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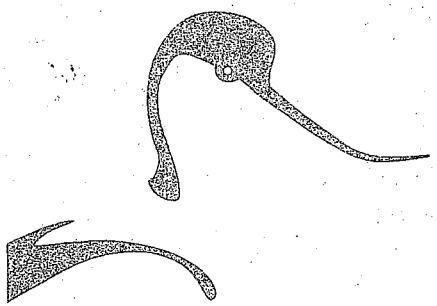

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Environmental Impact Assessment in EC Law

A Critical Appraisal

Angel-Manuel Moreno

I Introduction

Environmental Impact Assessment (hereinafter, "EIA") has become a universal technique in the domain of environmental protection. It was first introduced by US Federal Legislation in 1969, where the National Environment Policy Act ("NEPA") required all federal agencies to perform an assessment of the impact that all "major federal actions" could have on the environment.[1] This instrument is now present in most countries worldwide, as well as in international law. Thus, Principle 17 of the Rio Declaration of 7 May 1992 requires that EIA be undertaken for proposed activities "that are likely to have a significant adverse impact on the environment". Beyond soft law, there are several international instruments dealing with this technique. Some of them order to perform an EIA whenever a planned activity is supposed to harm or to have a significant effect ("impact") on the environment. That is the case of the UN Convention on Biological Diversity of 1992 (at Article 14). Furthermore, the UN-ECE 1991 Espoo Convention lays down several rules whenever a given action (a "project") planned in one country is supposed to have a significant impact on the environment of another, neighbouring country, the so-called "environmental impact assessment in a transfrontier context". This convention was signed by the European Community (hereinafter, "EC") on 26 February, 1991, and approved (that is, ratified) on behalf of the Community by Council Decision of 27 June 1997.[2] As the Member States have also ratified this Convention[3], it is a perfect example of a "mixed agreement" in the field on environmental law.

First restricted to individual projects, this instrument now covers also plans and programs (the so-called "strategic" assessment). Although this technique is commonplace and well known, there is no general, substantive regulation of it. The shape, format and legal regime of EIA vary enormously among different countries. This weakness pervades also EC regulation, as we will see later.

EIA is now present in EC Environmental Law in different instances.[4] First, several directives require that an EIA be performed whenever a project or a plan is likely to harm the environment (for instance, Article 6.3 of Directive 92/43, on the protection of habitats) while in others an environmental assessment is somehow implicitly required (in Article 4 of Directive 75/442, on waste, for instance). Second, the EC has managed to approve two separate directives on EIA: on the one hand, Council Directive 85/337 of 27 June 1985 on the assess-

1 42 USC 4321-4370. On this technique in US environmental law, see: Malone, L.A.: *Environmental Law*, (2003) New York: Aspen Publishers, p. 39-48.

2 The Convention entered into force for the EC on 22 September 1997.

3 For instance, Spain ratified it on 1 September 1992.

4 For a general description of this technique in EC environmental law, see: Ludwig Krämer, *EC Environmental Law*, 5th ed. (2003) London: Sweet & Maxwell, p. 151-155.

ment of the effects of certain public and private projects on the environment[5], regulates this technique as applied to individual activities and actions. On the other hand, Directive 2001/42 of 27 June 2001 requires an EIA for major plans and programs having a significant, negative effect on the environment.[6]

II Controversial Aspects of Directive 85/337 in the Case-law of the Court

In a nutshell, Directive 85/337 requires that any project included in Annex I or II be subjected to an evaluation, a study of the effects that such a project is supposed to cause on the environment. A "project", for the purpose of this directive is any human action or activity that transforms the environment in a significant way, for the purpose, among others, of constructing public infrastructures (roads, harbours, railways, airports, etc.), building up facilities for productive activities (nuclear power plants, chemical industries, iron smelters, etc) or economic activities such as mining. The notion of project, however, presents several difficulties that will be analysed *infra*.

By "environmental impact", Directive 85/337 means the effects that a given project is likely to trigger in a number of different aspects, which collectively are supposed to form 'the environment': "human beings, fauna and flora; soil, water, air, climate and the landscape; material assets and the cultural heritage" as well as the interaction between all these factors (Article 3). Directive 85/337, however, does not prescribe any precise or detailed procedure for the performance of an EIA, as it only lays down a procedural skeleton which might result in diverse national formats. Rather than performing a comprehensive explanation of this piece of legislation, we will focus on the 'dark' points and weaknesses of it, in order to provide a critical appraisal of the technique.

Since its enactment in 1985, this Directive has been a constant source of legal controversy, due to its horizontal nature and its very wide reach. Among the most important legal disputes and questions the following four stand out.

II.1 The Possible Direct Effect of the Directive

The possibility that Directive 85/337 have direct effect confronts a serious obstacle: in the traditional understanding of this judge-made doctrine, direct effect is linked to the question whether a given directive recognizes "rights" in favour (in the legal domain) of the individual, which can be claimed

[5] OJ L 175, p. 40; amended by Directive 97/11, (1997) OJ L 73, p. 5 and by Directive 2003/35 (2003) OJ L 156, p. 17.

[6] Directive 2001/42 on the assessment of the effects of certain plans and programs on the environment (2001) OJ L 197, p. 30.

as a protection against the action of governmental bodies and agencies.[7] The legal wording of the EIA Directive does not explicitly proclaims such rights. What is more, it imposes some duties on the individual (for instance, the production of documents and information on the impact of the project and their submission to the authorizing agency). However, the study of the case-law developed by the Court of Justice (hereinafter "ECJ") reveals a positive surprise, since the Court has eventually declared that a number of articles of Directive 85/337 do indeed have direct effect (Articles 1(1), 2(1), 4(2), 5 and 6(1)). In a nutshell, the main steps in this development may be summarised as follows. The starting point of this case-law development has to be found in the *Grosskrotzemburg* case,[8] where the Court clearly stated that Directive 85/337 establishes a clear and unequivocal obligation to perform EIA for projects having a significant deleterious impact on the environment. In the well-known *Kraaijeveld* judgment, decided in 1996,[9] the plaintiffs in the national proceedings had sought the annulment of a decision of the South Holland Provincial executive that approved a zoning plan, but had not claimed the direct effect of Directive 85/337. However, the Court stated that the direct effect of Directive 85/337 could be autonomously found and applied by national courts, even if the applicants did not invoke it. Some years later, the ECJ revisited the issue of the direct effect of the Directive in the decision *World Wildlife Fund and other* v. *Autonome Provinz Bozen* (Bolzano airport).[10] In these proceedings, the Italian regional authorities of Bozen (Bolzano) had approved a project whose main purpose was to transform an old military airfield into an airport to be used commercially. The project was subject to a simplified environmental impact study, an instrument provided for by the laws of the province of Bolzano. An environmental organisation and several people living in the vicinity of the airport challenged the legality of the regional authorities decision, on the ground that the project had not been submitted to a previous EIA with the requisites and contents provided for by Directive 85/337. The Court sustained the claim (paragraph 71 of the judgment) but did not provide any elaboration on the "dogmatic" foundations of this effect. What is more, the Court did not analyse whether Directive 85/337 confers "rights" in favour of individuals (the applicants).

Later, in the *Linster* case,[11] the government of Luxembourg had planned and approved the construction of a highway. The project involved the expropriation of some private properties. The Linsters, a couple owning one of the affected slots of land, challenged the project, claiming that it had been approved by the competent authority without conducting a EIA and without going through the

[7] See, for all, the famous *Ratti* affair; case 148/78 *Ratti* (1979) ECR 1629.

[8] Case C-431/92 *Commission* v. *Germany* (1995) ECR I-2189.

[9] Case C-72/95 *Kraaijeveld* (1996) ECR I-5403.

[10] Case C-435/97 *Bolzano* (1999) ECR I-5613.

[11] Case C-287/98 *Linster* (2000) ECR I-6917.

stage of public information, thereby violating Articles 5(1) and 6(2) of Directive 85/337. The Court was asked about the possible direct effect of those provisions, and it replied in the positive (paragraph 39), recalling its previous decisions in *Kraaijeveld* and *Bolzano*. But it is less certain whether this is a good decision for the public interest. It is true that the project was unlawful, since it did not include an EIA, but it is also true that, contrary to what happened in *Bolzano*, the Linsters did not argue that the project was bad for the environment. EC environmental law was not used here for the sake of protecting the environment, but just as an additional (procedural) argument to conserve a private property. On the other hand, it is also possible that the projected highway would have served environmental objectives as well, such as decongesting traffic jams, reducing air pollution, and so on.

Finally, in *Delena Wells*[12] the plaintiff lived in the proximity of an abandoned mine which was re-opened on the basis of a new set of conditions imposed by the competent authority, without undergoing an EIA. Ms Wells challenged the legality of such a re-opening on the ground that, since no EIA had been conducted, the re-opening was invalid. The national court (here, the High Court of Justice of England and Wales) asked the Court of Justice whether Articles 1(2), 2(1) and 2(4) of the Directive had direct effect. This case presents peculiar features that distinguish it from the others that have been analysed so far. In *Bolzano, Linster* and *Kraaijeveld,* the factual context is the same: an individual (a private person or a corporation) challenges an agency decision concerning a public project, which affects the public at large. However, in *Delena Wells*, an individual challenged an agency decision which licenced a private activity. Thus, the success of the law suit would trigger negative effects on the legal interests sphere of another individual. This nuance was really new in the doctrinal scenario of the direct effect of Directive 85/337. The Court solved this dilemma by declaring that "mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned" (paragraph 57), and went on to declare that an individual may rely on Article 2(1) of Directive 85/337. It is important to note that the Court does not inquire whether the Directive is "clear, precise and unconditional", whether it confers rights on the individuals or even whether Ms. Wells was seriously affected in her standard of life by the re-opening of the extractive activities.

Lastly, even if Directive 85/337 confers some procedural rights in the case of projects planned or performed without an EIA, those "rights" enshrined in Directive 85/337 are not strong enough as to modify the traditional regime of standing for annulment procedures before the Court of First Instance. See, in this line of reasoning, the case *Greenpeace* v. *Commission,*[13] where the Court

[12] Case C-201/02 *Delena Wells* (2004) ECR I-723.

[13] Case C-321/95P *Stichting Greenpeace* (1998) ECR I-1651.

dismissed an appeal against a judgment of the Court of First Instance that had dismissed a plea for annulment of a Commission Decision granting financial help for the construction of several thermal power stations in the Canary Islands (Spain).[14]

II.2 Connections between EIA and the Authorisation of the Project

As a good example of the principle of preventive action, Directive 85/337 requires an EIA before the project is actually licensed, or receives the relevant authorisation. However, this permit, licence, or authorisation is not regulated by EC law, but by national legislation, usually administrative law (the law on roads, railways, harbours and mining, as well as regulation of industry and business, etc.). Thus, there is a place or a procedural moment where EC environmental law and national administrative law are obliged to meet. This encounter triggers several controversial questions. The first problem is whether a project requires an EIA if it does not require a substantive authorization under national law. For instance, let us suppose that Slovak mining law does not provide for any licence before the opening of certain types of mines. Should the EIA be performed in that case? How can it be performed? If there is no substantive authorisation provided for by national mining law, for instance, there is a key element missing, since the results of the EIA cannot be "taken into consideration" by any agency or body, as the Directive requires. Under a first and literal, approach to the question, it seems that, whenever a substantive permit is not contemplated by the national administrative provision, EIA is unnecessary, or would lack any sense at all. However, this solution runs contrary to the requirements of a uniform application of EC law among Member States. For the Slovak Republic, for instance, it would be very easy to escape from the "clear obligations" stemming from Directive 85/337 *(Grosskrotzemburg)* by having recourse to the simple expedient of modifying its substantive laws on harbours, roads, mining, business regulation and so on, and removing the substantive permits provided for by those national provisions. The second question is what is an "authorisation" for the purpose of Directive 85/337? Since the authorisation is a kind of *a priori* category, regulated by national sectorial law, may EC law develop a "European" concept of it, in order to secure a more homogeneous application of Directive 85/337? Third, EC regulation of EIA does not clarify what happens if a substantive authorisation is awarded to the applicant without performing a previous EIA.

The relevant case-law of the ECJ has now clarified some of these questions. To begin with, the general rule is that it is for the national courts to ascertain whether a given administrative decision or document constitutes an "authorisa-

[14] See further the paper by Jan Jans in chapter 23 of this collection.

tion", in the light of national law (usually administrative law). For instance, in the case *Haarlemmerliede*,[15] a group of affected people in Holland challenged the approval of a zoning plan by the competent local and provincial Dutch authorities. The plan involved the enlargement of the harbour of Amsterdam and foresaw a number of connected individual projects (an industrial zone, a port, etc.). The lawsuit was based on the claim that the plan had been authorised without an EIA. The truth is that, under the Dutch laws and regulations that were approved to transpose Directive 85/337, an EIA is not obligatory for individual projects that were incorporated in a zoning plan. Consequently, the action of the national authorities in this case was *prima facie* valid under national law. Despite this apparent legality of agency action, the applicants urged the national court to decide on the compatibility of those national rules with the Directive. The reason was clear: if a project that is incorporated in a zoning or land use plan does not need a previous EIA, and, on the other hand, the plan itself is not submitted to an EIA, because Directive 85/337 does not cover plans and programmes, the practical result of the national rules would amount to an elusion of the "clear and unequivocal obligations" established by that Directive. The only solution to the problem was to decide, whether a local zoning plan is to be considered an "authorisation" for the purposes of Directive 85/337. The Court of Justice refused to answer that question itself. On the contrary, it stated that national courts must decide if a land use plan, like the one at stake in the national proceedings, is an "authorisation" within the requirements of the Directive.

The first reaction of the Court, then, was to defer the solution of the question to national courts. However, in *Delena Wells*, the ECJ stressed the need for an autonomous, EC concept of authorisation, and decided by itself that "a decision approving matters reserved by the new conditions" like the one at stake in the re-opening of the mine, must be considered an "authorisation", since it has the same effect of a new authorisation for the re-opening of a mine that had remained abandoned for several decades.

Another problematic issue is to determine what happens to the substantive authorisation of the project whenever an obligatory EIA was not actually performed. Nothing is said in the Directive on this question. In principle, it is for the national court to declare what type of effects are triggered by the absence of EIA, but in any case they are bound to take all necessary steps to see that such an assessment is actually conducted. Suspending or revoking the substantive authorisation is one such measure, as the Court stated expressly in *Delena Wells*, (rejecting a UK claim on the contrary). In countries of *droit administratif* tradition (such as Spain) that have a codified legislation on administrative procedure, national courts usually understand that the EIA is an essential and unavoidable step in the overall authorising procedure. Consequently, the absence of an EIA

[15] Case C-81/96 *Haarlemmerliede* (1998) ECR I-3923.

when it is required by either EC or national law is a ground for declaring that the substantive authorisation is void, because the essential procedure established for Agency decisions was seriously violated. As an alternative way, the Court also found in *Delena Wells* that paying damages to the affected person is a fair manner to ensure compliance with EC law.

II.3 The Projects Covered by the Directive

Directive 85/337 applies to "projects", a simple concept as paragraph 2 above notes. In order to confer more legal certainty to this key element, the Directive includes a general definition of project in Article 1(2), and, in addition, contains two different groups of projects that are supposed to be evaluated. Annex I lists a group of projects structured under more than twenty different headings, and these must be evaluated in all cases and in all Member States. Sometimes, national legislation has established quantitative limitations or thresholds for some of these projects. For instance, in *Commission* v. *Belgium*,[16] the Flemish Region had established restrictive criteria for "integrated chemical installations" (a project that was included at that time in point 6 of Annex I). The Court found the national provision incompatible with EC Law.

Annex II includes several dozens of other project types, for which the Member States has to decide whether a specific project falling with the categories shall be made subject to an assessment of its environmental impact, either through a case-by-case examination or by fixing thresholds or criteria (Article 4(2)).

From the very start , the system of two lists of projects turned out to be murky and a source of legal controversy. The margin of discretion enjoyed by Member States when determining whether a project in Annex II should be subject to an EIA or not was extensively discussed. On this issue, the Court of Justice declared in *Kraaijeveld* that the discretion of Member States is not unfettered, and that it can be controlled by the Judge at Luxemburg. Still in the same judgment, the ECJ clarified that a Member State cannot establish criteria or thresholds which are so tough or restrictive that they have in practice the effect of excluding an entire class of projects from EIA. In the context of infringement procedures against Belgium and Spain,[17] the Court of Justice analysed the legality of national regulations on EIA, approved for the incorporation of Directive 85/337, that excluded from EIA several projects included in Annex II of the Directive. The Court found these provisions incompatible with EC law, and declared that Article 4(2) cannot be read as leaving the Member States absolute freedom to exclude in advance a project or a group of projects listed in Annex II from EIA procedures.

[16] Case C-133/94 *Commission* v. *Belgium* (1996) ECR I-2323.

[17] Cases C-133/94 (n. 15 above) and C-474/99 *Commission* v. *Spain* (2002) ECR I-5293.

Another controversial aspect has been to determine in precise cases whether a given project was controlled by the Directive or not, depending on the date of the file. The transposition period of Directive 85/337 expired on 3 July 1988. From this date onwards, EIA is required for all projects listed in Annex I and Annex II (in this case, under Member States regulations). The question here is to determine exactly the time from which a given authorising procedure is subject to Directive 85/337. It is clear that, for legal certainty purposes, any procedure *started* before that date should not be controlled by the Directive, but, what is really the "starting point" of a said procedure? It is a real question, especially in the context of long administrative, licensing procedures, which might also be preceded by "informal" contacts between the developer and the competent administrative agency to deliver the permit. On this question, the ECJ declared, in case C-431/92 that the relevant point is the date, when the formal application was actually submitted by the promoter of the project, and that preliminary contacts were not relevant in this context.[18]

A national law cannot exclude from EIA projects whose authorising procedure started before the entry into force of such legislation, if the procedure actually started after the key date of 3 July 1988. That statement was made in case *Bund Naturschutz in Bayern*, where Bavarian authorities excluded from EIA a major infrastructure project, on the ground that the authorisation procedure had started before the entry into force of the controlling national statute (1 August 1990).[19] Since the date of the actual start of the procedure was later than the end of the transposition period, the Court found that the decision of the national authorities was incompatible with EC law. In this sense, see also the cases *Commission* v. *Portugal* and *Haarlemmerliede*.[20]

II.4 Exceptions Allowed by the Directive

Directive 85/337 allows for cases where an EIA need not be made, even if the project is *a priori* subject to its provisions because it is listed under Annex I or II. This is the case of projects for national defence purposes (Article 1(4)), projects approved by a legislative act (Article 1(5)) and projects exempted by the national government in specific circumstances (Article 2(3)). This system deserves criticism, for obvious reasons, as it can be used and abused by Member States to escape from EC environmental law. The critical point relates to individual, *ad hoc* waivers (Article 2(3)). In this case, the Member States need only communicate the exempting decision to the Commission, but have no further obligations. Thus, a given Member State can waive from EIA a major railroad, for instance, and all it has to do is to communicate this fact to

[18] Case C-431/92 *Commission* v. *Germany* (1995) ECR I-2189.

