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The European Environment Agency and the Freedom of Environmental Information Directive: Potential Cornerstones of EC Environmental Law

*Dietrich Gorny**

INTRODUCTION

The Council of the European Communities (Council) has adopted a regulation establishing the European Environment Agency (EEA) together with an environmental information network.¹ For the European Parliament (Parliament) and other groups that envisioned the EEA as an authority vested with extensive supervisory powers, much like the U.S. Environmental Protection Agency (EPA), the regulation is disappointing. As the Economic and Social Committee indicated in its opinion, however, establishing an EPA-type agency was never the European Community's (EC or Community) objective.² Instead, the Community has cast the EEA as a coordination and dissemination center for environmental information.

The Council has also adopted a directive granting Community citizens the right of free access to environmental information.³ This directive has engendered less controversy than the proposals for the EEA. Nevertheless, its provisions are potentially far-reaching, providing unprecedented access to environmental information. In light of the Commission's still embryonic project of an

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¹ Regulation 1210/90, Council Regulation of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, O.J. L120/1 (1990).

² Opinion of the Economic and Social Committee on the proposal for a Council Regulation on the establishment of the European Environment Agency and the European Environment Monitoring and Information Network, O.J. C56/20, at 23 (1990) [hereinafter ECOSOC Opinion].

³ Directive 90/313, Council Directive of 7 June 1990 on the freedom of access to information on the environment, O.J. L158/56 (1990).

environmental audit for industrial installations, it is worth considering the extent to which the directive may provide access to sensitive information.

The EEA and the new right of access to environmental information could well form the cornerstones of Community environmental law. This Article addresses these legislative enactments in turn. Part I first presents a brief overview of Community jurisdiction over environmental affairs. Part II then outlines and assesses the regulation creating the EEA and the environmental information network. Finally, Part III examines the directive granting Community citizens the right of free access to environmental information.

I. EC JURISDICTION OVER ENVIRONMENTAL AFFAIRS

A. *Title VII of the EEC Treaty*

In its original version, the Treaty of Rome (EEC Treaty)⁴ did not provide express jurisdiction for Community regulation of environmental affairs.⁵ The most closely related provision was article 36 which states: "provisions of the [a]rticles 30 to 34 shall not preclude prohibitions or restrictions . . . justified on grounds . . . of the protection of . . . health and life of humans, animals or plants . . ."⁶ This provision, however, can scarcely be interpreted as providing authority for Community environmental legislation.

When the member states resolved to act in the environmental field at the Paris Summit Conference of the Heads of State or Government of the Member States in October 1972,⁷ they resorted to article 2 of the EEC Treaty for authority. Article 2 defines the function of the EC as, *inter alia*, the promotion of "a harmonious development of economic activities" throughout the Community.⁸ Economic harmony, however, depends in part on harmonization of divergent member state environmental regu-

⁴ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

⁵ For an overview of the history of Community environmental law under the EEC Treaty, see ENVIRONMENT LAW OF THE EUROPEAN COMMUNITIES 10 731E (W. Burhenne ed. 1988) [hereinafter W. Burhenne].

⁶ EEC Treaty, *supra* note 4, at art. 36 (relating to elimination of quantitative restrictions between member states).

⁷ W. Burhenne, *supra* note 5, at 10 732D.

⁸ EEC Treaty, *supra* note 4, at art. 2.

lations. When article 2 is read in conjunction with the Preamble's reference to "improvement of the living and working conditions,"⁹ it follows that the protection of the environment is included in the functions of the Community. Nevertheless, the main objective of article 2 is to facilitate the establishment of the common market. Consequently, authority for Community activities in the environmental field had not been fully accepted.

The Single European Act clarified the jurisdictional issue by supplementing the EEC Treaty with Title VII, including articles 130r–130t, on the environment.¹⁰ Article 130r establishes Community policy and objectives concerning environmental affairs. These objectives are "to preserve, protect and improve the quality of the environment; to contribute towards protecting human health; [and] to ensure a prudent and rational utilization of natural resources."¹¹

Although the objectives in article 130r are compulsory,¹² they are not always mutually compatible. For example, an improvement of the quality of the environment does not necessarily result in rational utilization of natural resources. As the Court of Justice of the European Communities (Court of Justice) has ruled in similar cases relating to the Common Agricultural Policy, Community institutions must balance conflicting objectives in order to pursue a reasonable policy.¹³ In balancing such objectives, the institutions may set priorities.

Article 130s grants and structures Community decision-making powers with respect to environmental affairs.¹⁴ The Council, acting unanimously on a proposal from the Commission of the European Communities (Commission), and after consulting the Parliament and the Economic and Social Committee, determines areas for Community action. Article 130s allows the Council, by unanimous vote, to determine areas in which it can then act by vote of a qualified majority.

In addition to taking action under articles 130r–130s, the Community can also promote its environmental objectives in the con-

⁹ *Id.* at Preamble.

¹⁰ Single European Act, Feb. 17, 1986, O.J. L169/1, at art. 25 (1987) [hereinafter SEA].

¹¹ EEC Treaty, *supra* note 4, at art. 130r.

