -, the Commission would have to show its initiatives come within the purview of a defined policy field or head of power. The Commission services would thus have to concentrate from the beginning on specific aspects of environmental policy.

Although the initial allocation of jurisdictional authority will doubtless give rise to controversy, once this issue has been settled it would allow the relevant Commission services to be more focussed on specifically European aspects of environmental policy and set priorities accordingly. Of course, the politically interesting question will be to see how the Community institutions and the Member States will initially go about identifying the specifically European aspects of environmental policy.

4 Conclusion

In conclusion, it is fair to say that the Commission proposal for a sixth environmental action programme leaves one with mixed feelings. While it is encouraging to see the Commission taking a more searching look at policy integration, the exercise is not entirely convincing. It remains in large part too unspecific so that the frequent references to the necessity of integrating environmental concerns into the Common Agricultural or Fisheries Policy sometimes take on the appearance of paying mere lip-service to the principle. At the same time, the proposal contemplates Community action in areas that are almost certain to spark further jurisdictional conflict with the Member States.

IMPRINT

Editors: Regine Barth, Birgit Dette, Heike Unruh
Address: elni, c/o → Öko-Institut e.V.
 Elisabethenstr. 55-57, 64283 Darmstadt, Germany
 Tel: +49 (0)61 51/81 91-31, Fax: +49 (0)61 51/81 91-33;
 e-mail: unruh@oeko.de; http://www.oeko.de/elni

Manuscripts should be submitted as files by e-mail to the Editors using an IBM compatible word processing system. Articles that are not signed are in the responsibility of the Editors.

The elni Review is the review of the Environmental Law Network International. It is distributed twice a year to its members at the following price levels: commercial users (consultants, law firms, government administrations): DM100/US\$60; private users, students, libraries: DM40/US\$25. Members from Central and Eastern Europe will receive the elni Review free of charge. Non-members can order single issues at a fee of DM10 incl. packaging. The Environmental Law Network International also welcomes an exchange of publications as a way of payment. Private members and libraries who feel that the charge is exceeding their financial capability can subscribe to the newsletter at a reduced rate on request.

The elni Review is prepared with the financial and organisational support of the Öko-Institut e.V., a non-profit private research institute. The address of the main office is: Öko-Institut e.V., P.O. Box 62 26, 79038 Freiburg, Germany, Tel.: +49 (0)761 45 295-0, Fax: +49 (0)761 475437, http://www.oeko.de

The views expressed in the articles are those of the authors and do not necessarily reflect those of the Öko-Institut..

elni Membership

If you want to join the Environmental Law Network International, please use the membership form at our website: http://www.oeko.de/elni or send the form to the *elni* Coordinating Bureau, c/o <Öko-Institut e.V., Elisabethenstr. 55-57, 64283 Darmstadt, Germany, Fax: +49 6151 8191 33.

Yes, I hereby join the Environmental Law Network International:

Name: _____

Organisation: _____

Profession: _____

Street: _____

City/Country: _____

Authors of this issue:

Mercedes Fernández Armenteros, research associate, EEP Network, Öko-Institut, Darmstadt, Germany; fernandez@oeko.de

Regine Barth, coordinator of the Environmental Law Division and elni, Öko-Institut e.V., Darmstadt Office, Germany; barth@oeko.de

Sven Deimann, research associate, Johann-Wolfgang-Goethe University, Frankfurt am Main, Germany; sven.deimann@snaflu.de

Birgit Dette, lawyer, Environmental Law Division /elni, Öko-Institut e.V., Darmstadt Office, Germany; dette@oeko.de

Frédéric Jaquemont, researcher, EEP Network, Environmental Law Research Centre (FSUR), Johann Wolfgang Goethe University, Frankfurt, Germany; Jacquemont@jur.uni-frankfurt.de

Janna Lehmann, research associate at the Centre d'Etude et de Recherche sur le Droit de l'Environnement, de l'Aménagement et de l'Urbanisme (CERDEAU), Paris I-Sorbonne, EEP Network, currently a Ph.D. candidate at the University of Aix-Marseille III.; Janna_Lehmann@yahoo.com

Pedro Machado, Ph.D Researcher, European University Institute, Law Department, Florence, Italy; pedro.machado@iue.it

Jan De Mulder, lawyer with the Environment Administration (AMINAL) of the region of FLANDERS-Belgium, was detached to the Commission, DG ENV, Brussels; jan.demulder@lin.vlaanderen.be

Dirk Teßmer, lawyer, Frankfurt a.M., Germany, DTessmer@t-online.de

Tel:/Fax: _____

E-Mail: _____

I subscribe to the elni Review at a cost of

DM100 / EUR51.13 / USD60 per year for commercial users (consultants, law firms, government administrations)

DM40 / EUR20.45 / USD25 per year for private users, students, libraries

Please enclose a cheque or transmit the amount to our account No 185232-755 with the Postgiroamt Karlsruhe, Bank Code 660 100 75 (please indicate "KST 2914" on your remittance).

Date: _____

Signature: _____