[19] Case C-396/92 *Bund Naturschutz in Bayern* (1994) ECR I-3717.

[20] Cases C-150/97 *Commission* v. *Portugal* (1999) ECR I-259 and C-81/96 (n. 14).

the Commission. The guardian of the Treaty lacks any authority to disapprove of reject that exception whatsoever. All it is supposed to do is to elaborate a report on the different exemptions declared by the Member States and to submit it to the Council - that is to say, to the very same Member States.

The ECJ has performed an important clarification of this system of general exceptions provided for by the Directive, and whose general purpose is to restrict the possible abuses from Member States. Thus, the Court held in case C-435/97 that, as a rule, the exceptions must be interpreted in a restrictive manner. As regards the exception regulated at Article 1(5) (projects approved by legislative acts), its justification seems to be a claim of Denmark during the elaboration of the Directive, since it is usual in that country to approve major infrastructures by means of parliamentary legislation. It seems that, when a project is approved this way, there is publicity and participation of the public, as the Directive itself clarifies (with a "pedagogical" intention) in the last proviso of Article 1(5). That might be the case in the noble traditions of the venerable Danish people, but one should not be too confident that approving à major infrastructure project by means of a statute is a celebration of environmental democracy in all countries. The truth is sometimes the opposite: the approval of a project in Parliament deprives the affected people of the possibility to making comments to it, since the debate is restricted to members of the Parliament, and the project cannot be challenged before ordinary courts, since it is an Act of Parliament.

In this domain, the Court clarified that it is not enough to approve a project by means of a "legislative act". As the wording of the Directive states ("projects, *the details of which*") the authorising act has to meet all the precise and particular information and conditions that are usually required for specific authorisation deriving from Agency adjudication.[21]

The exclusion of projects related to national defence has been clarified by subsequent EC legislation. The original version of Directive 85/337 used a rather clear-cut wording, in the sense that the Directive did not apply to projects related to national defence. Today, the provision allows Members States to decide "on a case-by-case basis if so provided under national law not to apply the directive to projects serving national defence purposes". The current version has thus softened the exception, to the point that the rationale of the rule has been somehow reversed. The Court determined that, if a project is partly devised to military purposes, and partly for civilian ones, it has to undergo an EIA.[22]

[21] See in this sense cases C-435/97 (n. 9 above) and C-287/98 (n. 11 above).

[22] Case C-435/97 (n. 9 above).

III The Main Weaknesses of Directive 85/337

III.1 Loose Procedural Requirements

One of the most unsatisfactory aspects of Directive 85/337 is that it shapes a very loose procedure for the performance of an EIA. The actual procedure of an environmental assessment will be provided by national environmental or administrative law. This feature may result in high divergences among the different Member States, as regards length and detail, procedural rights and court review of agency action. For instance, it is unclear from the Directive whether the EIA must crystallize into a coherent and unitary decision from the competent environmental agency, department, or ministry. Another linked question is whether, this decision can be challenged in court or not as long as the EIA crystallizes in such an agency decision and provided this question is answered in the affirmative, whether the EIA decision can be challenged in court independently from the substantive consent or authorisation that the project might need under national law. In Spain, for instance, the Supreme Court understands that – under the Spanish legal scheme – the findings and evaluations of an EIA cannot be challenged in court independently from the substantive permit.

III.2 Lack of Substantive Standards of the EIA

Another unsatisfactory aspect of Directive 85/337 is that it introduces no substantial or material standards on the quality of EIA. Thus, in practice, too many times the EIA is conducted without following a rigorous methodology, and the resulting assessment is weak or superficial. In case C-431/92, though, the national authorities had performed an environmental assessment under the old German environmental legislation of 1974 before licensing the plant, but the Commission was unable to convince the Court that that assessment did not fulfil the requirements of Directive 85/337.[23] Consequently, it lost the case.

III.3 Same Assessment Procedure for Public and Private Projects

Directive 85/337 covers both projects that are promoted by private companies (example: a chemical industry) and those that are promoted by public authorities (roads, dams, airports, and so on) with distinction. In actual practice, the numbers of "public" projects greatly outnumber those of "private" projects. But there there is a sharp difference between private and public

[23] Case C-431/92 (n. 8 above).

projects, especially in the domain of procedure. For instance, the Directive presupposes that there is an "authorisation", but public projects are not generally "authorised" as such but rather simply "approved" by the competent agency. In the case of public projects, there is no really a "developer" being scrutinised by an environmental agency (for the sake of EIA) and later on by the competent agency (for the sake of obtaining the "authorisation"). Usually, a big infrastructure project is approved by a governmental agency (the Department of Transportation, for instance), and must be environmentally evaluated by another agency (usually, the Department of the Environment). Both bodies belong to the Cabinet or to the Council of Ministers, where political considerations may interfere with the mere protection of the environment. What is more, it is even possible that the same Agency both approves the project and performs the EIA of it. For instance, in 2003 the Spanish Ministry of the environment approved a huge water transfer project, and performed itself the EIA of that project.

III.4 Effects of EIA on the Authorisation

Directive 85/337 does not clarify which is the actual binding force of the conclusions of an EIA procedure *vis-à-vis* the authorisation that is supposed to be granted by the competent agency to the "developer". The Directive only states in Article 8 that the results of consultations and the information resulting from the environmental evaluation "must be taken into consideration in the development consent procedure". It seems that the only clear consequence of the wording of Article 8 is that the agency which is competent to deliver the authorisation is obliged to justify on reasonable grounds why and to which extent it did not follow the recommendations and conclusions of the EIA. The Directive does not clearly state that the EIA is binding on the competent agency which issues the authorisation, although national laws may introduce that possibility, as does Portuguese legislation.

IV Strategic Assessment in EC law

IV.1 Rationale for SEA

"Strategic" EIA is a new approach in EC environmental law. It aims at assessing the environmental impact not of individual projects, but of plans and programmes where those individual projects are foreseen. This is supposed to be a more powerful tool for discovering deep, synergetic impacts of different projects. Under Directive 85/337, a new international airport in Paris, say, will be submitted to a prior EIA. But generally the background to a major public infrastructure project is not the result of an isolated decision, but the part or a comprehensive plan of programme, in this case, maybe, likely French National Airports Plan. Despite that fact, the national plan is not covered

by Directive 85/337 since the Directive aims at "individual" projects only. By identifying the environmental impact of such a plan or programme, the public authorities may detect hidden or cumulative impact of the whole group of new airports that are foreseen in that national airports plan. This anticipated evaluation gives the planners a more global vision or analysis, the so-called "strategic" assessment.

"Strategic" EIA is now enshrined in international environmental law. The Espoo Convention of 1991 has been developed by the Protocol of Kiev, of March 2003, on strategic environmental evaluation of plans and programmes.[24] In April 2003, the Commission presented a proposal of Council Decision for the signature, on behalf of the European Community, of this Protocol.[25]

In 1992, some years before having a specific regulation of this technique, Directive 92/43, on the protection of habitats, had already established in Article 6(3) that any *plan* or project having a significant impact on a special protection area should be submitted to a previous assessment of its effects on that area. In order to incorporate specifically that technique in EC law, the Commission approved the first drafts in the mid-nineties[26] and, after a rather long decision-making process, the European institutions eventually approved Directive 2001/42 on environmental impact assessment of plans and programmes.[27] Strikingly, Directive 2001/42 is inspired by the precautionary principle rather than the principle of "preventive action", which is supposed to be the "right" ground for techniques like EIA. This, it is evident, introduces confusion in the murky field of the principles inspiring EC environmental policy and law.

Inevitably perhaps, Directive 2001/42 reproduces in most aspects the terminology and elements of Directive 85/337 (public information and participation, documents to be produced and submitted, etc.) It also shares its weaknesses (probably magnified), because it is even more abstract and general than Directive 85/337. To begin with, Directive 2001/42 does not provide a material definition of "plan" or "programme". Article 2 defines those concepts as "plans or programs [...] which are subject to preparation and/or adoption by an authority" at any level in the country, or "which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government" and are required by the law. This definition is tautological, murky and imprecise. Any plan or programme is subject to a strategic EIA, as long as it has "significant environmental effects" (Article 3(1)). Fortunately, Article 3(2) of the Directive singles out some programmes, which will be usually evaluated under this norm, among others: plans and programmes for agriculture, forestry and town and country

[24] See section I above.

[25] Commission, COM (2003) 221 of 28 April 2003.

[26] See the proposal of a Council Directive on the assessment of the effects of certain plans and programs on the environment, COM (96) 511 of 4 December 1996.

[27] Directive 2001/42 (n. 6 above).

planning or land use. Contrary to Directive 85/337, this norm does not cover plans and programmes that are private, or those having only macroeconomic goals, such as a national plan to fight unemployment. As one could expect, plans and programmes serving national defence are also excluded from the scope of Directive 2001/42.

IV.2 Main Requirements of the SEA Directive

As stated above, the operational and procedural skeleton of this Directive is based on Directive 85/337, and its key elements are summarized in the following sections.

(a) Preparation of an environmental report

The backbone of the procedure of strategic EIA consists of a document called "environmental report". This document must contain the information required by Article 5 and Annex I. Indeed, it must identify, describe and evaluate the significant effects on the environment of the plan or programme, as well as the reasonable alternatives to it. The precise content of this document is singled out in Annex I (an outline of the contents and main objectives of the plan; the relevant aspects of the current state of the environment; the effects of the plan on a number of aspects; and a non-technical summary of the information). All these ingredients remind clearly those required by Directive 85/337. Contrary to that norm, Directive 2001/42 clearly provides that Member States must "ensure that environmental reports are of sufficient quality as to meet the requirements of this directive"(Article 12(2))

(b) Consultations

Like its "twin sister", Directive 85/337, the SEA Directive provides for consultations at almost all levels, both inter-agency and with the public. In both cases, the agency and/or the public "shall be given an early and effective opportunity within appropriate time frames to express their opinion" on the draft plan or programme. However, it should be noted that the Member States shall designate what kind of public is to be consulted. It can be the public at large, of course, but national legislation will likely restrict participation to the public that is directly affected by the plan (for instance, the inhabitants of a city, concerned by a new municipal land use master plan). Whenever the plan or project is to trigger transboundary impacts, the Directive requires that consultations between the affected countries take place, too (Article 7).

(c) Consideration of the results of the EIA

Under Article 8 of the Directive, the environmental report and the opinion expressed during the consultation stage "shall be taken into account during the preparation of the plan". The meaning of this provision is obscure but at least one thing is clear: the outcome of the EIA procedure is not made clearly bind-

ing upon the agency or body that is supposed to approve the plan. This wording deserves the same kind of criticism as the one we have expressed above, when analysing the counterpart provision of Directive 85/337.

(d) Information on the decision

National authorities must inform the public and any other consulted Member State of the final adoption of the plan, and on the manner how environmental considerations have been integrated into it. Although the transposition period of this Directive expired on 21 July 2004, it had not been transposed in most countries at the time of writing. In addition, it should be stressed that ,under Article 13(4), Member States must designate the types of plans and programmes which would be subject to an EIA pursuant to the Directive, and must later on communicate the relevant information to the Commission. This aspect is controversial and may trigger a number of legal problems and even infringement procedures. Let us suppose that a given Member State does not incorporate this Directive in due time into its national legislation. Despite this fact, should the plans and programs mentioned at Article 3(2) be submitted, after 21 July 2004, to a strategic EIA? In our view, this question must be answered in the affirmative, since the case-law of Court of Justice under Directive 85/337 can be perfectly extrapolated to this case. Consequently, we understand that Directive 2001/42 states a "clear and unequivocal" obligation to perform such an assessment.

As regards transitory law, Article 13(3) states that the obligation to perform EIA shall apply to any plan or programme "of which the first formal preparatory act is subsequent to the date" of 21 July 2004. This wording is more precise than the counterpart provision in Directive 85/337, and we may find the effects of the doctrine of the Court of Justice in cases such as C-431/92.

Finally, Article 13(4) states that the Member States shall communicate to the Commission, before the same date of 21 July 2004, information on the types of plans and programmes which would be subject to an EIA. This provision is enormously relevant, and a likely source of legal conflict. First, if a given Member State does incorporate the Directive in due manner and time, but does not communicate this information to the Commission, it will be an autonomous ground for an infringement procedure. Second, it is unclear what kind of discretion, if any, is enjoyed by the Member State when identifying those plans or programmes, in the context of Article 3(2), which singles out several kinds of plans and programmes. Another problem lies in the fact that the same plan or programme may be subjected to a strategic EIA in country A, but not in country B.

It is unclear what happens, where a Member State does not identify plans and programmes and does not communicate that information to the Commission. One could argue that in practice the Directive will not be in force in that Member State, since it will be in a kind of *"de facto* suspension", because the Member State has not determined its material scope of application. It is also

arguable how strictly the Commission can control the discretion of the Member States when they designate plans and programmes that will be covered by the national legislation. The problem occurs primarily, because there are many kinds of plans even under the headings of Article 3(2), but not all of them deserve to be submitted to an EIA. It is clear, for instance, that a new land-use master plan for the city of Vienna needs to undergo an EIA, but it is not clear whether a small plan to rehabilitate a narrow street of that city needs such an assessment, even if that rehabilitation needs a land-use plan falling in the domain of town and country planning (Article 3(2)). As a matter of fact, there is no material guideline or help for the Commission in order to determine the rightfulness of Member State's "discretion" as to which plan or programme is to be subjected to an EIA, besides the loose criteria laid down in Annex II.

V The Performance of Member States

Directive 85/337 and its amendments have been a fertile field for infringement procedures against Member States. Those infringements may be classified in any of the following three types: (a) *Non incorporation*: at the expiration of the transposition period of either Directives 85/337 or Directive 97/11 (or at the expiration of the deadline granted to the Member State by the Commission in its reasoned opinion) that Member State had not approved all the laws and regulations necessary to adapt its legal order to the requirements of the Directives; (b) *Incorrect transposition:* in this case, the Member State approved laws and regulations to incorporate the Directives, but the Court of Justice found that those internal norms violated the letter or the spirit of any of the EC provisions. The usual ground for infringement consists in the fact that the Member State did not include some of the projects listed under Annex I or II of Directive 85/337. In other cases, the internal legislation includes some of those projects, but with some restrictive criteria that are not provided for by the Directive (c) *bad application in a specific case:* a Member State approved or realised a project covered by the Directive, without performing an EIA.

Here comes a list of the most important proceedings:

(a) non incorporation:

- Luxemburg: Cases C-133/93 on the failure to transpose Directive 85/337, and C-366/00 on the failure to transpose Directive 97/11.[28]
- Belgium: Case C-319/01 on the omission to transpose Directive 97/11.[29]
- France: Case C-348/01 on the omission to transpose Directive 97/11

[28] Cases C-133/93 *Commission* v. *Luxembourg* (1994) ECR I-1279; C-366/00 *Commission* v. *Luxembourg* (2002) ECR I-1749.

[29] Case C-319/01 *Commission* v. *Belgium* (2002) ECR I-10779.

judgement of 7 November 2002 (case C-348/01): non incorporation of Directive 97/11.[30]

- *(b) incorrect transposition:*
  - Spain: Case C-474/99 on the incorrect transposition of Directive 85/337.[31]
  - Germany : Case C-301/95 on the incorrect transposition of Directive. 85/337.[32]
  - Portugal: Case C-150/97 on the incorrect transposition of Directive 85/337.[33]
  - Ireland: Case C-392/96.[34]
  - Belgium: Case C-133/94 on the incorrect transposition of Directive 85/337.[35]

-*(c) bad application in a specific case:*
  - Spain: Case 227/01 on the construction of a public infrastructure for transport without performing an EIA.[36]
  - Germany: Case C-431/92, on the construction of a power plant.[37] It should be remembered that this case was lost by the Commission, on the grounds that were explained above.
  - Italy: Case C-87/02 concerning a project involving the construction of a major road.[38]

VI Conclusions

In my view, the instrument of EIA has led to more effective and efficient environmental protection throughout the European Union. Especially in some countries, such as Spain, EC regulation of EIA can be considered a major force in the development of environmental law, since national legislation ignored overall such an instrument. In our understanding, it has also served to secure a higher democratic legitimacy of environmental protection policies and decisions, promoting more active participation and involvement of the public.

[30] Case C-348/01 *Commission* v. *France* (2002) ECR I-10249.

[31] Case C-474/99 *Commission* v. *Spain* (2002) ECR I-5293.

[32] Case C-301/95 *Commission* v. *Germany* (1998) ECR I-6135.

[33] Case C-150/97 *Commission* v. *Portugal* (1999) ECR I-259.

[34] Case C-392/96 *Commission* v. *Ireland* (1999) ECR I-5901.

[35] Case C-133/94 (n. 15 above).

[36] Case C-227/01 *Commission* v. *Spain* (2002) ECR I-8253.

[37] Case C-431/92 (n. 8).

[38] Case C-87/02 *Commission* v. *Italy* (2004) ECR I-5975.