¹² Grabitz, *Art. 130r*, in KOMMENTAR ZUM EWG-VERTRAG No. 2 (E. Grabitz ed. 1989).

¹³ See Cases 197–200/80, 243/80, 245/80, 247/80, Ludwigshafener Walzmühle Erling KG v. Council and Commission, [1981] E.C.R. 3211, 3252 [1981–1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8796 (1981).

¹⁴ EEC Treaty, *supra* note 4, at art. 130s.

text of its harmonization of member state laws under article 100A. When drafting proposals pursuant to article 100A, the Commission must place a high priority on environmental protection.¹⁵

Finally, article 130t preserves the authority of member states to act in environmental affairs.¹⁶ This provision permits the member states to adopt measures that are more stringent than those imposed by the Community, as long as such provisions are consistent with the EEC Treaty.

B. *Incorporating Scientific and Technical Data*

Under article 130r, the Community must take available scientific and technical data into account when preparing action relating to environmental affairs.¹⁷ This provision is significant when considered in light of article 190 of the EEC Treaty.¹⁸ Article 190 provides that regulations, directives, and decisions of the Council and of the Commission must state the reasons on which they are based.¹⁹ When acting under article 130s, the Council must reference the scientific and technical data that it has considered. It is thus possible to determine whether Community environmental policy is staying abreast of technical progress.²⁰ Furthermore, the obligation to incorporate available scientific and technical data and to refer to the data in the legislation focuses Community efforts on those projects that are technically feasible.²¹

The Council reiterated this obligation in its resolution establishing the Fourth Environmental Action Programme.²² This action program emphasizes the need for clarifying Community environmental regulation, for increased public access to official

¹⁵ *Id.* at art. 100A(3). It is only in drafting proposals that the Commission must place a high priority on environmental protection. In adopting regulations and directives, the Council votes unanimously and is able to overrule the Commission. *Id.* at art. 149(1).

¹⁶ *Id.* at art. 130t.

¹⁷ *Id.* at art. 130r.

¹⁸ W. Burhenne, *supra* note 5, at 10 734E.

¹⁹ EEC Treaty, *supra* note 4, at art. 190. Article 190 makes it possible for the parties "to know their rights . . . and for the Member States as well as those of its nationals that may be concerned to be appraised [of] the manner in which the Commission has applied the Treaty." Case 24/62, *Federal Republic of Germany v. Commission*, [1963] E.C.R. 140, 145, 2 C.M.L.R. 347, 367 (1963).

²⁰ W. Burhenne, *supra* note 5, at 10 734E.

²¹ J. DE RUYT, L'ACTE UNIQUE EUROPÉEN 215 (1987).

²² Resolution of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992), O.J. C328/1 (1987) [hereinafter Council Resolution].

environmental information, and for increased opportunities for individuals and groups to defend their rights or interests in administrative procedures. The action programme also addressed the possibility of an EC "Freedom of Environmental Information Act."²³

II. REGULATION 1210/90—ESTABLISHING THE EEA AND AN ENVIRONMENTAL INFORMATION NETWORK

A. *Historical Background: Delegation of Powers*

Early proposals envisioned an EEA with rule-making and enforcement powers. Whether an EEA with such administrative powers was even feasible presents a question of Community law. Under articles 100a and 130r–130s of the EEC Treaty, the Commission has the initial power to make legislative proposals, but the Council has the ultimate decision-making authority.²⁴ Delegation of authority to subordinate bodies is permissible, but only to a limited extent.²⁵ As the Court of Justice ruled in the *Meroni* cases,²⁶ delegation of discretionary jurisdiction would violate the balance of powers that is established by the EC organizational structure, and is therefore incompatible with the EEC Treaty. As the power to make rules necessarily implies discretionary jurisdiction, the delegation of such powers to an independent institution—for example, the EEA—would be deemed a violation of article 130s, which vests authority over environmental affairs with the Council and the Commission.²⁷

The only means of endowing the EEA with rule-making authority, then, would have been by unanimous vote under article 235. Article 235 applies where the Community seeks to attain an important Community objective, but otherwise lacks authority under the EEC Treaty. In such cases, the Council may act by unanimity. Such assent, however, would have been difficult or impossible to obtain in the case of rule-making powers for the EEA.

²³ *Id.* at Annex 1.

²⁴ EEC Treaty, *supra* note 4, at arts. 100A, 130r–130s.

²⁵ *Id.* at art. 145.

²⁶ Case 9/56, *Meroni & Co. v. High Authority*, [1958] E.C.R. 11, 43 (1958); Case 10/56, *Meroni & Co. v. High Authority*, [1958] E.C.R. 51, 58 (1958); VOL. I L. CONSTANTINESCO, *DAS RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN* 400–01 (1977).

²⁷ EEC Treaty, *supra* note 4, at art. 130s.

In its opinion, the Economic and Social Committee welcomed the Commission's proposal for the EEA as a reasonable mechanism for balancing the important supranational functions of the EEA with the political responsibilities of the Commission.²⁸ The Committee considered the proposed agency to be an instrument for analysis and coordination of the information required to develop environmental policies and draft regulations.²⁹ In other words, the Economic and Social Committee viewed the EEA as an assistant authority—that is, one not endowed with executive powers.