However from a technical point of view, the normative instruments approved by the EC still contain several weaknesses and obscurities, and they should be corrected and improved in the future in order to secure a more uniform protection of the environment in the European Union. Among those aspects are the following:

a) *A stronger procedure is needed* , so that the different national laws are more uniform and legal certainty is promoted.

b) *EIA and substantive authorisation.* It should be made clear that EIA must be performed, even when national sectorial legislation does not provide for any licence for that project, and in this case a separate procedure should be devised.

c) *The two-list system should be clarified.* The current system is too complex. Perhaps there should be one single list of projects, or maybe there are too many projects in Annex II, or perhaps all should require an EIA. There is too much discretion on the part of Member States, and the danger of big differences between one Member State and another is high.

d) *Exceptions.* The possibility for a Member State to exempt a project from EIA, regulated in Article 2(3) of Directive 85/337, should be made stricter, for instance by requiring the Member State to obtain an authorisation from the Commission. The present system is too loose.

e) *Public-private projects.* Directive 85/337 should be sensitive to the sharp differences existing between public and private projects. The Directive should establish specific requirements when a project is promoted by a public authority, or different procedures could be drawn for each type of project. Also, it should be clearly stated that a project cannot be approved, licensed and environmentally evaluated by the same administrative agency, on essential grounds of adjudicatory fairness. The assessment should be performed by an independent body, or by an agency different from the one that promotes the project.

f) *Effects on the sectorial authorisation.* The findings, results and conclusions of an EIA should be made binding on the agency or body that must authorise the project. If this possibility seems too progressive, the agency should at least be obliged to explain clearly and in a reasonable way, why it did not follow those conclusions. Otherwise, the EIA procedure risks being a mere paperwork, without decisive effects on the protection of the environment.

These remarks are restricted to EIA of projects, but most can be extrapolated to EIA of plans, since both norms share many common features.

Public Information and Participation in EC Environmental Law

Origins, Milestones and Trends

Jerzy Jendroska*

way for starting work concerning special guidelines on Public Participation in International Forums under Article 3(7) of the Aarhus Convention which requires the Contracting Parties to "promote the application of the principles of the Convention in international environmental decision making processes" . The Guidelines are expected to be adopted at the second meeting of the Parties in Almaty in May 2005.[60]

IX Conclusions

While much of the hitherto existing Community environmental legislations concerning public information and participation were, in one way or the other, influenced by US experience, the Aarhus Convention provides a significant breakthrough in this respect. The Convention itself is based on the experience with the implementation of the hitherto existing pieces of EU law, but has much of an added value which serves as a driving force for subsequent developments in Europe. The development of EU law in relation to environmental procedural rights following the adoption of the Convention is clearly Aarhus-based and in turns influences any further developments under the Convention. However, the approach to implementing the three pillars of the Convention differ: from rather progressive ways in the case of access to information to rather restrictive methods in the case of public participation and access to justice.

[60] Jeremy Wates: "The Aarhus Convention: a driving force for environmental democracy", (2005) *Journal for European Environmental and Planning Law*, p. 2.

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lishment of appropriate assistance mechanisms to remove financial and other barriers to access to justice.

VII.3 The Draft Directive on Access to Justice

The approach of the majority of EU Member States towards the above issue has not changed much since the time of negotiating the Convention. Already then the basic approach was to make sure that no single Member State would need to change anything in its domestic legislation in order to satisfy the provisions of Article 9(3) of the Aarhus Convention. Therefore, the proposal for a directive on access to justice in environmental matters[49] was not greatly welcomed. Most Member States already had well-established traditions in this regard,[50] in certain cases much more liberal than envisaged by the draft directive.[51] This, and many other reasons seem to suggest that the chance for the directive to be adopted is rather limited, which perhaps may not be such a bad thing for the implementation of Article 9(3) of the Convention.[52] The legal grounds for such a decision are based on the assumption that in the absence of EU legislation in this respect, the issue remains outside the scope of EU law and fully within the national legal framework of Member States.

VIII The Application of the Aarhus Convention to EU Institutions

As it was already mentioned, the Convention makes Community institutions subject to obligations concerning its three pillars. Therefore, in order to allow for the ratification by the Community, not only the rules applicable to Member States, but also the rules applicable to Community institutions have to be changed, in order to comply with the obligations stemming from the Convention. To this end, the Commission prepared draft regulation applying the three pillars of the Convention to all EU institutions and bodies.[53]

[49] Commission (n. 25 above).

[50] See Nicolas de Sadeleer – Gerhard Roller – Miriam Dross (eds.): *Access to justice in environmental matters and the role of NGOs; empirical findings and legal appraisal* (2005) Groningen: Europa Law Publishing.

[51] See Jerzy Jendroska – Magdalena Bar: "Towards implementation of the Aarhus Convention's third pillar: Draft EU access to justice directive compared with the situation in Poland", (2004) *Environmental Liability*, p. 68 (p. 77).

[52] See Miriam Dross: "Access to justice in EU Member States", (2005) *Journal for European Environmental and Planning Law*, p. 22.

[53] Commission (n. 26 above).

Providing a legal framework to achieve the goal proved to be as difficult – if not more difficult – as the adoption of directives in order to implement the Aarhus Convention in Member States. The point is that the legal situation in relation to each of the three pillars slightly differs. In the case of access to information, there is already a piece of Community law regulating generally access to documents – Regulation 1049/2001.[54] The problem was, how to regulate the mutual relation of this Regulation and the new proposal.[55] In the case of public participation, the first issue to be addressed was whether the Community institutions were taking any decision subject to Article 6 of the Convention. With a negative answer, the only problem that remained was, how to define plans and programmes subject to public participation and how to design procedural details. Much more profound was a question how to assure implementation of Article 9(3).[56] One cannot escape addressing the issue in a way similar to the way applied to draft access to justice directive. The problem, however, is how to successfully combine requirements of Article 9(3) of the Aarhus Convention with Article 230 EC Treaty, in particular, how to assure that environmental organisations can file lawsuits in the public interests, while not being " directly and individually concerned". This issue, in the light of judgments of the European Court of Justice – in particular case C-321/95P *Greenpeace* v. *European Commission*[57] – proves indeed to be a challenge of almost a Gordian knot scale. The way it was solved by the drafters of the proposed regulation, although heavily criticized for its dubious legal basis, seems to be the only solution available given the political context.[58]

The entire legislative process concerning the draft regulation shows a clear tendency to apply only the absolute minimum required by the Convention with the justification that the Convention was not drafted with Community institutions in mind.[59] However, launching the draft regulations somehow paved the

[54] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145, p. 43.

[55] Bearing in mind all differences between legal scheme of access to documents in Regulation 1049/2001 on the one hand and legal schemes of access to environmental information in the Directive 2003/4 and the Convention on the other hand, as well as the clear political will not to change anything in Regulation 1049/2001.

[56] For more about the issues involved see for example Birgit Dette: "Access to justice in environmental matters. A fundamental democratic right". In: Marco Onida (ed.): *Europe and the Environment. Legal essays in honour of Ludwig Krämer* (2004) Groningen: Europa Law Publishing, p. 13.

[57] For more about these judgments in this context see Ludwig Krämer: *EU casebook on environmental law*, (2002) Oxford: Hart Publishing, p. 402.

[58] In particular, amending Article 230 EC Treaty because of the Aarhus Convention seems rather unconceivable bearing in mind current trends in Europe, where environmental protection and human rights are not necessarily high on the agenda.

[59] One can clearly note however that the European Parliament, as usual, opted for a more progressive approach, while most of the Member States as well as the European Commission (especially after the changes in this institution) have been more cautious.

I The Context

For more than 20 years the European Community has been at the forefront of efforts to develop legal instruments to bring climate change under control, recognizing that the Member States of the European Union (EU)[1] are among the world's largest emitters of greenhouse gases (GHG). The issue of global climate change appeared first in the fourth Environment Action Plan in 1987; since then the EC Member States played a major role in the International Negotiating Committee which finalised the text of what became the 1992 UN Framework Convention on Climate Change (UNFCCC) and the EU was a major player at the negotiation of the 1997 Kyoto Protocol to the UNFCCC. Indeed seven years before the Kyoto negotiations the EU Ministers of Environment and Energy had already agreed among themselves to stabilize the GHG emissions of the EU at 1990 levels. At Kyoto they agreed jointly to an extra 8% reduction. When the US Administration under President Bush announced its decision in 2001 not to ratify the Protocol, the intellectual leadership of both the negotiations and implementation process passed firmly to the EU. With the ratification by Russia of the Protocol on the 18 November 2004, the requirements for it to come into force were met, with this taking place 90 days later on 16 February 2005.

However, before looking in detail at the Kyoto regime and the ways in which the EU and its members are proposing to meet their requirements, it is useful to put these developments into context, for EU policy in the area of climate change is inseparably linked to the Union's energy policy. When concerns for the global climate moved higher up the political agenda in the early 1990s, it created a new context for EU energy policy.[2] Attempts within the Union to create a common environmental policy based on economic and fiscal measures led to an increased influence for the European Community (EC) in the energy policy of the Member States. In its Green Paper "Towards a European strategy for securing energy supply"[3] the Commission listed the fight against global warming as one of the priorities for the Union in developing an energy strategy. It drew attention to the structural weaknesses of energy supply within Europe, and proposed a new

1 While the term "European Union" describes the policy union created by the Maastricht Treaty in 1992 the term "European Community" describes the supranational organisation of (currently) 25 Member States, which forms one part of the European Union, and is the source of much of the law directly applicable in the Member States. The pillars of the Union comprise the European Community, the Common Foreign and Security Policy, and Co-operation and Justice in Home Affairs.

2 Svein Andersen (2000), *EU Energy Policy: Interest Interaction and Supranational Authority*, Arena Working Papers, WP 00/5; http://www.arena.uio.no/publications/wp00_5.htm#bånn*, accessed July 26, 2004.

3 Commission (COM (2000) 769 of 29 November 2000; http://europa.eu.int/comm/energy_transport/doc-principal/pubfinal_en.pdf.

strategy focussing on the reduction of dependence on fossil fuels and an energy policy based on demand-side management and the exploration of alternative energy sources. The paper initiated an unprecedented debate about European and national energy policies.[4]

To date, the EU and its Member States have adopted an impressive set of policies and measures aiming at reducing GHG emissions. However, while a few member states (notably the United Kingdom and Germany) seem likely to meet their emission reduction targets, set both under the Kyoto Protocol[5] and the EU Burden Sharing Agreement,[6] most are behind schedule and a number (such as the Netherlands, Spain, and Italy) are a long way behind. Progress in the implementation of national policy measures is slow; transport emissions are steadily increasing throughout the Union, and energy supply and generation still largely relies on what is often the often inefficient use of fossil fuels. The "implementation gap," which in any event is one of the biggest problems of European environmental policy, is particularly obvious in the context of climate change. The European Commission has acknowledged that Member States have made important reductions in their GHG emissions, but it is also stressing that they need to do much more.[7] Faced with the very real threat that the EU members will fail to meet their Kyoto targets, the European Commission proposed a Community-wide emissions trading scheme, which was adopted by the Parliament and the Council in 2003.[8] The tough deadlines and mandatory character of this scheme have stimulated wide discussion on how to curb GHG emissions and have also elevated climate change policies to the highest political levels in the EU Member States.

Despite these shortcomings, the EU has been a driving force in setting targets and developing policy instruments to address the problem of global climate change. This chapter looks at the way the Union has sought to develop coherent policies on climate change. It looks first at the actions initiated by the Environmental Action Plans, then at its role at the international level through the UNFCCC and Kyoto Protocol and finally at the various ways that the EU has addressed the very real policy problems involved in reducing GHG emissions, both in the context of meeting the Kyoto targets, and also, given that until

4 See Commission, Final Report on the Green Paper 'Towards a European strategy for the security of energy supply', (COM (2002) 321; http://europa.eu.int/comm/energy_transport/livrevert/final/report_en.pdf.

5 Decision 1/CP. 3 : Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, http://unfccc.int/resource/docs/convkp/kpeng.pdf.

6 Decision 2002/358 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfillments of commitments thereunder (2002) OJ L 130, p. 1.

7 Commission (2002), EU Focus on Climate Change, European Communities, Brussels.

8 Directive 2003/87/EC of the European Parliament and of the Council (2203) OJ L 275, p. 32.

recently it was unclear whether Kyoto was likely to enter into force, in a more "Euro-centric" role.

II EU Climate Change Policy before Kyoto

Since its inception European climate change policy has been based on the formulation of strategies and programmes on one hand, and on the adoption of EC legislation on the other. The first strategic documents making reference to the phenomenon known as global warming were the Environmental Action Programmes, which constitute the bases of EU environmental policies.

II.1 The Environment Action Programmes

The first Environment Action Programme was proposed by the European Commission as a means of setting out the basic principles of a European environmental policy in a situation where there was no clear legal basis under the Treaty of Rome for the formulation of Community measures in the field of the environment. Since 1973, when the Council of Ministers adopted the first such programme, six have been developed and implemented.[9] Each programme covers a five-year period; it formulates objectives and priorities for Union actions and describes in general terms measures and policies to be developed and implemented in the five year period. Each programme also provides a platform for the discussion of European environmental policy for the next decade[10] as well as putting EU policy in the context of international developments. Currently, the sixth EAP is under implementation.[11] The first five were adopted before the 1992 Maastricht Treaty on European Union provided for the first time a clear legal basis for action in the field of the environment.[12] Since

9 First Environment Action Programme 1973-1976 (1973) OJ C 112, p. 1, second programme 1977-1982 (1977) OJ C 139, p. 1; third programme 1983-1986 (1983) OJ C 46, p. 1; fourth programme 1987-1993 (1987) OJ C 328, p. 1; fifth programme 1993-2000 (1993) OJ C 138, p. 1.

10 For more detail see: Astrid Epiney, *Umweltrecht in der Europäischen Union*, (1997) Köln: Heymanns.

11 Decision No 1600/2002 laying down the Sixth Community Environment Action Programme, (2002) OJ L 242, p. 1.

12 The Treaty on European Union was signed in Maastricht on 7 February 1992, entered into force on 1 November 1993. See also David Freestone and Diane Ryland, "EC Environmental Law after Maastricht" (1994) *Northern Ireland Legal Quarterly*, p. 152. The Maastricht Treaty was itself amended on 2.10.1997 (in Amsterdam) and 26.2.2001 (in Nice). The Treaty of Amsterdam renumbered and amended the EU and EC Treaties. With the Treaty of Nice the former Treaty on European Union and the Treaty of the EC have been merged into one consolidated version. The Consolidated Version of the EC Treaty was published in the Official Journal of the European Communities (2001) OJ C 325, p. 1.

1993, the EU Treaty has anchored the environment action programmes in Community law.[13]

There was little public attention to, or even understanding of, the potential risks of climate change, when the fourth environment action programme was published in 1987. The programme, for the years 1988-1993, was the first to draw the attention of European policy makers to these new risks. It noted that:

"... it is clear that difficult problems could arise from the use of fossil fuels if the build-up of atmospheric carbon dioxide levels and the 'Greenhouse effect' are shown (as certain scientists fear) to have serious impacts on climate and agricultural productivity worldwide."

It also saw the potential need for action and "possible responses and alternative energy strategies", in the event that further research were to confirm that the global climate might warm in this way.[14]

The Fifth environment programme, adopted in 1993 after the 1992 UN Conference on Environment and Development, introduced the concept of sustainable development into EU environmental policy.[15] In the area of climate change it recognized the need for both mitigation and adaptive measures, while highlighting the need for more information about the possible impacts on various sectors of the economy. Despite the fact that uncertainties remained about the possible impacts of climate change the environment action programme followed the precautionary principle (itself also contained in the UN Conference on Environment and Development (UNCED) Declaration and in the Maastricht Treaty).[16] It proposed a number of energy conservation measures, including improvements in energy efficiency and fuel switching, as well as new general approaches, ranging from "behavioural changes" to "changes in transport modes" and non specific "economic and fiscal measures".[17]

The sixth environment action programme, adopted in 2002, starts from a different premise. It takes the view that there is scientific consensus that human activity is causing increasing levels in GHG leading to higher temperatures and disruptions in climate patterns.[18] The programme identifies four environmental priority areas of which climate change is one.[19] It emphasizes that effective action to mitigate climate change is an outstanding and long-term challenge, the overall objective of which should be to stabilize carbon dioxide (CO^2) in the atmosphere below 550ppm.[20] The Commission takes the view that this can be done without the need to compromise economic growth,[21] and sets out the following policy objectives necessary to reach the longer-term goal of stabilization at these levels:

- ratification of the Kyoto Protocol;
- realization of demonstrable progress in achieving Kyoto commitments by 2005; and
- placing the Community in a credible position to advocate an international agreement on more stringent reduction targets for the Protocol's second commitment period.[22]

The programme also spells out a list of priority actions necessary to be able to achieve these objectives. These actions include the establishment of a Community-wide emission-trading scheme, the evaluation of the European Climate Change Programme (ECCP) as basis for further measures, and the improvement of atmospheric monitoring systems. Specific proposals in the energy sector include encouraging renewable energy generation, increasing combined heat and power systems, and promoting energy efficiency. In the transport sector identifying actions to reduce GHGs from aviation, improving transport logistics and organization, reducing vehicle emissions, and promoting measures to reflect full environmental costs in the price of transport. In industrial production proposals include promoting eco-efficiency, phasing out of HFCs (hydrofluorocarbons), PFCs (Perfluorocarbons), and SF6 (sulphur hexafluoride) production), and reducing GHG emissions in other sectors such as heating and agriculture.[23] Instruments to be promoted include fiscal measures, such as the development of a framework for energy taxation, cleaner energy and transport and to encourage technological innovation, voluntary agreements with industries, research and development.[24] The programme also stresses the importance of extending measures to cut GHG emissions in the new Eastern European Member States.[25] Finally, combating climate change is to form part of EU foreign policy; resources should be made available to assist developing coun-

[13] Article 175(3) EC Treaty requires that "general action programmes setting out priority objectives to be attained shall be adopted by the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions. The Council ... shall adopt the measures necessary for the implementation of these programmes."

[14] Fourth environment programme (n. 8 above), p. 18.

[15] Fifth Environmental Action Programme (n. 8 above), p. 42.

[16] See further David Freestone, "The Road From Rio: International Environmental Law after the Earth Summit" (1994) *Journal of Environmental Law* 6, p. 193.

[17] Fifth environment action programme (n. 8 above), p. 43.

[18] Decision 1600/2002 (n. 11 above), Recital 17.

[19] The other areas are nature and biodiversity; environment and health and quality of life; and natural resources and waste. See Decision 1600/2002 (n. 10 above), Article 1(4).

[20] Decision 1600/2002 (n. 11 above), Article 1(3).

[21] Decision 1600/2002 (n. 11 above) Recital 18.

[22] Decision 1600/2002 (n. 11 above), Article 5(1).

[23] Decision 1600/2002 (n. 11 above), Article 5(2).

[24] Decision 1600/2002 (n. 11 above), Article 5(2).

[25] Decision No 1600/2002 (n. 11 above).

tries in capacity building and in encouraging the use of the Clean Development Mechanism (one of the market mechanisms of the Kyoto Protocol), in promoting technology transfer and adaptation measures in developing countries.[26]

II.2 Towards a Climate Change Strategy

It was in 1988, following the publication of the fourth environment action programme, that the European Commission first officially recognized the need for a legislative response to the increasingly disturbing phenomenon of the greenhouse effect.[27] At its meeting on 29 October 1990, the Council agreed that it was willing to take actions aimed at reaching stabilization of the total CO^2 emissions of the Union by 2000 at 1990 levels, assuming that "other leading countries undertook similar commitments".[28] The commitments in this declaration formed the main basis for the European position in the negotiations leading to the 1992 UNFCCC. In October 1991, the European Commission presented to the Council a comprehensive strategy to curb GHG emissions that included measures ranging from policies enhancing energy efficiency to a proposal to introduce a carbon tax on energy intensive products and processes.[29] Following this proposal, the Council, meeting in December 1991, invited the Commission to propose concrete measures arising from the proposed strategy. The Commission was instructed to take into account particularly the concept of equitable burden sharing between the member states. The Council, however, failed to agree on the adoption of the most important elements of the proposed priority action, namely the harmonization of energy taxes, and the whole package was rejected.[30]

In 1992, the UN Framework Convention on Climate Change (UNFCCC) was adopted and opened for signature at the UN Conference on Environment and Development (UNCED) in Rio di Janeiro. The Convention's basic objective is to stabilise GHG emissions "at a level that would prevent dangerous anthropogenic interference with the climate system".[31] Although the text goes on to require that such stabilization should be achieved "within a time frame sufficient to allow

[26] Decision 1600/2002 (n. 11 above), Article 5(3)(4)(5).

[27] Commission, Communication: The greenhouse effect and the Community. Commission work programme concerning the evaluation of policy options to deal with the greenhouse effect COM (1988) 656.

[28] See reference and quote in the recitals of Decision 93/389 (1993) OJ L 167, p. 31.

[29] Commission: Communication on a strategy on the reduction of CO^2 emissions and on the improvement of energy efficiency, including Community-wide carbon-cum-energy taxes; Community Strategy to limit carbon dioxide emissions and to improve energy efficiency, SEC (19) 1744 of 14 October 1991.

[30] Leonard Massai, Climate Change Dossier, Section 2; http://www.eel.nl/dossier/Dossier%20Climate%20Policy.htm#_2.

[31] UNFCCC, Article 2.

eco-systems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner"[32] the Convention does not specify target dates for that time frame. It also fails to set concrete targets for reduction of GHG emissions.

Nevertheless, after the adoption of the UNFCCC, the EU Member States agreed to implement programmes that 'contribute' to the stabilization of CO^2 emissions into the atmosphere at 1990 levels by 2000[33] and agreed to set up a monitoring mechanism to keep track of their GHG emissions.[34] The Community also adopted a number of measures that promoted renewable energy and increased energy efficiency. This process, however, was not supported equally by all the member states and the development of European climate change policy was largely dominated by a few countries of the Union, principally the United Kingdom, Germany, and the Netherlands.

The UNFCCC entered into force on 21 March 1994 and the first session of the Conference of the Parties (CoP 1) was held in Berlin in April 1995. At the CoP the major issue was the need for the Parties to address the vagueness of the commitments in the Convention itself and to develop more concrete obligations and a more precise time frame for the reduction of GHG emissions by Annex I countries. The Conference produced a negotiated paper setting both a process and a time line for the development of another instrument to achieve this objective.[35] This became known as the Berlin Mandate.[36]

[32] Ibidem.

[33] Decision 93/389 (n. 28 above), Article 1. The original decision was amended by Decision 99/296 for a monitoring mechanism of Community CO^2 and other greenhouse gas emissions (1999) OJ L 117, p. 35. The Decision from 1993 was replaced in 2004 by Decision 280/2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (2004) OJ L 49, p. 1.; this Decision provides a new legal basis of the compilation of the EC inventory.

[34] Ibidem. The monitoring mechanism for GHG was established in 1993, following the adoption of Council Decision 93/389 (n. 28 above).

[35] At the final Plenary session of the Conference, the President, Angela Merkel, introduced the review of the adequacy of commitments in Article 4.2(a) and (b) (FCCC/CP/1995/L.14, review of the adequacy of commitments in Article 4.2(a) and (b)). She said that the industrialised countries' agreement to specific measures and the developing countries' agreement to reaffirm and advance existing commitments meant that the process would advance. India for the G77 and China said the decision to launch a process to strengthen the commitments made CoP-1 a success, noting that consultations were not easy. The EU stated its understanding that the wording "developed countries/other Parties" in section II (2)(a) must be interpreted as "developed countries and/or other Parties" and means that this sub-paragraph applies to Annex I Parties within the European Community, individually or jointly among themselves, in accordance with Article 4.2(a) and (b) of the Convention.

[36] For a detailed discussion of this process, see David Freestone, "Introduction: The UN Framework Convention on Climate Change, the Kyoto Protocol and the Kyoto Mechanisms" in David Freestone – Carlotte Streck (eds.): *Legal aspects of implementing the Kyoto Protocol mechanisms: making Kyoto work* (2005) Oxford: Oxford University Press, p. 3.

The process that leads to the adoption of the Kyoto Protocol reinvigorated the formulation of a common negotiating position and the formulation of an EU climate change strategy. In the process of negotiating the Kyoto Protocol EC Member States coordinated their negotiating position and a climate change strategy began to emerge. The European Commission failed in its attempt to be given a mandate to coordinate the EU position, and progress in developing a coherent negotiation position largely depended (and still depends) on the country holding the EU Presidency.[37] However, the influence of the Commission that has had a consistently pro-active attitude towards the issue cannot be underestimated; it has played a key role in the development and adoption of new policy instruments.

III The European Union and the Kyoto Protocol

The 1997 Kyoto Protocol was a major diplomatic achievement. Agreement on the text of the Protocol was finally reached after a marathon final session ending in the early hours of the day after the Kyoto Conference (being the third session of the conference of the parties to the UNFCCC) was due to close. In the course of those negotiations important compromises were made in many quarters. The Protocol strengthens the commitments of the 1992 Convention – particularly Article 4(2) (a) and (b), by setting out a firm schedule for reductions of GHG emissions by Annex I countries and firm targets to be met within the agreed commitment period.[38]

The specific commitments of Annex I parties are set out in Annex B to the Protocol. These envisage that during the five years of the "commitment period" from 2008 to 2012, the parties listed in Annex B will have reduced their emissions by an average of 5.2% from 1990 levels. The specific targets (or assigned amounts), however, range from Iceland and Australia which were able to increase their emissions from the 1990 base levels (by 10 and 8% respectively) to the countries of the European Union which accepted an 8% reduction from 1990 levels.

These commitments are even more rigorous than the 1990 decision of the EU Council of Ministers to reduce emissions to 1990 levels by 2000, albeit

[37] On the competence of the EU to deal with environmental issues see: Gerhard Loibl, "The Role of the European Union in the Formation of International Environmental Law", in: *Yearbook of European Environmental Law* 2 (2002), p. 223; Richard Macrory and Martin Hession, "The European Community and Climate Change – The role of law and legal competence", in: Tim O'Riordan and Jill Jäger (eds.), *Politics of climate change – a European perspective*, (1996) Routledge, p. 106.

[38] Annex I of the UNFCCC and the Kyoto Protocol include the 1990 member countries of the Organization of Economic Development and Cooperation as well as the Eastern European countries with economies in transition and the Russian Federation.

within a longer time frame. However, the most innovative aspects of the Protocol are probably not the strict emission reduction commitments but the recognition that in meeting these commitments Annex I Parties may take advantage of so-called market mechanisms. Initially pressed for strongly by the US, and opposed by the EU countries, the mechanisms allow trading of emissions under Article 17, the claiming of credits for joint activities which reduce GHG emissions between two Annex I parties (under Article 6) and also the claiming of credit by Annex I countries for the financing of project activities which reduce GHG emission in developing countries provided that they meet the rigorous requirements of the Clean Development Mechanism defined by Article 12.

The EU joint position had been to press for all industrialised countries to meet their targets by domestic policies and measures, without emission trading of any kind, while at the same time allowing the EU countries to be treated as a single unit. Faced with the US argument that EU joint implementation was virtually the same as emission trading, the EU abandoned with some reluctance its opposition to the other market mechanisms.[39]

In fact some degree of co-operation had been envisaged by the 1992 Convention itself which in Article 4(2) (b) talks of the aims of "returning [GHG emissions] individually, *or jointly*, to their 1990 levels..."[40] This wording is echoed in Article 3(1) of the Protocol which envisages that Annex I Parties commitments may be made individually or jointly.

This was further developed in Article 4 in response to the EU strong requests to allow its commitments to be met within the EU group of nations as a whole. This device, the so-called EU "Bubble", requires that Parties in Annex I which reach an agreement to fulfil their commitments under Article 3 jointly shall be deemed to have met those commitments if their total combined aggregate emissions do not exceed their assigned amounts calculated in accordance with Annex B. Such an inter-state agreement must be formally concluded and notified to the Parties through the UNFCCC Secretariat and in the event of failure of the group of states to meet the required reductions, then each party then becomes again individually liable for its own levels of emissions.[41]

The EU and its Member States ratified the Kyoto Protocol on 31 May 2002.[42] By ratifying the Protocol, they agreed to a target of 1990 levels minus 8%,

[39] Sebastian Oberthür – Hermann Ott: *The Kyoto Protocol: International climate policy for the 21st century* (1999) Berlin: Springer, p. 145.

[40] The idea that the parties might seek to do this jointly was the basis for the Activities Implementation Jointly pilot phase, in which the modalities of international co-operation in climate change mitigation would be explored.

[41] See also Article 4(6) which applies the same principles to co-operation within a "regional economic integration organization" (the standard treaty language for bodies such as the EU) which is itself a Party to the Protocol.

[42] Decision 2002/358 (n. 6 above). By the time of their accession, all EU candidate countries had also completed their ratification processes.

which equals a reduction of some 336 Mt CO^2.[43] On signing the Protocol, the EC declared that:

"The European Community and its Member States will fulfil their respective commitments under Article 3, paragraph 1, of the Protocol jointly and in accordance with the provisions of Article 4."[44]

In June 1998, the Council had reached an agreement on the targets of its Member States under a "Burden Sharing Agreement", which adjusted the national targets under the Kyoto Protocol within a common European "bubble".[45]

In contrast with the strong European support for the Kyoto Protocol, the US under the Presidency of George W. Bush has denounced it.[46] Since then climate change has become a major issue in transatlantic relations.[47] The EU remains firmly committed to the Kyoto process and implements strategies and policies to achieve its Kyoto targets, while the US Administration has practically withdrawn from all international processes related to the mitigation of global climate change. The issue has come to be seen by many as a symbol of US unilateralism.[48] However, it is obvious that for there to be an effective global regime addressing climate change it must, in the long term, include the participation of the US, not only because of the geopolitical power of the US, but also because it is the single biggest emitter of GHGs – some 25% of global totals. However, in the absence of the US, the European States and the EU have emerged as the global leaders in this field. In particular, the decision of the EU to go forward with implementing the Protocol, even before the treaty had entered into force, sent a powerful message to the rest of the world. It is this determination and a major diplomatic effort that eventually led the Russian Federation to ratify the Protocol, thus opening the way for its entry into force in early 2005.

43 Commission (2003), Second ECCP Progress Report: Can we meet our Kyoto targets? http://europa.eu.int/comm/environment/climat/pdf/second_eccp_report_xsum.pdf., p. 5.

44 See http://unfccc.int/resource/kpstats.pdf.

45 EU Bulletin 6-1998, 1.3.141. The table is reproduced in Davies, *supra*, p. 29.

46 The Clinton Administration had signed Kyoto – announcing this decision at the COP 4 in Buenos Aires in November 1998.

47 Sebastian Oberthür – Hermann Ott: "Framing Climate Policy Beyond Kyoto: Looking Back to Move Forward", in: Michel David (ed.), *Climate change for the 21st century* (2003) Washington: Center for Transatlantic Relations, p. 3.

48 Josh Busby – Alexander Ochs, "From Mars and Venus Down to Earth: Understanding the Transatlantic Climate Divide", in David (n. 47 above), p. 36.

IV Policies and Measures to Reduce Greenhouse Gases: EU Approaches

In addition to the European Trading Scheme (ETS) discussed in more detail below, the EU has developed a broad suite of domestic "policies and measures" to meet its Kyoto target. In June 2000, the EU established the European Climate Change Programme (ECCP) to help identify the most efficient, cost-efficient and environmentally friendly measures to reduce GHG emissions.[49] The ECCP was developed in consultation with a wide range of stakeholders, including non-governmental organizations, businesses, and governments, and lists more than 40 measures which if all were to be implemented could curb GHG emissions by twice the required levels.[50] Cost-effectiveness is the main priority in the choice of the policy instruments listed in the ECCP. The Commission takes the view that the EU's target could be achieved for a cost of as little as 0.06% of GDP per annum, or less then €20 per tonne of CO^2 equivalent (CO^2e) reductions. In July 2001, the European Commission published its first review of the programme,[51] which was followed by a Commission Communication laying down the concrete policy proposals of the Commission to tackle global climate change.[52] It formulated a package of twelve priority measures, including the establishment of an emissions trading scheme, a combined heat and power directive, a regulatory framework for fluorinated gases, and an action plan for the implementation of these measures.[53] The ECCP builds links with on-going activities at the level of the Community and dovetails with the Sixth Environmental Action Programme and the EU Strategy for Sustainable Development. In April 2003, the Commission presented the Second ECCP Progress

49 Commission, Communication on EU policies and measures to reduce greenhouse gas emissions: Towards a European Climate Change Programme (ECCP) EU policies and measures to reduce greenhouse gas emissions, COM (2000) 88.

50 Commission (n. 43 above), p. iii. The Second ECCP Progress Report reviews the implementation of policies and measures that have a total emission reduction potential of 578-696 Mt CO^2e, about twice the EU15's of 336 Mt CO^2e needed for the first commitment period.

51 Commission, European climate change programme, Long Report, http://europa.eu.int/comm/environment/climat/eccp_longreport_0106.pdf. June 2001.

52 Commission, Communication on the implementation of the first phase of the European climate change programme, COM (2001) 580 of 23 October 2001.

53 The measures are grouped in four sections: cross-cutting (effective implementation of the IPCC directive, linking JI and CDM to the EC emissions trading scheme, review of the Monitoring Mechanism); energy (a directive on eco-design requirements for end-use equipment, an energy service directive, a combined heat and power directive, an energy-efficient public procurement initiative, a public awareness campaign (campaign to take off on energy efficiency); transport (a proposal for shifting the balance between modes of transport), a proposal for improvements in infrastructure use and charging, a biofuel directive), industry (a regulatory framework on fluorinated gases).

Report[54] in which there can be seen a clear shift of focus from development of measures to implementation.[55] While the first ECCP Report focused on the identification of the priority measures, the ECCP second phase was to analyze the progress in implementing previously identified policy measures. The second ECCP Report came to the overall conclusion that the EU would not achieve the Kyoto target with the measures in place at that time, but could exceed the target with additional policies and measures.[56]

V Fiscal Measures – The Proposed Carbon Tax

The October 1991 Commission strategy paper on the European response to climate change included what became a controversial proposal for a Community-wide carbon tax.[57] While most other measures proposed in the 1991 Community Strategy to limit CO^2 emissions have been implemented, the implementation of the lynch-pin of this first strategy paper, the carbon tax, stalled. While the Commission has continuously tried to move the debate forward, there has been little enthusiasm on the part of the Member States for such a tax, if only because of the legal precedent that it sets.

Shortly before the UNCED Earth Summit in Rio de Janeiro in June of 1992, the European Commission presented a first proposal for a directive implementing an energy tax.[58] The introduction of such a tax would have resulted in significant energy price increases and in differential pricing formulae for different energy sources. Although there was some support among Member States for such a tax, that support was dependant upon it being internationally coordinated, and Member States were reluctant to see the introduction of any energy or carbon tax (with the possible impacts it might have on the competitiveness of EU goods) without its simultaneous introduction in the other OECD countries.[59] Commentators see the failure to reach consensus on the introduction of an energy tax in the Council as a factor that severely undermined the Community's early climate change policy.[60] A number of Member States argued that environmental taxation fell outside the legislative competence of the Community.[61] In 1995, the Commission's original proposal was superseded by an amended proposal that aimed at introducing a combined carbon and energy tax.[62] However, consensus on this revised proposal also proved impossible.