The Parliament's original vision for the EEA was quite different. After its first reading of the Commission's proposal, the Parliament called for an authority vested with extensive administrative powers to protect natural resources and the environment, and to ensure nuclear safety.³⁰ This concept, however, was totally unrealistic. As noted, the member states were not prepared to transfer rule-making authority to the EEA. Furthermore, the Commission had already been entrusted with ensurance of nuclear safety under articles 35–36 of the treaty establishing the European Atomic Energy Community.³¹ Therefore, the Parliament settled for a compromise formula that was acceptable to the Commission, and voted for the proposal after the second reading.

B. *Objectives and Duties of the EEA*

The objective of Regulation 1210/90 is to establish the EEA and to coordinate a Community environmental information network.³² The EEA is a legally independent body charged with providing the Community and the member states with technical and scientific assistance necessary to meet the objectives of the environmental policy as established in the EEC Treaty, action programmes, and binding international agreements.³³

²⁸ ECOSOC Opinion, *supra* note 2, at 21.

²⁹ *Id.*

³⁰ Proposal from the Commission to the Council for a Council Regulation on the Establishment of the European Environment Agency and the European Environment Monitoring and Information Network, O.J. C68/50 (1990).

³¹ Treaty Establishing the European Atomic Energy Community, Mar. 15, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM Treaty].

³² Regulation 1210/90, *supra* note 1, at art. 1.

³³ *Id.* at arts. 1–2.

To achieve its objectives,³⁴ the EEA must fulfill the duties enumerated in article 2 of the regulation. The main duty is to establish and coordinate an environmental information network in cooperation with the member states.³⁵ Accordingly, the EEA is charged with gathering, processing, and analyzing data on the environment.³⁶ Additionally, the EEA must continue the work begun under Decision 85/338, which established the Coordinated Information on the Environment Programme (CORINE).³⁷

1. Establishing the Environmental Information Network

Article 4 of the regulation outlines the structure of the environmental information network that is called for under article 1.³⁸ According to article 4, the network must include "the main component elements of the national information networks, the national focal points, [and] the topic centres."³⁹

Within six months of the regulation's entry into force, the member states must notify the EEA of their central environmental agencies, and the components of their national environmental information networks, particularly with regard to the priority areas referred to in article 3(2).⁴⁰ Member states may designate a "national focal point" from among these institutions or other environmental organizations, to coordinate and transmit national information to the EEA and the network. The EEA may conclude agreements with the organizations designated by the member states in order to facilitate execution of the tasks specified in article 4.⁴¹

In addition to this general network, member states may identify institutions or other organizations that could be entrusted to

³⁴ See *id.*

³⁵ See *id.* at art. 4 for a description of the network.

³⁶ Regulation 1210/90, *supra* note 1, at art. 2.

³⁷ See Decision 85/338, Council Decision of 27 June 1985 on the adoption of the Commission work programme concerning an experimental project for gathering, coordinating and ensuring the consistency of information on the state of the environment and natural resources in the Community, O.J. L176/14 (1985) [hereinafter CORINE]; *infra* notes 47-53 and accompanying text.

³⁸ Regulation 1210/90, *supra* note 1, at art. 14.

³⁹ *Id.*

⁴⁰ *Id.* at art. 4(2).

⁴¹ *Id.* at art. 18. Contractual liability of the EEA is governed by the law applicable to the contract at issue. In cases of non-contractual liability, the EEA, in accordance with general principles common to the law of the member states, would be liable for damages caused by the EEA or its employees in the performance of their duties. *Id.* at art. 16.

cooperate with the EEA regarding certain topics of environmental protection in a given geographical area.⁴² The Management Board of the EEA will designate these topic centres for multiannual work programmes and allocate specific tasks to them.

2. Furnishing Information

The EEA's first priority is to gather information on the present and foreseeable state of the environment.⁴³ This data is not merely for academic interest. Article 3 requires the EEA to furnish information that can be directly used in the implementation of Community environmental policy.⁴⁴ The regulation, therefore, leaves no doubt as to the EEA's mandate—furnishing hard, reliable data for decisionmakers within the Community and the member states.

Article 3 enumerates the priority areas on which the EEA must focus its information gathering activities:

- air quality and atmospheric emissions,
- water quality, pollutants and water resources,
- the state of the soil, of the fauna and flora, and of biotopes,
- land use and natural resources,
- waste management,
- noise emissions,
- chemical substances which are hazardous for the environment,
- coastal protection.

In particular, transfrontier, plurinational and global phenomena shall be covered.⁴⁵

The EEA has no responsibilities relating to nuclear pollution of the environment. Pursuant to article 36 of the Treaty establishing the European Atomic Energy Community,⁴⁶ the Commission already receives information on the results of EC nuclear regulations. These data include measurements of the level of radioactivity in the atmosphere, water, and soil conducted by the member states.

⁴² *Id.* at art. 4(4).

⁴³ *Id.* at art. 3(1).

⁴⁴ *Id.* at art. 3(2).

⁴⁵ *Id.*

⁴⁶ EURATOM Treaty, *supra* note 31, at art. 36.

3. Achieving the Goals of CORINE

Council Decision 85/338 adopted CORINE, an experimental project for gathering, coordinating, and ensuring the consistency of information on the state of the environment and natural resources in the Community.⁴⁷ The objectives of CORINE were to provide information to assist the Community in implementing environmental policy. CORINE also addressed the prospect of a Community information system on the state of the EC's environment.⁴⁸

Article 3(2) of Regulation 1210/90, which provides for the gathering of information to assist implementation of Community environmental policy, achieves one of the main objectives of CORINE.⁴⁹ Activities enumerated in article 2(ii)–(v) of the regulation also parallel the activities encompassed by CORINE. These activities include: providing the Community and the member states with the objective information necessary to frame and implement sound and effective environmental policies;⁵⁰ recording, collating, and assessing data for the Commission;⁵¹ drafting expert reports on the state of the Community environment;⁵² providing member states with uniform criteria for assessing environmental data; helping ensure that environmental data at the European level are comparable; and promoting the incorporation of European environmental information into an international monitoring program.⁵³

Additional tasks for the EEA include ensuring broad dissemination of reliable environmental information, including publication of a triannual report on the state of the environment.⁵⁴ The EEA must also promote the development and application of environmental forecasting techniques so that adequate and timely preventive measures can be taken.⁵⁵ In addition, the EEA must

⁴⁷ CORINE, *supra* note 37, at art. 1.

⁴⁸ *Id.* at Annex.

⁴⁹ Regulation 1210/90, *supra* note 1, at art. 3(2). Areas of activity that are not addressed in Regulation 1210/90 include biotopes of major importance for nature conservation, acid deposition (acid rain), and protection of the environment in the Mediterranean region. These activities should be pursued further by the EEA.

⁵⁰ *Id.* at art. 2(ii).

⁵¹ *Id.* at art. 2(iii).

⁵² *Id.* at art. 2(iv).

⁵³ *Id.* at art. 2(v).

⁵⁴ *Id.* at art. 2(vi).

⁵⁵ *Id.* at art. 2(vii).

encourage development of methods to assess the cost of environmental damage and the costs of various environmental policies.⁵⁶ Finally, the EEA must facilitate the exchange of information concerning the most advanced technologies available for preventing or reducing damage to the environment, and must cooperate with the organizations and programmes referred to in article 15 of the regulation.⁵⁷

Article 2 contains an exhaustive list prescribing EEA activities and thereby delineates the powers of the EEA.⁵⁸ Such a detailed enumeration is necessary in order to avoid challenges for lack of jurisdiction.⁵⁹

According to article 20, the Council may extend the scope of the EEA's activities two years after the regulation enters into force.⁶⁰ The significance of article 20, however, should not be overestimated. Unless otherwise determined by the Council, article 20 restricts the EEA to implementation of Community environmental legislation. Article 2 contains no mention of activities related to observation, surveillance, or control.⁶¹ Apparently, these activities will remain with the Commission.

⁵⁶ *Id.* at art. 2(viii). These environmental policies include prevention, protection, and restoration.

⁵⁷ *Id.* at arts. 2(ix)–(x). The bodies and programmes referred to in article 15 include the Joint Research Center, the Statistical Office of the European Communities (Eurostat), the European Space Agency, the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the International Energy Agency, the United Nations and its specialized agencies, the World Meteorological Organization, and the International Atomic Energy Authority. *Id.* at art. 15.

⁵⁸ EEC Treaty, *supra* note 4, at art. 2.

⁵⁹ *See id.* at art. 173; J. STEINER, TEXTBOOK ON EEC LAW 267 (1988). If the Court of Justice of the European Communities (Court of Justice) were to find that the EEA acted without jurisdiction, the act would be deemed illegal and there would be grounds for annulment.

⁶⁰ Regulation 1210/90, *supra* note 1, at art. 20. After consultations with the European Parliament and the Commission, the Council will decide whether to extend the activities of the EEA, especially with regard to the following areas:

- associating in the monitoring of the implementation of Community environmental legislation, in cooperation with the Commission and existing competent bodies in the Member States,
- preparing environmental labels and criteria for the award of such labels to environmentally friendly products, technologies, goods, services and programmes which do not waste natural resources,
- promoting environmentally friendly technologies and processes and their use and transfer within the Community and third countries,
- establishing criteria for assessing the impact on the environment with a view to application and possible revision of Council Directive 85/337

Id. (citations omitted).

⁶¹ Apparently, the Council has not acceded to the wishes of the Parliament in this area.

C. *Organization of the EEA*

According to article 7 of the regulation, the EEA is an independent legal entity entitled to the full panoply of rights and duties that the laws of the member states accord to legal persons.⁶² The EEA consists of four organs: the Management Board, the Executive Director, the Scientific Committee, and the Financial Controller.⁶³ This Section discusses the organization of the EEA, detailing the functions of each of these organs.