The Council then asked the Commission to submit a recommendation, accompanied by a proposal for a framework directive to provide for compatibility between Community legislation on competition, excise duties and the internal market, and national initiatives concerning CO^2 and energy taxes.[63] This mandate to the Commission resulted in the abandonment of the energy/carbon tax proposal. Instead, in 1997, the Commission presented a proposal to restructure the Community's excise duty system on energy products.[64] This proposed directive covered only motor and heating fuels. It provided for an extension of the already currently valid minimum tax rates for mineral oils (petrol and diesel) to all energy products and for an increase of all minimum tax rates in three stages (1998/2000/2002).[65] Under this proposed directive, existing minimum duty rates would be increased and rebates would be made available for firms whose energy costs represented a particularly high percentage of their overall production costs.[66] While renewable energy sources would enjoy preferential treatment, the directive would not cover industrial processes. However, even this weakened proposal for energy taxation was not adopted. Because all fiscal matters require the unanimous agreement of the EU members, a breakthrough on this issue seems unlikely. The recent introduction of the EU Emissions Trading System (ETS) seems, for the time being, to have shown which is the more popular approach, however, there are still those who advocate an energy tax in the EU, to cover all those sectors not already covered by the ETS.[67]

[54] Commission (n. 43 above).

[55] Ibidem, p. 8.

[56] Ibidem, p. iv. The report also states that preliminary date for the year 2001 show that for the second consecutive year, the GHG emissions in the EU are on the rise.

[57] Commission, Community Strategy to limit carbon dioxide emissions and to improve energy efficiency, SEC (91) 1744 of 14 October 1991.

[58] Proposal for a Council Directive introducing a tax on carbon dioxide emissions and energy, COM (92) 226 of 3 August 1992; Bull. 5-1992, point 1.1.114.

[59] Kai Schlegelmilch, *Energy taxation in the EU and some Member States: Looking for opportunities ahead*, Wuppertal Institute for Climate, Environment and Energy, on behalf of the Heinrich Böll Foundation, November 1998, updated February 1999, http://www.boell.de/downloads/oeko/energytax1.pdf; and Kai Schlegelmilch, *Energy taxation in the EU – recent processes*, on behalf of the Heinrich Böll Foundation, January 2000, http://www.boell.de/downloads/oeko/energytax2.pdf.

[60] Peter Davies, "Climate Change and the European Community", in Peter Cameron – Donald Zillman (eds.), *Kyoto – From Principles to Practice* (2001) The Hague: Kluwer, pp. 28, 31.

[61] COM (92) 226.

[62] COM (95) 172 of 10 May 1995.

[63] Bulletin EU 3-1996, Environment (1/10); http://europa.eu.int/abc/doc/off/bull/en/9603/p103117.htm, reference to: European Council conclusions – Bull. 12-1994, point I.5.

[64] COM (97) 30 of 17 March 1997.

[65] Schlegelmilch, progress (n. 59 above), p. 4.

[66] Davies (n. 60 above).

[67] See for more information: http://oeko-steuer.de.

VI Energy Policies; Renewable Energy and Energy Efficiency

VI.1 Renewable Energy

Since the early 1990s, the EU has become increasingly influential in the energy policies of its Member States.[68] The liberalization of energy markets in the last twenty years has called upon the EU to ensure fair competition among European energy suppliers. The EU work with the member states on reducing subsidies in the energy sector also comes within its mandate of creating an efficient internal market. The Community's far-reaching competence in the area of environmental protection also allows it to formulate policies on a majority basis that also have a direct influence on energy policies. The promotion of renewable energy is one of the areas in which the EC has had the most impact on the energy policy of the EU members.

In 1997, the EU Commission published a White Paper on Renewable Energy in which it set out a comprehensive strategy and action plan to achieve the ambitious objective of doubling the percentage of renewables in the EU total energy supply, from 6% to 12%, by 2010.[69] The Paper highlights the importance of ensuring security and diversification of energy supply, guaranteeing environmental protection and social and economic cohesion. It also proposed a quota system that would introduce a trading scheme based on renewable energy certificates. Three years later, the Commission outlined in a Green Paper "Towards a European strategy for the security of energy supply" the main components of a long-term energy strategy for the Community.[70] The paper stressed that the "purpose of an EU energy supply-security policy is to secure, for the EU, the immediate and longer term availability of a diverse range of energy products at a price which is affordable to all customers while respecting environmental requirements". In this context, it highlighted the need for a more efficient use of energy, reform of the transport sector, and for energy generation to utilise multiple energy sources.

The enhancement of renewable energy sources forms an important part of the Commission strategy to reduce GHG emissions.[71] Today the indicative target for the share of renewables in the generation of power is 22%. The most important piece of legislation adopted by the Parliament and the Council with respect to the promotion of renewable energy sources in the Community is Directive 2001/77.[72] The Directive proposed indicative targets for non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases) and the Member States are required to "take the appropriate steps ... in proportion to the objective to be attained". The approval processes of the Directive were characterized by political disputes surrounding the possible national support schemes for renewable energy. While some countries (Germany, Denmark, and Spain) supported renewables with fixed-feed in tariffs, other countries (United Kingdom and France) relied on renewable energy certificates. The final Directive does not prescribe any single form of support scheme, but mandates the Commission to evaluate the different approaches in 2005.

[68] Svein Andersen (1999), *European integration and the changing paradigm of energy policy. The case of natural gas liberalisation*. Arena Working Papers, WB 99/12, University Oslo. http://www.arena.uio.no/publications/wp00_13.htm.

[69] Commission, White Paper: Energy for the future – renewable sources of energy COM (97) 599 of 26 November 1997.

[70] Commission, COM (2000) 769 of 29 November 2000; http://europa.eu.int/comm/energy_transport/doc-principal/pubfinal_en.pdf.

[71] Decision 93/500 concerning the promoting of renewable energy sources in the Community (1993) OJ L 235, p. 1.

VI.2 Energy Efficiency

The Commission has also underlined the importance of further implementing energy efficiency measures projects that have the potential to result in 40% of the EU commitment under the Kyoto Protocol or 200 Mt CO^2 equivalent emission reductions per year.[73] However, the rules for a common market in electricity and natural gas that are focused on price competition do not always work to promote a more efficient use of electricity and heat. Despite what are sometimes conflicting policy measures, the EC member states have been obliged to improve energy efficiency by developing and implementing programmes which include the insulation of buildings, or the introduction of energy audits. At the Community level standards with respect to fridges, freezers, and boilers have been adopted.[74] Particular emphasis has been phased on the promotion of combined heat and power (CHP) plants, which lead to significant emission reduction in combining the generation of electricity and heat.[75] In the 1997 Commission cogeneration strategy, an overall indicative target of a doubling of the share of electricity production from cogeneration, to 18% by 2010 was set. This target, endorsed by a Council decision, is included in the Commu-

[72] Directive 2001/77 on the promotion of electricity produced for renewable energy sources in the internal electricity market (2001) OJ L 283, p. 33.

[73] See: http://europa.eu.int/comm/energy/demand/index_en.htm.

[74] Directive 96/57 on energy efficiency requirements for household electric refrigerators, freezers and combinations thereof, (1996) OJ L 236, p. 36; Commission Directive 95/12 implementing Directive 92/75 with regard to energy labelling of household washing machines, (1995) OJ L 136, p. 1; Commission Directive 96/60 implementing Directive 92/75 with regard to energy labelling of household combined washer-driers, (1996) OJ L 266, p. 1.

[75] Davies (n. 60 above), p. 35.

nity's communication on CHP.[76] A directive promoting CHP also entered into force in February 2004.[77]

VII The Problem of Transport

The EU has also formulated policies with respect to other climate relevant sectors, specific initiatives relate to the transport, industry, agricultural sector.

The transport sector contributes to about a third of the Community CO^2 emissions. The first Community strategy in the field of transport was adopted in 1995.[78] However, neither the 1998 Commission's voluntary agreement with the Automobile Manufactures' Association which seeks to reduce CO^2 emissions from new cars sold in 2008 by 25% compared to 1995 levels,[79] nor similar agreements which have been concluded with the Japanese and Korean Manufactures' Association[80] have so far yielded success in form of decreased emissions. The increased efficiency of cars has so far been offset with the simultaneously increasing number of cars of European streets. In its White Paper "European Transport Policy for 2010. It is time to decide"[81] The Commission lists 60 or so measures to be taken to guarantee an efficient and environmentally friendly transport in Europe and advocates a qualitative change of direction in transport policy in order to ensure that measures to promote an environmentally friendly mix of transport services go hand in hand with the measures to open up the markets. These measures, however, still wait for implementation and transposition, and it is fair to say that reducing transport emissions is one of the biggest climate change challenges the EU faces.

[76] Commission, Communication on CHP (COM (97)514).

[77] Directive 2004/8 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42 (2004) OJ L 52 , p. 50.

[78] The transport sector has always been responsible for a big part of the Community CO^2 emissions and the Community strategy in this field is indicated in the Communication from the Commission to the Council and the European Parliament on a community strategy to reduce CO^2 emissions from passenger cars and improve fuel economy COM (1995) 689.

[79] Commission, Implementing the Community strategy to reduce CO^2 emissions from cars: an environmental agreement with the European automobile industry, COM (98) 495 of 29 July 1998.

[80] Commission Recommendation 1999/125 on the reduction of CO^2 emissions from passenger cars (1999) OJ L 40, p. 49; Commission Recommendation 2000/303 on the reduction of CO^2 emissions from passenger cars (Korean Automobile Manifacturers Association-KAMA) (2000) OJ L 100, p. 55.

[81] Commission, COM (2001) 370 of 12 September 2000.

VIII The Most Recent Approach: Emissions Trading

One of the most innovative measures taken by the Community in order to achieve compliance with the Kyoto Protocol, is the introduction of a Community emissions trading scheme (ETS). Starting 1 January 2005, GHG emissions or Europe's biggest industrialized polluters are caped. Operators have received an allocation of allowances which authorize the holder to emit a certain amount of CO^2. These allowances are transferable and fungible in the Community. The objective of the ETS is to achieve a effective and cost-efficient reduction of industrial pollutions in the Community.

However, it was not Europe but the US which first developed the idea of economic instruments, such as emission authorizations trading, to achieve environmental benefits.[82] Traditionally, the EU had eyed the US experience with emissions trading with some reservations. In Kyoto the EU had opposed the inclusion of trading of 'pollution rights' into the Protocol, while the US promoted it. But the support of the US for emission trading has faded since Kyoto, and today it is the EU which is implementing an emissions trading scheme ten times the size of the US Acid Rain Program.[83]

Motivated by the introduction of emissions trading in the Kyoto Protocol and disillusioned by the bleak prospects of introducing a carbon tax anytime in the near future, the EU Commission started laying the groundwork for the introduction of an European emissions trading scheme as early as 1998.[84] Compared with a carbon tax, the introduction of an emission trading scheme has the important tactical and political advantage that it does not require the unanimous approval of all Member States.

In its post-Kyoto Communication Strategy from 3 June 1998, the EU Commission proposed to the Council to develop an emissions trading scheme by 2005 to ensure the cost-efficient achievement of the Kyoto targets.[85] Two years

[82] The 1990 amendment of the IV. Title of the Clean Air Act introduced the first air pollution control program relying on tradable permits. The objective of this so-called Acid Rain Program is to reduce sulphur dioxide and nitrous oxides levels to 50% of 1980's emissions. The Program thereby relies on a system of tradable permits which is intended to help curbing abatement costs. Covered facilities are allocated emissions allowances, which each authorizes the emission of a tonne of SO^2, based on their historical fuel consumption and a gradually reduced emission rate; http://www.epa.gov/oar/oaqps/peg_caa/pegcaa02.html#topic2.

[83] See for more details: Chad Damor – Pilar Lunaces-Méndez, *The Kyoto Protocol's Emission Trading System: An EU-US Environmental Flip-Flop*, http://www.ucis.pitt.edu/cwes/papers/work_papers/Kyoto.pdf; Atle Christiansen – Joergen Wettestad, "The EU as a frontrunner on greenhouse gas emissions trading: how did it happen and will the EU succeed?" (2003) *Climate Policy* 3, p. 3.

[84] For background on and history of the EU Emissions Trading Scheme see: Jürgen Lefevere, *Greenhouse Gas Emission Allowance Trading in the EU: a Background*, 27 September 2002, FIELD, London.

[85] Commission, Communication: Climate Change – towards an EU post Kyoto strategy COM (1998) 353 of 3 June 1998.

later, on 3 March 2000, the Commission published a Green Paper on Greenhouse Gas Emissions Trading in the European Union, which made a strong case for emissions trading in the EU.[86] However, it was the withdrawal of the US from the Kyoto Protocol which accelerated the development of an emissions trading scheme as the EU wished to show its continuous strong support for the Kyoto Protocol. On 23 October 2001, the Commission published a proposal for establishing a Directive establishing a scheme for greenhouse gas emission allowance trading within the Community.[87] Almost exactly two years later, Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61 was adopted.[88] This Directive establishes a scheme based on the trade of authorizations to emit a certain amount of greenhouse gases in the European Union (EU Emissions Trading Scheme or EU ETS) from 1 January 2005.

The EU ETS is mandatory for all sectors listed in the annex of the Directive: combustion installations with a rated thermal input exceeding 20MW, mineral oil refineries, coke ovens, production and processing of ferrous metals, mineral industry (cement clinker, glass and ceramic bricks) and pulp, paper and board activities. From 2005 all operators of installations covered by the Directive must hold an EU ETS permit that establishes the allowed quantity of emissions for each installation. Permit holders will receive a matching amount of allocations each year. Each year they will have to surrender to the national regulator a number of allowances equal to the total emissions permitted from their installations during the preceding calendar year. Allowances can be traded in the marketplace and transferred between accounts via an internet based registry system with electronic accounts. The EU ETS is based on 5-year periods. For each period, each Member State develops a plan for the allocation of allowances to operators in its country. All allocation plans will have to be approved by the Commission.

Emissions trading does not aim to replace more traditional command-and-control approaches, but is designed to complement them and to bring Europe a big step closer to meeting its emissions reduction targets.[89] The real advantages

[86] Commission, Green Paper on greenhouse gas emissions trading within the European Union, COM (2000) 87 of 3 March 2000.

[87] Proposal for establishing a Directive establishing a scheme for greenhouse gas emission allowance trading within the Community and amending of Council Directive 96/91/EC, COM (2001) 581 of 23 October 2001.

[88] Directive 2003/87 (n. 8 above).

[89] The name 'emissions trading' is misleading. Firstly, because not the trade in emissions but the potential trade in authorizations (or allowances) to emit is regulated in emissions trading schemes. Secondly, because none of these schemes prescribes or regulates the 'trading' in emissions authorizations. Instead these schemes are based on the idea of the possibility to 'transfer' and 'acquire' authorizations to emit a certain amount of a pollutant.

of emissions trading are the flexibility it gives industry to identify the most cost-efficient GHG abatement possibilities.

The initial design of the Directive did not link the EU ETS to emission credits under the Kyoto Protocol. It therefore did not allow Emission Reductions Units (ERUs) or Certified Emission Reductions (CERs) generated by JI or CDM projects respectively imported into the EU to be converted into EU Allowances. To remedy this, the EU adopted in September 2004 a directive to amend the EU ETS to link the scheme to emission reduction units that comply with the Kyoto Protocol.[90] The Directive, which is known as the "Linking Directive", aims to decrease further the costs of compliance with the Kyoto targets in Europe through the use of the credits generated by the Kyoto mechanisms. The Directive aims to promote the development of the project based mechanisms whilst at the same time adhering to the environmental and social responsibility policies of the EU and respecting concerns that project based mechanisms should only supplement, not replace, domestic actions. Attempting to balance these goals has led to a number of quantitative and qualitative conditions relating to the way that Kyoto units can be converted into EU allowances.

The linking of the EU ETS with the flexible mechanisms defined in the Kyoto Protocol is an important signal in support of the Kyoto Protocol. It lays the groundwork for a global climate regime and an international carbon market. The EU ETS and the Linking Directive give carbon credits generated under the CDM and JI an independent value. It also makes sure that developing countries can, although in a more limited form than initially expected, benefit from carbon finance (through CDM resources). Indeed, the Directive may well have the effect of "kick-starting" the CDM and JI to the benefit of both EU and developing country partners.[91]

IX Conclusions

Over the last decade, climate change policy has become one of the main environmental concerns of the EU. Internationally, the Union has assumed a leadership role in the process of negotiating and of implementing the Kyoto Protocol. Within the Community, the European Commission has proposed a wide array of policy instruments that aim to curb GHG emissions. The recently adopted Emissions Trading Scheme is not only the most complex

[90] Directive 2004/101 amending Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms (2004) OJ L 338, p. 1.

[91] See also: *Completing The European Emissions Trading Scheme in The Emerging Climate Change Regime*, Report of a CEPS Task Force, Nicholson, C., Chairman, Egenhofer, C., Fujiwara, N., Rapporteurs, CEPS Task Force Report No. 49, Brussels, 2004.

and ambitious of these instruments, but it has also triggered a policy debate that has made the issue of global climate change an important topic for public discussion. The level of knowledge and concern has further increased through the unusually hot summer of 2003 in continental Europe and a series of high profile extreme weather events which have led to natural disasters such as the flooding and mud slides in Haiti and the Philippines. However, despite undeniable achievements, more challenges lie ahead: transport emissions continue to rise, climate costs are not properly reflected in the prices for heat and power, and industries and households have still not tapped all the GHG reduction potentials.

The results of the November 2004 election in the US, confirming the continuation of the Bush administration, suggests that official US policy on climate change is unlikely to change in the medium term. This will further increase the pressure for international leadership on this issue from the EU. On 3 November 2004, the Queen opened a British-German summit on climate change, at which both countries have confirmed their commitment to tackle global climate change and their preparedness to assume a leadership role in the international arena.[92] However, coordination of the EU position in international negotiations is notoriously cumbersome. The accession of 10 new countries to the Union will not make this coordination any easier. The negotiations on the second commitment period, or the "post-Kyoto" regime, are scheduled to start in 2005. These will provide an early test of the whether the EU can live up to this important challenge.

[92] http://www.britischebotschaft.de/statevisit/en/press/climate_change_conference.htm.