1. The Management Board

The Management Board will consist of sixteen members—twelve representing the member states, two representing the Commission, and two designated by the Parliament.⁶⁴ The two members to be designated by the Parliament must be qualified in the field of environmental protection and must be selected on the basis of the scientific and technical contribution that they are likely to make to the work of the EEA.

Representatives of the member states may be the same ministers who represent their states in the meetings of the Council. Each member of the Management Board will have one vote. Normal voting procedure requires a two-thirds majority for approval.⁶⁵ Thus, those members designated by the Parliament and the Commission will not have considerable voting influence. Given that three-quarters of the members of the Management Board will be representatives of the member states, Board decisions probably will not differ from Council decisions. In other words, the Council will continue to make the decisions.

The Management Board will elect a chairman, from among its members, for a period of three years, and will adopt its own rules of procedure.⁶⁶ The main duties of the Management Board are to adopt multiannual work programmes, appoint the Executive

Parliament took notice of this fact in its analysis of Regulation 1210/90. *See generally* Notice to Members, PE 141.217 (May 21, 1990).

⁶² Regulation 1210/90, *supra* note 1, at art. 7. The legal capacity of individuals will of course vary among the member states. For example, in the United Kingdom, legal capacity is limited under the *ultra vires* doctrine. This is not the case in continental civil-law states such as Germany.

⁶³ *Id.* at arts. 8–10, 13.

⁶⁴ *Id.* at art. 8(1).

⁶⁵ *Id.* at art. 8(2)–(3).

⁶⁶ *Id.* at art. 8(2).

Director, and designate members of the Scientific Committee.⁶⁷ When the EEA commences operation, the Management Board will organize the main elements of the environmental information network.⁶⁸ In addition, the Management Board will designate topic centres,⁶⁹ by unanimous decision, for a period not exceeding the duration of each multiannual work programme.

When adopting a multiannual work programme, the Management Board must focus on the priority areas referred to in article 3 of the regulation.⁷⁰ Before adopting the programme, however, the Management Board must consult the Scientific Committee, and must solicit the opinion of the Commission.⁷¹

Each year, as part of the multiannual work programme, the Management Board must adopt the EEA's work programme for that year.⁷² In adopting this annual work programme, the Management Board must base its proposal on a draft from the Executive Director, must consult with the Scientific Committee, and must solicit the opinion of the Commission. Neither the consultation of the Scientific Committee nor the opinion of the Commission, however, are binding on the decision of the Management Board. Theoretically, the board has the authority to adopt any programme—even those that conflict with the opinion of the Commission. Nevertheless, the consultation of the Scientific Committee and the opinion of the Commission are essential to the decision-making process and any decision made without such consultation or opinion may be nullified by the Court of Justice.

The Management Board has several appointment responsibilities. When appointing the Executive Director of the EEA, the Management Board must base its decision on a proposal from the Commission.⁷³ The Management Board may either adopt or reject the candidate nominated by the Commission.⁷⁴ Agreement between the Management Board and the Commission on selection of the Executive Director may prove to be time consuming.

⁶⁷ *Id.* at arts. 8–10.

⁶⁸ *Id.* at art. 4(5).

⁶⁹ For a discussion of topic centres, see *supra* text accompanying note 42.

⁷⁰ Regulation 1210/90, *supra* note 1, at arts. 3, 8(4).

⁷¹ *Id.* at art. 8(4).

⁷² *Id.* at art. 8(5).

⁷³ *Id.* at art. 9(1).

⁷⁴ Parliament tried to ensure that the Commission's right of proposal would only be exercised in cooperation with the Parliament. The Council, however, did not adopt this approach. Notice to Members, *supra* note 61, at 8.

The Management Board must also appoint the members of the Scientific Committee.⁷⁵ The regulation does not establish a procedure for designating these members except that it requires a two-thirds majority vote by the board.⁷⁶ The Management Board must also appoint a Financial Controller to manage the EEA's budget.⁷⁷ Finally, the Management Board must adopt an annual report on the activities of the EEA.⁷⁸ The board must forward the report to the Parliament, the Council, the Commission, and the member states.

2. The Executive Director

The Executive Director heads the EEA and is its legal representative.⁷⁹ The Management Board appoints the Executive Director for a renewable period of five years. The Executive Director's responsibilities include the daily management of the EEA, "the proper preparation and execution of the decisions and programmes adopted by the Management Board," and drafting both the multiannual and annual work programmes.⁸⁰ In addition, the Executive Director is responsible for drafting and implementing the EEA's budget,⁸¹ and publishing reports on the state of the environment.⁸²

Because the Executive Director is appointed on the basis of a Commission proposal, the procedure strengthens the Commission's tenuous position in the management of the EEA. When drafting the annual and multiannual work programmes under article 8(4) of the regulation, the Executive Director must consult the Scientific Committee and solicit an opinion from the Commission.⁸³ The regulation, however, does not require the Executive Director to incorporate their input in drafting the work programmes.

⁷⁵ Regulation 1210/90, *supra* note 1, at art. 10.

⁷⁶ *Id.* at art. 8(3).

⁷⁷ *Id.* at art. 13(2).

⁷⁸ *Id.* at art. 8(6).

⁷⁹ *Id.* at art. 9.

⁸⁰ *Id.*

⁸¹ *Id.* at arts. 12–13. See *infra* text accompanying note 86.

⁸² *Id.* at arts. 2(vi), 9(1).

⁸³ *Id.* at art. 8(4).

3. The Scientific Committee

Although the Scientific Committee is one of the indispensable organs of the EEA, the regulation does not specify its responsibilities.⁸⁴ As noted, the Executive Director must consult with the Scientific Committee in drafting the EEA's annual and multiannual work programmes.⁸⁵ There is no additional legal requirement to submit other EEA activity to the Scientific Committee. Both the Management Board and Executive Director may virtually ignore the Scientific Committee if its opinion is unwelcome.

The Scientific Committee is composed of nine members who are qualified in environmental affairs.⁸⁶ The Management Board designates members for a term of four years. The committee shall elect a chairman for a period of three years and shall adopt its own rules of procedure, with each member entitled to one vote.⁸⁷

4. Financial Management

The EEA will be financed mainly by revenue from payments for services rendered and through a subsidy from the Community.⁸⁸ The Community subsidy will probably be the most important source of revenue. The subsidy from the Community will be entered into the general budget of the European Communities. The Management Board must draw up an estimate of the EEA's revenue and expenditure based on a draft from the Executive Director, and must then forward the estimate together with an establishment plan to the Commission.⁸⁹ The Commission then prepares the preliminary draft budget and submits it to the Council.⁹⁰ Article 203 of the EEC Treaty establishes the procedure for adopting the Community budget.⁹¹ During this process, the Parliament may exercise its right to amend the draft budget, and

⁸⁴ *Id.* at art. 10(1). Article 10(1) provides: "The management board and the Executive Director shall be assisted by a scientific committee which shall deliver an opinion where provided for in this Regulation and on any scientific matter concerning the [EEA's] activity which the management board or the Executive Director may submit to it."

⁸⁵ *Id.* at art. 8(4).

⁸⁶ *Id.* at art. 10(2).

⁸⁷ *Id.* at arts. 8(2), 10(2).

⁸⁸ *Id.* at art. 11(3). Article 11(3), however, provides no details as to what services the EEA would render against payment.

⁸⁹ *Id.* at art. 12.

⁹⁰ *Id.* at art. 12(2).

⁹¹ EEC Treaty, *supra* note 4, at art. 203.

thus can directly influence the work of the EEA. After adoption of the Community budget, the Management Board will adjust the EEA's budget to reflect the amount of the subsidy provided for in the Community budget.⁹²

D. *Prospects for the EEA*

Two factors threaten the future of the EEA. First, member states have yet to agree on a location for the EEA. Eleven member states have applied to the Council and have satisfied the technical requirements for becoming the site for the EEA. Conceivably, the inability to agree on a site may block development of the EEA for years. Regulation 1210/90 enters into force on the day after the competent authorities determine the site of the EEA.⁹³ In a similar case, the Council has yet to agree on a site for the Community trademark authority. The regulation establishing a Community trademark has thus been blocked for nearly 7 years.

Second, based on examination of recent Commission proposals in the field of environmental protection, it does not appear that the Community foresees the EEA as a legitimate, operating authority in the near future. For example, the Commission recently published a proposal for a regulation on the protection of the environment in the coastal regions of waters of the Irish Sea, the Baltic Sea, and the North Atlantic.⁹⁴ Such an area of regulation would be a paradigmatic field of activity for the EEA, but the EEA is not even mentioned in the proposal. The same is true with the modified proposal for a Council decision on research and development in the field of marine service and technology.⁹⁵ Similarly, the modified proposal for a Council decision on a specific program for research and development in the field of the

⁹² Regulation 1210/90, *supra* note 1, at art. 12(3). The budget is then implemented by the Executive Director. *Id.* at art. 13(1). The Financial Controller will monitor the commitment and payment of all the EEA's expenditure and carry out the establishment and recovery of all the EEA's revenue. *Id.* at art. 13(2). The Executive Director must forward accounts of the agency's revenue and expenditure to the Commission, the Management Board, and the Court of Auditors. *Id.* at art. 13(3). The Court of Auditors will then examine these records.

⁹³ *Id.* at art. 21.

⁹⁴ Proposal for a Council Regulation (EEC) on specific action to protect the environment in the coastal areas and coastal waters of the Irish Sea, North Sea, Baltic Sea and North-East Atlantic, O.J. C21/6 (1991).

⁹⁵ Amended proposal for a Council Decision adopting a specific research and technological development programme in the field of marine science and technology (1991-1994), O.J. C321/8 (1990).

environment also fails to incorporate the EEA.⁹⁶ Rather than providing for a future role for the EEA, these programs provide for advisory committees of representatives from the member states to implement the programs. This trend does not instill much optimism concerning the future of the EEA.