CHAPTER 6

The European Community Eco-labelling Scheme

Mar Campins Eritja

Liability

Gerhard Roller

I Introduction

The focus of the following analysis is limited to environmental liability and – to a lesser extent –product liability. In European environmental law the regulatory approach still plays a dominant role. But in recent years, economic and so called "soft" instruments[1] have gained ever more influence. Liability law must certainly be considered not as an alternative, but as a supplement to the traditional regulatory approach. As the subject of the following contribution is "liability", we first of all need to clarify what we mean by this term. At first sight, lawyers will probably think of "civil" liability rules such as the law of torts or product liability. And even if we focus on environmental liability, we have in mind civil claims seeking to prevent or reinstate damage to the environment. As we will see, the Community legislator has, to a certain extent, moved beyond this conception: the new Environmental Liability Directive contains much more public than civil law substance.

Before examining this new piece of Community legislation, however, we must take a look at the Product Liability Directive (II) as the first Community liability law regime. The experience made with (civil) environmental law regimes, in particular in terms of the preventive effect of liability law (III), will prepare our analysis of some important aspects of the new liability directive discussed under IV.

II Product Liability

After 10 years of debate, the first comprehensive liability regime in the Community entered into force 1985.[2] Article 1 of Directive 85/374/EEC on liability for defective products[3] provides for a strict liability regime holding the producer liable for any damage to health and property that is caused by a defective product. Since the amendment of the Directive in 1999,[4] primary agricultural products are also within the scope of the Directive.[5]

Product liability is of high relevance in practice. Although in some Member States jurisprudence already protected consumer interests on the basis of common civil law,[6] the Product Liability Directive is an important milestone

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1 Such as labelling or management schemes (EMAS).

2 Liability rules need a long time and very intense debate before they see the light of day. The Environmental Liability Directive was no exception, see infra IV. A.

3 Directive 85/210 on liability for defective products (1985) OJ L 210, p. 29.

4 Directive 1999/34/EC of the European Parliament and of the Council amending Council Directive 85/374/EEC on liability for defective products, (1999) OJ L 141, p. 20.

5 It seems, however, that the practical relevance of these provisions is not very great.

6 See for example the leading decision in the *Hühnerpest* (fowl pest) case, *Bundesgerichtshof*, case VI ZR 212/66, Court Reports 51(1968), p. 91, based on Art. 823 BGB (German Civil Code). In France, the Cour

for consumer protection in the Community. It is at the very least an important barrier preventing the rollback of consumer protection legislation and jurisprudence in the Member States. But, on the other hand, according to the European Court of Justice, the Directive seeks to achieve, in regard to the matters it regulates, complete harmonisation. This means that a Member State cannot provide for stricter regulation in terms of consumer protection.[7]

In Germany, important cases related to health risks have been brought to the court,[8] and it seems that the most important legal questions are being solved by the courts. The number of cases going to the Federal High Court in Germany is dropping continuously: in 1999 5 cases were brought to the Court, but there were only 2 in 2000, 1 in 2001 and none from January to April 2003.[9] In Germany, a recent amendment to the Civil Code improved the situation of the damaged party by providing for new liability provisions concerning non-material damage.[10]

Product liability law – often in combination with the threat of criminal law – had an important impact on the structure and organisation of preventive measures in industries.[11] In this respect product liability has the same preventive effect as environmental liability rules, and in order to minimise the liability risks, industries have to set up risk management systems to prevent defective products, accidents and long-term pollution risks.

de Cassation came to similar conclusions on the basis of Art. 1384 *Code Civil* ("gardien de la chose"), see Prieur, Michel, *Droit de l'environnement*, 4th ed. (2001) Paris: Dalloz, p. 872.

7 Thus, a French provision going further than Art. 9 of the Directive and also covering material damage of less than 500 Euros does not conform to the Directive, case C-52/00 *Commission* v. *France*, (2002) ECR I-3827.

8 Such as the "Baby-Bottle-Syndrome" cases, see BGH, Case VI ZR 7/91, Court Reports 116(1991) p. 60.

9 See Hans-Jürgen Kullmann, "Die Rechtsprechung des BGH zum Produkthaftpflichtrecht in den Jahren 2001-2003", (2003) *Neue Juristische Wochenschrift*, p. 1908.

10 Art. 9 of Directive 85/374/EEC(n. 3) provides that the Directive shall be without prejudice to national provisions relating to non-material damage. § 8(2) of the German *Produkthaftungsgesetz* now also covers non-material damage under the scope of product liability law. Up to this amendment, claimants had to base their lawsuits on fault-based Art. 823 BGB in order to gain compensation for non-material damage.

11 See the mineral water cases, *Bundesgerichtshof, Neue Juristische Wochenschrift* (1988), p. 2611 and (1995), p. 2162; Joachim Schmidt-Salzer, "Verbraucherschutz, Produkthaftung, Umwelthaftung, Unternehmensverantwortung", (1994) *Neue Juristische Wochenschrift*, p. 1305; Kullmann (n. 9) p. 1908.

III The Suitability of Civil Liability Law to Protect the Environment

Before looking more closely at the current state of the art in EC liability law, I would like to make some general comments on the function of civil liability law in protecting the environment.

In theory and from the perspective of environmental policy, the purpose of environmental liability law must be to strengthen prevention by internalising external costs, this being complementary to the regulatory instruments in place – in particular those of environmental administrative law. Anyone who pursues a dangerous activity and bears the risk of becoming liable on the occurrence of damage will intensify their efforts to prevent such an occurrence. The need for action also arises because the existing liability regimes fail to ensure adequate protection of the damaged environment. Some scholars argue, from an economic analysis of law perspective, that the preventive effect of strict liability is higher than the preventive effect of fault based liability.[12]

In practice, however, it seems that to some extent the role of civil liability law has been overestimated in the past both by environmental organisations and industries. The former's expectations of the preventive effects of civil liability law were too high, while the latter imagined the worst by arguing that industry would be overwhelmed with lawsuits and would have to shoulder an unacceptable economic risk. None of these expectations have in practice come true. Nowhere has environmental civil liability law become an obstacle to economic growth.

Experience in Germany with the Environmental Liability Act enacted in 1990 shows that lawsuits under the Act are extremely rare.[13] Of course, one might argue that this would be completely different if the Act were to cover damage to biodiversity – which it does not at present – but I do not believe that this scenario is realistic. With respect to the German Environmental Liability Act, Schwarze[14] comes to an ambiguous conclusion: based on a theoretical anal-

12 Panther, *Haftung als Instrument einer präventiven Umweltpolitik*, (1992) Frankfurt, p. 134; Endres, "Haftpflichtrecht und Verhütung von Umweltschäden: Haftpflichtrecht und Verhütung von Umweltschäden: Ökonomische Aspekt", p. 1 in: Endres/Rehbinder/Schwarze, *Haftung und Versicherung für Umweltschäden aus ökonomischer und juristischer Sicht*, (1992) Berlin.

13 As in product liability, the Courts reversed the burden of proof under the law of torts (Art. 823 BGB), see the landmark case "Kupolofen", case VI ZR 223/82, (1985) *Neue Juristische Wochenschrift*, p. 47. One of the rare cases where the claim was (also) based on the Environmental Liability Act concerned health damage caused by a polluting installation: *Bundesgerichtshof*, case VI ZR 372/95, (1997) *Neue Juristische Wochenschrift*, p. 2748. In this case the Court held that compliance with administrative provisions (the licence and/or regulatory standards) does not exclude civil liability under Art. 823 BGB and the Environmental Liability Act.

14 Reimund Schwarze, "Umwelthaftungsgesetz und Umwelthaftpflichtversicherung – eine Bilanz nach zehn Jahren", (2002) *Zeitschrift für angewandte Umweltforschung*, Sonderheft, p. 1.

ysis and on empirical investigation of insurance and hazardous incidents data he found that there was an increase in insurance policies taken out by companies since the entry into force of the Act. To that extent there exists an internalisation of external costs for environmental damage. On the other hand, no reduction of accidents could be observed in this period. He concludes from this that the preventive effect of environmental liability is not significant.[15] This could be explained by the fact that a high level of protection is already in place due to administrative law and regulatory standards. Certainly, the general assumption that the preventive effect of liability law is related to the existing level of protection established by regulatory environmental standards is quite plausible.

In a number of Member States, civil law might play a more important role. In some countries it is used effectively by environmental organisations that have access to the courts and can sue polluters under civil law.[16] But as already noted, the preventive effect of civil liability law is difficult to estimate. The fact that civil lawsuits are rare does not necessarily mean that they have no effect. Polluters may take into account the economic loss that may be caused by liability law, and the fact that environmental management systems such as ISO 14001 or EMAS in industry have been implemented increasingly in recent years, may also be explained by the desire of the responsible persons to minimise the legal risk of being held liable.[17]

IV Environmental Liability in EU Law

IV.1 First Steps: a Sectoral Approach

If we look at environmental liability law more specifically, we can identify liability for waste as being one of the first liability issues the Community dealt with. As far as I can see, third party liability was mentioned for the first time in the Second Community Programme for the Environment in 1977 in connection with toxic substances.[18] Later on, Directive 84/631/EEC of 6 December 1984[19] obliged the Council to propose a liability regime for damage caused by waste. We had to wait until 1989 for the Commission to make a first proposal on civil liability for waste. This proposal – and even more so the second proposal of 1991 – already constituted a far-reaching sectoral approach for a civil liability regime. For the first time, the proposal of 1989[20] covered not only damage to persons and property but also – in the version of the amended proposal of 1991[21] – "impairment of the environment", which was defined as "any significant physical, chemical or biological deterioration of the environment", insofar as such injury was not also to be considered damage to property. But at this time, Member States obviously were not ready to follow the Commission, and they did not even discuss the Proposal in Council.

The Commission then modified its strategy. The issue was discussed in a wider perspective, encompassing all aspects of environmental liability, and we can identify a shift from a sectoral approach towards a horizontal approach. It was at this time, by the way, that competence for the matter went to Ludwig Krämer's department.

IV.2 Towards a Horizontal Approach: The Debate on Environmental Liability in the EC

IV.2.1 Green Paper

The Green Paper thus marked the starting point of the "horizontal" approach. The Paper[22] was accompanied by an extensive debate directed by the Commission.[23] that showed the significance of the issue, with seven Member State governments, and more than 100 international, European and national organisations and associations taking part. It was indeed the stated purpose of the Green Paper to initiate such a Community-wide discussion process. A joint public hearing was held in November 1993 by the European Parliament and the Commission.

[15] On the other hand, it might be questioned whether the criterion of notified accidents is suited to evaluate the preventive effect of liability law, as long as no information about the extent of damage to the environment is given.

[16] For example in France and Portugal, less frequently in the Netherlands, see de Sadeleer/Roller/Dross, (2005) *Access to Justice in environmental matters and the role of NGOs*, Chapter 2.

[17] It is on the other hand true that in companies, the responsibility for liability issues and technical security issues does not normally rest with the same persons, Schwarze(n. 14), p. 9.

[18] Under the heading of non-hazardous disposal of non-recyclable wastes, the Programme noted: "Finally, it (the Commission) will study in the appropriate context the problems of surveillance of the storing of toxic products and third party liability and insurance problems connected with the processing of such products." ((1977) OJ C 139, p. 34, para. 194).

[19] Directive 84/631 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste (1984) OJ L 326, p. 31, Article 11(3): "The Council shall, acting in accordance with the procedure referred to in Article 100 of the Treaty, determine not later than 30 September 1988 the conditions for implementing the civil liability of the producer in the case of damage or that of any other person who may be accountable for the said damage and shall also determine a system of insurance."

[20] Commission, COM (89) 282.

[21] Commission, COM (91) 219. See on this proposal: Peter v. Wilmowsky – Gerhard Roller, *Civil liability for waste*, (1992) Frankfurt am Main.

[22] Communication of the Commission to the Council and the European Parliament and the Economic and Social Committee: Green Paper on Remedying Environmental Damages, COM (93) 47.

[23] See the Summaries of the Responses to the Commission Green Paper, published by the Commission, Final Report, 20 May 1994.

The Green Paper still had a focus on *civil* liability law. The Green Paper stressed the importance of civil liability law in the proper allocation of environmental remediation costs to the generator of the damage, and thus also the indirectly preventive function of liability law. The main issues of the Green Paper were the adequate type of liability, channelling of liability, definition of environmental damage,[24] proof of causation, standing to sue in cases concerning "pure" natural goods and insurability. The Commission also examined the possibilities of remedying environmental damages through a liability fund.

IV.2.2 White Paper

As early as April 1994, the European Parliament adopted a resolution based on (the old) Article 192(2) of the Treaty, calling for a proposal for a directive on civil liability in respect of (future) environmental damage. The Commission then decided, in 1997, to prepare a White Paper instead of presenting a proposal for a directive straight away.

The "Two tier approach" proposed by the White Paper[25] directed the discussion towards the responsibility of Member States being under a duty to ensure restoration of biodiversity damage and decontamination in the first place *(first tier)*, by using the compensation or damages paid by the polluter. The White Paper proposed, furthermore, that public interest groups should get the right to act on a subsidiary basis, i.e. only if the State does not act at all or does not act properly *(second tier)*. We can conclude that the White Paper paved the way to shift the key concept from a civil liability regime to a public law liability regime.

IV.2.3 The Environmental Liability Directive

Directive 2004/35/EC on environmental liability[26] is the final point that puts at least a preliminary end to a discussion on environmental liability that ran for more than ten years. During this debate it was questioned whether there was a need at all for European legislation in this area. Environmental organisations urged regulation at EC level, industries denied any such need, and Member States were reluctant from the beginning of the debate. We may assume that for reasons of environmental protection and the need to improve enforcement of the regulatory framework of EC environmental law, the

[24] The Commission refers in its Green Paper to the definition in the proposal for a Waste Liability Directive, which describes "impairment of the environment" as meaning "any significant physical, chemical or biological deterioration of the environment".

[25] COM (2000) 66 final.

[26] Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, (2004) OJ L 143, p. 56.

Directive is necessary and meets the subsidiarity principle. This holds true particularly for biodiversity damage, given that the designation procedure for protected habitats has been handled with extreme negligence by Member States.[27]

The new Community legislation on environmental liability has shifted the focus from a civil liability base to one based more on public law liability, with some remaining elements of a civil liability regime.[28] The Directive does not provide at all for direct claims against private polluters, but only for claims against public authorities. In this respect, the title that has remained for the Directive is somewhat misleading.[29]

In the following sections we focus particularly on the concept of damage to biodiversity, although the Directive raises many more questions.

a. The general approach: strict liability for dangerous activities and complementary fault-based liability

The general approach of the Directive is to provide for strict liability insofar as the damage has occurred due to one of the professional activities listed in Annex III of the Directive. Thus, the Community legislator did not opt for a liability regime based on licensed installations as the German legislator did, but for a more comprehensive regime, based on dangerous activities such as we can find in the Lugano Convention. Moreover, for a specific type of damage, the Directive provides for complementary fault-based liability: Article 3(1.b) holds liable any person damaging natural habitats or species, if the damage is caused by any occupational activities other than those listed in Annex III, but only if the act was committed with fault or negligence.

This mixture between a strict and a fault-based liability approach could cause some implementation problems for Member States. In public law in Germany, liability generally is not based on fault. Even the owner of the land may be held liable under public law for remedying environmental damage caused by his land.[30] Under the nature conservation law of the German regional States *(Länder)*, the competent authority may demand reinstatement measures, if an impairment of nature occurred, even if the responsible person did not act negligently.[31] In order to avoid distortions between existing public liability rules and the new Directive, some Member States could be well advised to extend strict liability to also cover other occupational activities than those listed in Annex III.

[27] See e.g. Nicolas de Sadeleer – Charles-Hubert Born, *Droit international et communautaire de la biodiversité*, (2004) Paris: Dalloz, p. 504.

[28] Such as the fault-based liability for biodiversity damage.

[29] See also M. Meyer-Koeneke, "The proposal for a directive on environmental liability" (2003) *ELNI-Review* no. 2,p. 4.

[30] See Art. 4 par. 3 of the Federal Soil Conservation Act (*Bundes-Bodenschutzgesetz*).

[31] So-called "Störerhaftung", see: Sparwasser/Engel/Voßkuhle, *Umweltrecht*, 5th ed. (2003) Heidelberg, p. 316.

The fault-based approach is debatable in civil liability law, but is out of place in public law. As the Directive is based on Article 175(1) EC Treaty, Member States may introduce more stringent measures on the basis of Article 176 EC Treaty.

The scope of application of the Directive is therefore limited by several factors: First, the Directive is only applicable if the damage is caused by an occupational activity. The concept of occupation is rather broad and covers any activity carried out in the course of an economic activity, a business or an undertaking, irrespective of its private or public, profit or non-profit character. Secondly, the scope of application is restricted by the types of damage that are covered by the Directive (see b. below).

b. Concept of damage

The Directive does not cover "classic" types of damage – physical injury, damage to property. These types of damage are already covered by existing national legislation, so that problems in the existing legal orders arise not so much with respect to the concept of damage, but rather with respect to the proof of causation by an identifiable damaging party (e.g. in the case of forest decline).[32] A need for regulation arises in the case of damage to the environment that is not also damage to property, and this applies particularly to damage to natural goods that are not subject to any property rights, such as wild animals and plants, water, climate and the like.

The Directive covers three types of damage: damage to protected species and natural habitats, water damage and land damage. Water damage is linked to the Water Framework Directive[33], and goes beyond the scope of application of existing laws insofar as this damage is not linked to private property.[34] According to the definition of land damage in Article 2(1)(c) of the Directive, liability for land pollution only arises if the land contamination "creates a significant risk of human health". For this reason we believe that the effect on Member States laws that results from this provision of the Directive will be rather limited.

As far as "biodiversity damage" is concerned, the scope of the Directive is restricted to damage to protected species and natural habitats. The objective of the lawmaker was obviously to link the Liability Directive to the Natura 2000 legislation of the Community in order to enforce that legislation.[35] Consequently,

[32] It is regrettable, however, that the Directive is silent on the issue of causation.

[33] Directive 2000/60 establishing a framework for Community action in the field of water policy, (2000) OJ L 327, p. 1.

[34] As is the case under the existing laws in the Member States, see for instance Art. 22 of the German Water Resources Act or the "Rylands v. Fletscher" rule under Common Law.