III. ESTABLISHING THE RIGHT OF FREE ACCESS TO ENVIRONMENTAL INFORMATION

Both the Council and the Commission have recognized the importance of compiling information on the environment. The Council resolution establishing the Fourth Environmental Action Programme declared improved access to information on the environment to be a priority area for Community action.⁹⁷ In the annex of that resolution, the Commission emphasized that "particular attention needs to be given to situations where access to information is an element for the better protection of man or the environment"⁹⁸ Accordingly, the annex contains a promise from the Commission to study the need and desirability of a Community "Freedom of Environmental Information Act" and to make appropriate proposals.⁹⁹ Directive 90/313 is the product of the Commission's research.

A. *The Right of Free Access to Environmental Information*

Article 3 of the directive provides that member states must ensure that local authorities make environmental information available to all natural or legal persons, without requiring applicants to demonstrate a particular interest in the information. There are, however, some restrictions regarding special information,¹⁰⁰ and the member states are authorized to establish their own regulations for making the information accessible.¹⁰¹

The directive grants a right of access to information to all natural or legal persons.¹⁰² The term legal persons includes as-

⁹⁶ Amended proposal for a Council Decision adopting a specific research and technological development programme in the field of environment (1991-1994), O.J. C327/22 (1990).

⁹⁷ Council Resolution, *supra* note 22, at 4.

⁹⁸ *Id.* at Annex, at 15, § 2.6.1.

⁹⁹ *Id.* at Annex, at 15, § 2.6.2.

¹⁰⁰ Directive 90/313, *supra* note 3, at art. 3(2).

¹⁰¹ *Id.* at art. 9(1). The authority of member states to establish their own regulations may, however, result in a sort of "steeple chase" of overregulation.

¹⁰² *Id.* at art. 3(1).

sociations of environmental fundamentalists if these associations are considered legal persons under their national law. Because article 7 of the EEC Treaty prohibits discrimination on the basis of nationality,¹⁰³ any citizen of the Community may claim a right of access to environmental information anywhere within the Community.

Pollution does not respect national frontiers, and environmental problems in one member state often affect individuals throughout the Community. For this reason, the directive requires unconditional public access to environmental information. Such wide and comprehensive access to information is virtually unheard of in member states. For example, under German law, a claimant normally has to prove a particular need for the information requested.

Article 3(2)–(3) enumerates the few situations where access to information about the environment may be denied.¹⁰⁴ These situations include information concerning: confidential deliberations of authorities; international relations, national defense, and public security; cases pending in court; business secrets, including intellectual property; confidential personal data or files; and information, dissemination of which would magnify the probability of harm to the environment. The terms used in article 3, however, are ambiguous and may cause disputes between claimants and authorities. Therefore, in order to ensure that access to environmental information is not unjustly denied, the directive provides minimum rules for an appellate procedure.¹⁰⁵

The scope of the right of access to environmental information is far-reaching, providing claimants with near total access to any environment-related information. The information that must be provided to claimants includes any information in written, pictorial, sound, or computerized form, on the state of waters, air, and soil; fauna and flora and their natural habitants; and any other information on activities or measures that could impair the environment, or on activities and measures for the protection of these environmental areas, including administrative measures and programmes.¹⁰⁶

¹⁰³ See EEC Treaty, *supra* note 4, at art. 7; Case 14/68, *Wilhelm v. Bundeskartellamt*, [1969] E.C.R. 1, 15 (1969).

¹⁰⁴ Directive 90/313, *supra* note 3, at art. 3(2)–(3).

¹⁰⁵ *Id.* at art. 4. Article 4 permits “judicial or administrative review of the decision in accordance with the relevant national legal system.”

¹⁰⁶ *Id.* at art. 2(a).

The authorities that must respond to requests for environmental information include all national, regional, and local administrative agencies involved with environmental protection, with the exception of those bodies acting in a legislative or judicial capacity.¹⁰⁷ Member states must enact legislation to ensure that every Community citizen, regardless of nationality, has access to environmental information, and that agencies involved in environmental protection make environmental information available directly or through supervising authorities.¹⁰⁸

B. *Rules of Procedure*

Article 1 of the directive establishes the prerequisites for accessibility of environmental information.¹⁰⁹ The directive defines environmental information, lists the authorities that must provide the information, and specifies the persons who are entitled to claim free access.¹¹⁰ In addition, the directive provides basic rules of procedure.

Authorities responsible for providing environmental information must respond to applications as fast as possible—at least within a period of two months, without any time extensions.¹¹¹ If the authority rejects the application, it must state the grounds for rejection.¹¹² The grounds for rejecting an application are enumerated in article 3(2) of the directive. The wording of this provision, however, is ambiguous. For example, member states may reject an application when the information requested affects public security. But it is not clear whether interpretation of the term “public security” is left to the discretion of the member states and is thus beyond the jurisdiction of the Court of Justice, or whether it is an issue of Community law.¹¹³ In addition, authorities may

¹⁰⁷ *Id.* at art. 2(b).

¹⁰⁸ *Id.* at art. 6.

¹⁰⁹ *Id.* at art. 1.

¹¹⁰ *Id.* at art. 2.

¹¹¹ *Id.* at art. 3(4).