[35] Jonathan Verschuuren, "Effectiveness of Nature Protection Legislation in the EU and the US: The Birds and Habitats Directives and the Endangered Species Act", (2004) *Yearbook of European Environmental Law*, p. 311.

the Directive defines protected species and natural habitats as the species and habitats listed in Directives 79/409/EEC and 92/43/EEC.[36]

However, as far as natural habitats are concerned, it remains unclear whether the Liability Directive only covers damage that occurs in *designated* Natura 2000 sites, or if it also covers damage to all *habitat types* listed in the Habitats and Birds Directives – even if the conditions for designating a specific site under these directives are not fulfilled. The wording of Article 2 par. 3 suggests the latter interpretation, because it only refers to "listed" habitats. But it does not exclude a more restricted interpretation. One could argue that only "protected natural habitats" are concerned and a habitat is only protected, once it has undergone the formal designation procedure under the "Natura 2000" directives.[37]

The history of the Directive points more towards the broader interpretation: The Legal Affairs Committee of the EP proposed an amendment to the Directive in order to restrict the obligation to take remedial measures for species and habitats to designated Natura 2000 protection areas.[38] This amendment obtained no majority in Parliament and therefore was not considered in the further legislative procedure. We can conclude from this that at least the Community legislature did not want to restrict the scope of the Directive to *designated* areas in the sense of the third step of the classification procedure.[39] This does not exclude the interpretation, however, that only those habitats that have been selected and put on the national list by Member States are covered.

On the other hand the objective of the lawmaker to align the Liability Directive to the "Natura 2000" legislation has to be taken into account. The fifth consideration of the Directive talks about the "common criteria that can be used" and that "uniform application" should be promoted. It seems indeed

[36] Directive 2004/35 (n. 26), Art. 2(3) reads as follows: 'protected species and natural habitats' means:
(a) the species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annexes II and IV to Directive 92/43/EEC;
(b) the habitats of species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annex II to Directive 92/43/EEC, and the natural habitat types listed in Annex I to Directive 92/43/EEC and the breeding sites or resting places of the species listed in Annex IV to Directive 92/43/EEC, and
(c) where a Member State so determines, any habitat or species, not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives."

[37] In the French version of the Directive the adjective "protected" in Art. 2(3) is also linked to habitat, not only to species, as in the English and German versions: "espèces et habitats naturels protégés". This is also the wording of the Italian ("specie e habitat naturali protetti"), Spanish ("especies y hábitats naturales protegidos") and Portuguese versions ("Espécies e habitats naturais protegidos").

[38] See Recommendation for Second Reading, Document A5-0461/2003.

[39] This step is still far from being reached. See on the classification procedure: Nicolas de Sadeleer – Charles Hubert Born (n. 27), p. 504-509.

reasonable to harmonise the scope of application of these three directives. It would follow that damage to natural habitats that have been notified to the Commission by the Member states and damage to "factual" areas that should have been selected pursuant to the case law of the Court are within the scope of application of the Directive.[40]

The Directive only covers such damage to species and natural habitats that has *significant* adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The criterion of significance thus determines the scope of application of the Directive, and Annex I of the Directive provides some further criteria. Thus, damage with a proven effect on human health must be classified as significant damage.

Besides this, the case law of the Court of Justice concerning the "significance" criteria under Article 6(2) and (3) of the Habitats Directive should be taken into account. The Court seems to consider any adverse effect on the conservation aims as significant.[41] It might be useful to develop – as far as possible also quantitative – standards in order to make the significance criteria more concrete.[42] This would also facilitate the insurability of biodiversity damage.

c. Rights of individuals and associations

The Directive does not provide for direct claims against polluters, but it does strengthen the rights of associations by giving them a right to request action against public authorities (Article 12). This right has the potential to enhance considerably the implementation of the Directive. Legal scholars have rightly pointed out in the past that the effectiveness of liability rules depends on the probability that their provisions are used in practice,[43] and in this context, environmental associations can play an important role. Indeed, experience in some Member States shows that environmental organisations are using lawsuits as an effective tool to stop environmentally harmful activities.[44] This provision of the Directive is in line with the new Directives implementing the Aarhus Convention and the recently proposed EU Directive on access to justice in environmental matters.[45]

d. Options for implementation

The Directive leaves it open to Member States to decide on a number of issues on which no consensus could be reached. Article 8(4) provides for an

[40] Case C-355/90 *Santona* (1993) ECR I-4221.

[41] Case C-127/02 *Landelijke Vereniging* (2004) ECR I-7405, para 46.

[42] Quantitative criteria could be developed for the reduction of habitat area.

[43] Joachim Schmidt-Salzer (n. 11).

[44] de Sadeleer/Roller/Dross (n. 16).

[45] Commission, COM (2003) 624 final. See Birgit Dette, "Access to justice in environmental matters; a fundamental democratic right," p. 3 in: Marco Onida (ed.), *Europe and the Environment, Legal Essays in Honour of Ludwig Krämer*, (2004) Groningen: Europa Law Publishing.

option to limit strict liability in cases, where the environmental damage was caused by an explicitly licensed emission or "event", or where the operator demonstrates that the activity "was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time, when the emission was released or the activity took place." Industry is already pleading to implement these options, but the scope of these two defences should not be overestimated. Accidents are usually not "expressly authorised"; long term pollution risks might be a potential candidate, but only if the emission is expressly authorised which is not the case where the license is silent on a specific polluting substance. It should also be noted that a highly relevant activity, namely agriculture, could hardly benefit from these defences given that agricultural activities are generally not subject to authorisation.

A further controversial point during the legislative procedure was financial security. The Directive does not provide for compulsory insurance. Instead, the Member states must take measures to encourage the development of financial security instruments and markets (Article 14(1)). Beside compulsory insurance the best instrument to encourage the market is probably an information campaign to raise awareness among the operators that fall within the scope of the Directive. European insurers will propose adequate insurance policies, if there is demand. Experience with the German Environmental Liability Act shows that this demand will probably grow, once the Directive is transposed into national law.

V Evaluation and Outlook

Despite all these shortcomings, the Liability Directive is certainly a step forward in remedying deficiencies of environmental liability law. The most important improvement is the inclusion of biodiversity damage in the liability regime established by the Directive. This closes a gap in liability law that has often been criticised in the past because the concept of biodiversity damage had not yet entered the legal systems of the Member States. Furthermore, the Directive can be considered an enforcement tool to support the objectives of the Habitats and Birds Directives. It is, though, not really an independent instrument as conceived in the early debate on environmental liability.

Compared to the – maybe overly – ambitious environmental objectives pursued in the early liability debate, one might find that the outcome after more than ten years is somewhat disappointing. Some important issues are still not resolved, such as proof of causation; the Directive is silent on this point. Nonetheless, it is an important and maybe not the last step.

Finally, Member States must report to the Commission on the experience gained in the application of this Directive by 30 April 2013 at the latest. So we can surely predict that the liability issue will be on the agenda again in less than ten years. I believe that this is a reasonable time to evaluate the experience and to propose further improvements.

CHAPTER 8

Competition and Environment: An Ecologically Rational Agreement

Caroline London

for the performance of a task in the general interest, those rules have the effect of favouring the national undertaking and increasing its dominant position."

In conclusion, the Commission's and Court's case law show, with the passage of time, a better integration of environmental considerations in competition policy. However, both institutions ensure that the ecologically correct is by no means a way of circumventing competition rules.

Integration of Environmental Requirements into EC Energy Policy

Florian Ermacora[1]

I Introduction

Article 6 of the EC Treaty stipulates that environmental protection requirements be integrated into the definition and implementation of the Community policies referred to in Article 3 EC Treaty, including Community energy policy.[2] The need to comply with Article 6 EC Treaty[3] is, however, not the only driving force for environmental protection measures in the energy sector.

The emission of various pollutants and immense quantities of CO^2, the non-sustainable depletion of natural resources and the generation of nuclear waste are important examples of negative environmental impacts from the production, transmission and consumption of energy. The acceleration of energy consumption and thus the aggravation of these impacts is considerable: global energy use has grown 20-fold over the past century and is expected to increase by 2% annually until 2020. This means a doubling of energy consumption by 2035 relative to 1998 and a tripling by 2055.[4] Against this background, it is difficult to see how the general environmental protection objectives set out in Article 174 EC Treaty can be met without taking environmental protection measures in the energy sector. In this sense it would not even be necessary to refer to Article 6 EC Treaty in order to justify EC measures in this area.

Traditionally, the provision of electricity and gas has been viewed as a service of general economic interest.[5] Important considerations in the provision of services of general economic interest are environmental protection and sustainable development.[6] This, along with a number of other reasons, explains why the distribution of gas and electricity has, traditionally, been kept under the direct management and control of the public sector in European countries. The liberalisation of the energy market initiated through the EC Electricity[7] and Gas Directives[8] changed this situation fundamentally and has led to the emergence of many private operators,[9] who might be less concerned about environmental protection and sustainable development than publicly controlled enterprises. A

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1 The author only expresses his personal opinion.

2 Measures in the sphere of energy are mentioned in Article 3(1)(u) EC Treaty.

3 On the legal obligations contained in Article 6 EC Treaty, Florian Ermacora, "Art 6. EGV", in Mayer (ed.) *EU- und EG-Vertrag*, (2005) Wien: Manz, para. 7.

4 http://europa.eu.int/comm/environment/integration/energy_en.htm.

5 Commission, Green Paper on Services of General Interest, COM (2003) 270 of 8 May 2003, para. 17.

6 Annex to the Green Paper on Services of General Interest (n. 5 above), para. 13.

7 Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92 (2003) OJ L 176, p. 37.

8 Directive 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (2003) OJ L 76, p. 57.

9 Environment Policy Review 2003, COM (2003) 745 of 24 November 2003, Figure 4, p. 25.

second point which might justify additional environmental regulatory action is the reduction of energy prices which is typically accompanied by an increase in the use of electricity. Furthermore, a decrease of energy costs would run counter to the concept of internalising external costs, such as those of environmental damage, into the costs of energy.[10]

The EC Treaty does not currently provide a specific legal basis for EC measures in the energy sector. For this reason, the Energy Policy Strategy of 1997[11] underlined the need to centre actions in the energy sector more closely around the priority objectives of the Community, such as the protection of the environment. Thus, environmental protection is considered to be a "raison d'être" of Community energy policy.[12] Environmental protection is also of particular importance for the development of energy policy as this objective coincides with the main priority of EC energy policy – the security of energy supply. The Green Paper "Towards a European strategy for the security of energy supply"[13] clearly recognised that both the promotion of renewable sources of energy and energy saving measures could considerably contribute to securing energy supply.

In 1998 the European Council, meeting in Cardiff, Wales asked the Commission and the Council to take concrete policy initiatives aimed at integrating environmental requirements into energy policy ("Cardiff process"). In response to this request the Commission adopted the Communication "Strengthening Environmental Integration within Community Energy Policy",[14] which set out the three main policy objectives in this area: the promotion of energy efficiency and energy saving, including measures to internalise external costs, the increase of the share of production and use of cleaner energy sources and the reduction of the environmental impact of the production and use of energy sources. All subsequent policy documents on environmental protec-

[10] For further information concerning the effects of liberalisation refer to Nele Dhondt, *Integration of Environmental Protection into other EC Policies*, (2003) Groningen: Europa Law Publishing, p. 423; Peter Badura, "Umweltschutz und Energiepolitik", in: Hans-Werner Rengeling (Ed.), *Handbuch zum europäischen und deutschen Umweltrecht*, 2nd ed. (2003) Köln: Carl Heymanns, Vol. II, § 82, para. 30.

[11] Commission, Communication on an overall view of energy policy and actions, COM (97) 167 of 23 April 1997.

[12] This will, however, fundamentally change with the entry into force of the Constitution for Europe, which introduces a new chapter on energy (Article III-157 of the Treaty establishing a Constitution for Europe [provisional consolidated version adopted by the Conference of the Representatives of the Governments of the Member States, CIG 86/04, 25 June 2004]). For further information concerning the legal basis of directives in the energy sector, refer to Badura(n. 10 above), para. 20.

[13] Commission, Green Paper, COM (2000) 769 of 29 November 2000.

[14] COM (1998) 571; the European Parliament assessed this Communication and concluded with a resolution on "Environmental Integration within Community Energy Policy".

tion measures in the energy sector basically confirmed these objectives.[15] The Commission committed itself to carry out an annual stocktaking of the Cardiff process of environmental integration and a regular environment policy review, and adopted the first stocktaking report on 1 June 2004.[16]

This contribution gives an overview of the legislative initiatives that are aimed at prioritising the integration of environmental protection requirements into EC energy policy. This includes a review of measures relating to energy demand (promotion of energy efficiency and energy saving, including energy taxation) and energy supply (change to renewable energies). In the context of presenting EC policy on renewable energies, the relevant EC Treaty principles, which may limit the ambition of Member States in this area, are discussed. The key developments regarding the integration of environmental protection requirements into EC policy on nuclear energy are then examined. Finally, there is an outlook on expected developments in the area of integration of environmental requirements into EC energy policy. The contribution, therefore, is limited to discussing direct energy policy measures and does not touch upon other EC policies and legislation, such as transport or waste policy, which could also have a major impact on the energy sector.

II Legislative Initiatives

II.1 Measures on the Energy Demand Side

II.1.1 Strengthening Energy Efficiency

Product-related energy efficiency legislation

Existing EC energy efficiency requirements for products are, in principle, based on two Directives from 1992: Directive 92/42 on efficiency

[15] In this sense Council Decision adopting a multi annual framework programme for actions in the energy sector (1998-2002) and connected measures (1999) OJ L 7, p. 16, Article 2(1)(c) to (e); Report from the Council (Energy) to the European Council on the Strategy for integrating environmental aspects and sustainable development into energy policy (Document ENER 140, ENV 426 of 3 December 1999); Commission, Review Report 2001 and implementation of the strategies (SEC (2001) 502), p. 5; Decision 1230/2003/EC adopting a multi-annual programme for action in the field of energy, (2003)OJ L 176p. 32: 'Intelligent Energy – Europe' structures this programme into the fields: "SAVE" for the improvement of energy efficiency and the rational use of energy, "ALTENER" for the promotion of new and renewable energy sources, "STEER" for all energy aspects of transport, the diversification of fuels and the promotion of renewable fuels and energy efficiency in transport and "COOPENER" for the promotion of renewable energy sources and energy efficiency in developing countries.

[16] Commission Working Document "Integrating environmental considerations into other policy areas – a stocktaking of the Cardiff process" COM (2004) 394 of 1 June 2004.

requirements for new hot-water boilers fired with liquid or gaseous fuels[17] and Directive 92/75 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances.[18] The main objective of both Directives, which are based on Article 95 EC Treaty, is to harmonise national legislation rather than to protect the environment. While Directive 92/42 determines the energy efficiency of the products covered, Directive 92/75 contains labelling requirements. Directive 92/75 has been implemented via eight daughter Directives which focus exclusively on household equipment.[19] Along the lines set by Directive 92/42, Directive 96/57 on energy efficiency requirements for household refrigerators, freezers and combinations thereof[20] and Directive 2000/55 on energy efficiency requirements for ballasts for fluorescent lighting[21] stipulate requirements for maximum power consumption of the covered equipment.

In 2003 the Council concluded on behalf of the Community an international agreement between the United States and the EC on a voluntary labelling system on office equipment, known as the "Energy Star".[22] Prior to the adoption of this Decision the choice of the correct legal basis gave rise to a dispute between the Commission and the Council. The Agreement has three main aims. First, it aims to improve information to consumers by use of a logo which identifies energy-efficient office equipment products; second, it aims at raising awareness in users, equipment and component manufacturers about energy use in the office; and third it aims to create a *de facto* world-wide efficiency standard for office information and communication technology equipment. The European Court of Justice found that the conclusion of this Agreement had to be based on Article 133 EC Treaty – the legal basis for Community measures in the area of international trade –, rather than on Article 175 EC Treaty – the legal basis for environmental legislation. The Court held that while the labelling programme should have a positive environmental effect it is indirect and distant, in contrast to the effect on trade in office equipment which for several reasons is considered to be direct and immediate. As a conclusion, the Court held that the commercial-policy objective pursued by the Energy Star Agreement must be regarded as

[17] Directive 92/42 (1992) OJ L 167, p. 17.

[18] Directive 92/75 (1992) OJ L 297, p. 16.

[19] Products covered by the daughter directives include household electric ovens, household air-conditioners, household electric refrigerators, freezers and their combinations, household lamps, household dishwashers, household combined washer-driers, household electric tumble driers and household washing machines.

[20] Directive 96/75 (1996) OJ L 236, p. 36.

[21] Directive 2000/55 (2000) OJ L 279, p. 33.

[22] Council Decision 2003/269 concerning the conclusion on behalf of the Community of the Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficient labelling programmes for office equipment (2003) OJ L 99, p. 47.

predominant.[23] Consequently, the Court annulled the initial Council Decision concerning the conclusion of the Energy Star Agreement. The content of the agreement has been implemented into Community law by Regulation 2422/2001,[24] which is – undisputedly – based on Article 175 EC Treaty.[25]

In August 2003 the Commission adopted the proposal for a directive on the eco-design of energy-using products.[26] The draft directive, which should, in the view of the Commission[27], be based on Article 95 EC Treaty, aims at establishing a framework for the integration of environmental aspects into product design and the development of energy-using products. It provides for the definition of eco-design requirements which energy using products covered by future implementing measures must fulfil. Obviously, it will not be possible to define environmental requirements for all energy-using products. The selection of the products, which should be covered by such measures, will be made according to the significance of the volume of sales, the environmental impact and the significance of the potential for improvement in relation to the environmental impact without entailing excessive costs (Article 12). The parameters which are to constitute the eco-design requirements are set out in Annex I to the Directive and include *inter alia* the weight and volume of the product, the use of materials issued from recycling activities, the energy consumption throughout the life cycle and the use of substances classified as hazardous. Despite its environmental relevance,[28] no provisions aiming at savings of energy required for "standby" power are set out in the Proposal. The above-mentioned Directives 92/42, 96/57 and 2000/55, which contain energy efficiency requirements, would in future be considered as implementing measures to the Directive on the eco-design of energy-using products.[29]

Energy end-use efficiency and energy services

In view of the Commission's estimation that total final energy consumption in the EU is approximately 20% higher than can be justified on purely economic

[23] Case C-281/01 *Commission* v. *Council* (2002) ECR I-12049, para. 41 to 43.