¹¹² *Id.* at art. 3(2). See *supra* text accompanying notes 104–105.

¹¹³ The term “public security” also appears in article 36 of the EEC Treaty, which permits prohibitions or restrictions on trade for reasons of public security. EEC Treaty, *supra* note 4, at art. 36. Thus, it could be argued that public security has the same meaning under article 3(2) of Directive 90/313 as it does under article 36 of the EEC Treaty. The Court of Justice has failed to clarify the meaning of public security under article 36. See Case 72/83, *Campus Oil Ltd. v. Minister for Industry and Energy*, [1984] E.C.R. 2727, 2751; 41 C.M.L.R. 544, 569–70 (1984). In *Regina v. Henn & Darby*, however, the Court of Justice ruled that a member state must interpret the term “public morality” in accor-

reject applications that refer to documents not yet completed, data not yet processed, or to internal memoranda.¹¹⁴ Finally, the authorities may reject applications that they judge to be manifestly unreasonable or vague.

Article 4 of the directive provides for the right to appeal a decision refusing free access to environmental information.¹¹⁵ Because the right to appeal is granted in the directive, it does not require a right of appeal under national law, nor does it require harmonization of the laws of the member states. Nonetheless, national procedures concerning a right to appeal have not yet been the object of harmonization. Therefore, appellants must refer to their national judicial or administrative rules for such procedures. In Germany, for example, the Rules of the Administrative Courts govern the right to appeal. Accordingly, an appeal may eventually come before the Court of Justice under article 177 of the EEC Treaty¹¹⁶ if the Administrative Court considers a ruling necessary to render a judgment. Thus, in years to come, the Court of Justice will likely have ample opportunity to rule on controversies related to free access to environmental information, or related to environmental impact assessments under Directive 85/337.¹¹⁷

C. *Implementing Directive 90/313*

Member states must enact national laws and regulations necessary to implement the directive by December 31, 1992. Failure to comply with article 9(1) may lead to proceedings under article 169 of the EEC Treaty.¹¹⁸ In addition, individuals could attempt to invoke their right of free access to environmental information against member state authorities failing to implement the direc-

dance with its own values. Case 34/79, [1979] E.C.R. 3795, 3813, 27 C.M.L.R. 246, 272 (1979). It is not clear whether the Court of Justice will allow member states the same discretion with respect to article 3(2).

¹¹⁴ Directive 90/313, *supra* note 3, at art. 3(3).

¹¹⁵ *Id.* at art. 4.

¹¹⁶ EEC Treaty, *supra* note 4, at art. 117. "The Court of Justice shall be competent to make a preliminary decision concerning . . . the validity and interpretation of acts of the institutions of the Community . . ."

¹¹⁷ Directive 85/337, Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L175/40 (1985).

¹¹⁸ EEC Treaty, *supra* note 4, at art. 169. "If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments." *Id.*

tive based on the doctrine of direct effect or direct applicability. It is well-settled case law that a directive confers directly enforceable rights if the provision is sufficiently clear, precise, and unconditional in that it leaves no discretion to member states concerning its implementation.¹¹⁹

Examination of Directive 90/313, however, suggests that its provisions only partially fulfill the requirements for direct effect as established by the Court of Justice. The definitions contained in the directive are sufficiently clear and precise. Nevertheless, because member states themselves provide the implementing regulations, the content of the directive is not unconditional. Therefore, individuals or groups would probably not be able to invoke their right of access until the member states enact implementing legislation.

D. *Prospects*

The right of access to environmental information could well have far-reaching consequences. That the Community is granting free access to information on one of the most sensitive problems besetting the member states must be regarded as practically revolutionary, especially in light of its reticence regarding civil rights issues.

Pressure groups of all kinds should now be able to use this new information to facilitate or obstruct industrial investments. For example, the conditions for authorization of an oil refinery or nuclear power plant have been inaccessible to the public. Henceforth, this will not be the case. Under an environmental pretext, it will be possible to scrutinize the environmental and therefore the investment policies of large corporations within the Community.

Further, member state implementation of Directive 90/313 could well create a Community-wide right of access to information that could reach beyond the area of environmental protection. For example, the Council is deliberating whether the Community should join the European Human Rights Convention,¹²⁰ which could result in demand for free access to information concerning alleged human rights violations.

¹¹⁹ See Case 103/88, *Costanzo v. Città di Milano*, [1989] E.C.R. 1839, —, 59 C.M.L.R. 239, 258 (1989). See also EEC Treaty, *supra* note 4, at art. 189.

¹²⁰ See Answer of President Delors on behalf of the Commission to the inquiry of MEP Preja, O.J. C328/29, at 29–30 (1990).

CONCLUSION

The Community has limited the role of the EEA to that of a collection and coordination center for environmental information. Nevertheless, establishment of the EEA can be seen as a positive step towards uniform protection of the environment. The EEA, as well as Directive 90/313 and the newly established right of access to information, should greatly advance the quality and accessibility of environmental information in the Community. Given that sunshine is the best disinfectant, these initiatives could well form the cornerstones for future Community environmental protection efforts.