[24] Regulation 2422/2001 (2001) OJ L 332, p. 1.

[25] The effectiveness of the Energy Star Label is questionable. See the „critical thoughts" expressed by Bruggeman, V., "Energy Efficiency in the European Community", (2004) *European Environmental Law Review*, p. 140 (p. 145).

[26] Proposal on establishing a framework for the setting of eco-design requirements for energy-using products and amending Council Directive 92/42/EEC, COM (2003) 453 of 17 July 2003. In the meantime this proposal was adopted as Directive 2005/32, (2005) OJ L 191, p. 29.

[27] Conversely, in the first reading of the proposal, the European Parliament proposed Article 175 EC Treaty as legal basis of this directive.

[28] The WWF estimates that energy wasted by the "standby" mode accounts for up to 13% of total energy consumption in various EC Member States (*European Voice* 14-20 October 2004, p. 20).

[29] Explanatory Memorandum to COM (2003) 453 (n. 26 above), p. 9.

grounds[30], EC initiatives on energy efficiency and saving of energy should not be limited to efficiency or labelling requirements provided for some products. Consequently, the Commission proposal for a directive on energy end-use efficiency and energy services[31] addressed the issue of energy efficiency more broadly. The reasons for proposing this directive, which should be based on Article 175 EC Treaty, can be illustrated as follows[32]: In various Member States the average cost of saving electricity in the domestic sector is around 2.6 Euro Cents/kWh, compared to the average price for delivered electricity of 3.9 Euro Cents/kWh. Against this background, the objective of the proposal is to promote competition between energy end-use efficiency and energy generation. Thus, as in other areas where the polluter-pays principle applies, environmental protection efforts should pay off also in economic terms.

The Proposal introduces the concept of "energy services for end users" as a tool to achieve energy efficiency. According to Article 3(c) of the Proposal, "Energy Service" is defined as the physical amenity for energy end-users derived from a combination of energy and energy using technology and, in certain cases, the operations and maintenance necessary to deliver the service. Thus, energy end-use services require a combination of energy supply and the provision of energy-using equipment or technology. For example, illumination in a building may consist of a package of products and services which include the provision of lighting equipment, maintenance service and the supply of electricity. Such a package provides a predetermined level and quality of lux that is billed on the basis of €/m2 per year. With similar illumination services being offered by different enterprises, end-use efficiency improvements included in and paid for in this way will thus compete with each other to minimise the total cost of the package.[33]

Furthermore, the Proposal requires Member States to adopt and meet a mandatory target for cumulative annual energy savings (Article 1 para 1)[34] and to appoint one or more new or existing independent public sector authorities or agencies to be assigned overall control and responsibility for overseeing the framework for reaching the energy efficiency target (Article 1 para 5). Other measures include *inter alia* the procurement of energy end-use efficiency by the public sector (Article 5), the obligation of energy distributors and/or retail energy sales companies to promote energy services (Article 6) and the removal of barriers regarding financial instruments for energy savings.

[30] The Commission cites a 17% energy savings potential for consumption by industry, 22% for the domestic and tertiary sector and 14% for the transport sector (Explanatory Memorandum to the Proposal COM (2003) 739 of 24 November 2003, p. 6).

[31] Commission, COM (2003) 739 (n. 30 above).

[32] See the Explanatory Memorandum to the proposal COM (2003) 739 (n. 30 above), p. 2.

[33] Example indicated in the Explanatory Memorandum to the Proposal COM (2003) 739 (n. 30 above), p. 4.

Energy performance of buildings

Although it is the building sector, rather than industry or transport, that offers the largest single potential for energy savings in the EU[35] a concrete measure in this area, Directive 2002/91 on the energy performance of buildings,[36] has been adopted relatively late and leaves much flexibility to Member States. In this sense the setting of minimum energy performance requirements for buildings – these include *inter alia* the thermal characteristics of the building, heating installation and hot water supply and natural ventilation – is left to Member States (Article 4) and no minimum performance targets, even indicative ones, are provided at Community level. The national minimum energy performance requirements are applied to new, and only to a limited extent to existing buildings.[37] Other provisions of the Directive cover the obligatory issuance of an energy performance certificate – which is primarily for information purposes (Article 7) – and the regular inspection of boilers and air-conditioning systems.

Co-generation

The second existing EC Energy Efficiency Directive of a more horizontal nature – Directive 2004/8 – targets the promotion of cogeneration based on a useful heat demand in the internal energy market.[38] The potential saving of CO2 emissions, which could be achieved by the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy (cogeneration), was the main driver for adopting this Directive. Contrary to Directive 2002/91 on the energy performance of buildings harmonised efficiency reference values are to be established at EC level. Provisions of the Cogeneration Directive include a guarantee of the origin of cogeneration (Article 5), rules on (national) support schemes (Article 7), electricity grid system issues (Article 8) and administrative procedures (Article 9). The Cogeneration Directive is fuel-neutral. It promotes renewable energy cogeneration alongside fossil cogeneration.

[34] The annual amount of energy to be saved needs to be equal to 1% of the amount of energy distributed and/or sold to final customers.

[35] According to the Commission Staff Working Paper (SEC (2001) 502,p. 5, up to 40% (!) of final energy demand is attributed to the energy demand of buildings.

[36] Directive 2002/91, (2003) OJ L 1, p. 65.

[37] According to Article 6 of Directive 2002/91 (n. 36 above), minimum energy performance requirements have to be applied to existing buildings with a total useful floor area over 1000 m2 which undergo major renovation.

[38] Directive 2004/8 (2004) OJ L 52, p. 50.

II.1.2 Taxation of Energy Products and Electricity

Following lengthy debates between the Member States[39] in October 2003, the Council adopted Directive 2003/96 restructuring the Community framework for the taxation of energy products and electricity[40] ("Energy Taxation Directive") which extends the Community system of minimum rates, initially only applying to mineral oils,[41] to coal, natural gas and electricity. While this Directive is based on Article 93 EC Treaty – the legal basis for taxation provisions – a number of "whereas" clauses of this Directive illustrate the ambition of the legislator to contribute to environmental protection.[42]

In principle, the levels of taxation which Member States shall apply to the products covered by the Directive may not be less than the minimum levels set by the Directive. These minimum levels set by the Directive are, however, strongly criticised by environmental groups for being too low.[43] Total or partial exemptions in the level of taxation could be applied *inter alia* to electricity produced from renewable energies (Article 15(1)(b)) or energy products and electricity used for or electricity produced from combined heat and power generation (Article 15(1)(c) and (d)). In view of the difficult negotiations on this Directive in the Council, the large number of possibilities for Member States to apply tax reductions on the consumption of energy products used for heating purposes and on electricity, does not come as a surprise. In this sense, tax reductions have been granted in favour of energy-intensive industries and where agreements with undertakings/associations or tradable permit schemes/equivalent arrangements have been implemented to achieve environmental protection objectives or improvements in energy efficiency (Article 17). A certain degree of reductions in the levels of taxation could be maintained in all Member States for a certain time (Article 18(1) and (2)). 11 out of the EU 15 Member States had reserved specific exemptions according to their national circumstances. The new Member States were granted transitional periods for the full application of the Directive.[44]

[39] See for the history of these discussions, which actually started as early as 1992, Delvaux, B., "Promoting Biofuels in Energy Supply the European Legal Framework", (2004) *European Environmental Law Review* p. 66 (p. 74).

[40] Directive 2003/96 (2003) OJ L 283, p. 51.

[41] Until the adoption of the Energy Taxation Directive this system was confined to mineral oils: Council Directive 92/81 on the harmonisation of the structures of excise duties on mineral oils, (1992) OJ L 316, p. 12 and Council Directive 92/82 on the approximation of the rates of excise duties on mineral oils, (1992) OJ L 316, p. 19.

[42] Compare recitals 6 (reference to the integration principle set out in Article 6 EC Treaty), 7 (taxation of energy products as instrument to achieve the Kyoto Protocol objectives) or 12 (acknowledgment of energy prices as key elements of Community environment policy).

[43] Environmental Fiscal Reform, Campaign Newsletter number 6, page 13.

[44] See Commission press release of 30 April 2004 (IP/04/575).

In principle, an Energy Taxation Directive could constitute a powerful instrument to motivate consumers and industry to use energy sources more efficiently. However, the fact that the present Directive will only induce limited increases in the levels of energy taxation in a number of Member States and provides a wide range of exemptions from its scope of application suggests that its impact on energy efficiency and emissions is not likely to be strong. This has been acknowledged by the Commission,[45] which was frustrated with the gradual watering down of its initial comparably pro-active Proposal for an Energy Taxation Directive.

II.2 Measures on the Energy Supply Side

II.2.1 Promotion of Electricity Produced from Renewable Energy Sources

On 27 September 2001, only 16 months (!) after the adoption of the respective Commission Proposal, the European Parliament and the Council adopted Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market[46] ("Green Electricity Directive"). The legal basis of the Green Electricity Directive is Article 175(1) EC Treaty. Had the legislature considered that this Directive affects significantly a Member State's choice between different energy sources and the general structure of its energy supply, Article 175(2) EC Treaty, which requires a unanimous vote of the Council and excludes the European Parliament from the decision, would have been the correct legal basis. Looking at the criteria constituting the scope of application of Article 175(2) EC Treaty, one has to say that the legislature was right in its choice.[47] While the Green Electricity Directive certainly affects, possibly even significantly, the choice between different energy sources by promoting the recourse to renewable energies, it is difficult to see how the promotion of renewable energies affects the general structure of the energy supply of the Member States, in particular as all Member States had utilised renewable energies as energy sources already before the adoption of the Directive.

The Green Electricity Directive contains definitions of the key terms in this area, indicative targets for the production and the consumption of renewable energies both for the Member States and the Community as a whole (Article 3), a provision establishing a guarantee of origin of electricity produced from renewable energy sources (Article 5), a stipulation aimed at reducing regulatory and non-regulatory barriers to the increase in electricity production from renewable energy sources (Article 6), the assurance that renewable energy produced

[45] Commission, Environment Policy Review (COM (2003) 745 of 24 November 2003, p. 10).

[46] Directive 2001/77 (2001) OJ L 283, p. 33.

[47] See Oschmann, V., "Scheitert die europäische Richtlinie für Erneuerbare Energien an der Rechtsgrundlage?" (2001) *Zeitschrift für neues Energierecht*, p. 84 (p. 88).

is granted access to transmission and distribution grids (Article 7) and various reporting requirements both for the Commission and for Member States (Articles 3, 4, 6 and 8).

The initial Commission proposal for the Green Electricity Directive[48] contained an obligation on Member States to set national targets for future consumption of electricity from renewable energy sources. The Explanatory Memorandum[49] to the proposal stated, in this context, that Member States are *obliged* to meet the national targets for domestic future consumption of renewable generated electricity. The Council and the European Parliament were less ambitious than the Commission, as the final version of Article 3(2) of the Green Electricity Directive requires Member States merely to adopt and publish a report setting national *indicative* targets for future consumption of electricity produced from renewable energy sources in terms of a percentage of electricity consumption for the next ten years.[50]

Article 3(4) of the Green Electricity Directive stipulates, however, the obligation of the Commission to address national targets in the appropriate form, *including the setting of mandatory targets*, if the Commission concludes that the national indicative targets are likely to be inconsistent with the global Community indicative targets for reasons that are unjustified and/or do not relate to new scientific evidence. In its first assessment on the national achievements in the area of the promotion of renewable energies, the Commission concludes that the 2010 Community target of a 22.1%[51] share of electricity produced from renewable energy sources in total Community electricity consumption by 2010 will – based on extrapolation scenarios of current national renewable energies promotion strategies – not be met.[52] It appears, however, that the Commission does not – at least in the short term – intend to react to this situation.[53]

[48] Commission, COM (2000) 279.

[49] COM (2000) 279, p. 4.

[50] The indicative national targets need to be consistent with firstly reference values set out individually for each Member States, secondly a global indicative target of 12% of gross national energy consumption by 2010 and thirdly with the 22.1% indicative share of electricity produced from renewable energy sources in total Community electricity consumption by 2010 (Article 3 paragraph 2 and 4 Green Electricity Directive). National indicative targets for the share of electricity from renewable energy in each new Member State are set out in the Accession Treaty. These new national targets reduce the collective target for the electricity produced from renewable energy sources in total EU25 electricity consumption to 21% in 2010.

[51] 21% after accession of the new Member States.

[52] Communication to the Council and the European Parliament "The share of renewable energy in the EU" COM (2004) 366 of 5 May 2004, p. 13: Currently implemented policies would probably result in a share of between 18% and 19% in 2010.

[53] As a reaction to the deficient performance of Member States the Commission merely announced to closely monitor the situation in all Member States, in order to prepare follow-up actions; COM (2004) 366, p. 22.

Article 6 of the Green Electricity Directive provides for limiting the regulatory and non-regulatory barriers to the increase in electricity production from renewable energy sources. Accordingly, Member States are obliged to undertake such a review with a view, inter *alia to* reducing the regulatory barriers to the increase in electricity production from renewable energy sources. The construction of wind power generators, hydro-power plants or biomass installations, to name just some examples, might have considerable impact on the environment. Consequently, the promotion of the respective energy sources by lowering environmental standards applicable to the construction and operation of these installations might be counter-productive from an environmental protection point of view. Nonetheless, this questionable form of promoting environmental issues appears to continue to spread in Community law.[54]

II.2.2 Limits in EC law for the Promotion of Renewable Energies

Monitoring of national support schemes

The requirement for Member States to promote renewable energies set out in the Green Electricity Directive is general in nature. According to Article 3 Member States shall take "appropriate steps" and comply with the national indicative targets. At the same time, the Green Electricity Directive provides for the Commission's competence to closely monitor "the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, and which could have the effect of restricting trade, on the basis that these contribute to the objectives set out in Articles 6 and 174 of the Treaty." When establishing support schemes, Member States "make the necessary assumption that the State aid guidelines for environmental protection allow for the existence of national support schemes'for the promotion of electricity produced from renewable energy sources."[55] The Commission shall evaluate national support schemes and – not later than 27 October 2005 – present a well-documented report on the experience gained. If necessary, this report shall be accompanied by a proposal for a Community framework with regard to support schemes for electricity produced from renewable energy sources.

[54] For an analysis of this issue in relation to the Proposal for a Decision of the European Parliament and of the Council laying down Guidelines for Trans-European Energy Networks see Zhang Shu Yu, "The Proposed EU Energy Security Package vis-à-vis EU Law", (2004) *European Environmental Law Review*, p. 170.

[55] Annex to the Green Electricity Directive (n. 46 above). The guidelines referred to are the Community Guidelines on State aid for environmental protection, (2001) OJ C 37, p. 3.

The Preussen Elektra *case*

Most Member States have implemented support schemes for renewable energy, which usually take the form of feed-in tariffs, quota obligations and/or green certificates.[56] In the preliminary ruling, C-379/98 *Preussen Elektra*,[57] the ECJ had to assess the compatibility of one of these national support schemes for renewable energy – the German Law on feeding electricity from renewable energy sources into the public grid[58] (in the following referred to as the *Stromeinspeisungsgesetz*) – with the EC Treaty provisions on the prohibition of quantitative restrictions between Member States (Article 28 to 30 EC Treaty) and aids granted by States (Article 87 EC Treaty). As is the case for similar provisions in other Member States, the *Stromeinspeisungsgesetz* obliged suppliers of electricity to purchase electricity from renewable sources. A specific feature of the German law was the compulsory origin of the relevant renewable sources from the area of supply. On the basis of the *Stromeinspeisungsgesetz* Preussen Elektra AG, as producer of electricity, had to pay a part of the costs related to this support scheme. Subsequent to such payment, Preussen Elektra AG claimed its money back, arguing that it was paid without a valid legal reason, as the respective provisions of the *Stromeinspeisungsgesetz* were contrary to the directly applicable provisions of the Treaty on State aid and free circulation of goods and could therefore not be applied.

The competent national court asked the ECJ whether Article 87 EC Treaty covered national rules for the benefit of the recipient of a payment, under which the costs entailed are not met from the public budget, but are borne by individual undertakings in a sector. In line with its well-established jurisprudence,[59] the Court found that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 67(1) EC Treaty. The obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices, as set out in the *Stromeinspeisungsgesetz*, does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity. The fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article 87 EC Treaty.[60]

The national court also asked whether the relevant German provision could constitute a quantitative restriction on imports and/or a measure having

[56] Commission, COM (2004) 366 of 5 May 2004, p. 15.

[57] Case C-379/98 *Preussen Elektra* [2001] ECR I-2099.

[58] Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz vom 7. Dezember 1990 (BGBl. 1990 I, p. 2633).

[59] See case 82/77 *Van Tiggele* (1978) ECR 25.

[60] Case C-379/98 (n. 57 above), para. 58 et seq.

equivalent effect.[61] The Court[62] referred to its case-law according to which the obligation placed on traders in a Member State to obtain a certain percentage of their supplies of a given product from a national supplier limits to that extent the possibility of importing the same product. As the German provisions in question expressly stated that the purchase obligation imposed on electricity supply undertakings applied only to electricity produced from renewable energy sources within the scope of that statute and within the respective supply area of each undertaking concerned, the ECJ considered them as capable of hindering intra-Community trade. The ECJ held, however, that such a discriminating purchase obligation could be compatible with Article 30 EC Treaty considering, on the one hand, the aim of the provision in question and, on the other hand, the particular features of the electricity market.

Regarding the aim of the provision, the ECJ stated that the use of renewable energy sources for producing electricity is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases. Accordingly, it is also designed to protect the health and life of humans, animals and plants. In this context, the ECJ – for the first time ever in an environmental case[63] – referred to the principle of integration of environmental protection requirements into the other Community policies as set out in Article 6 EC Treaty.[64] Regarding the particular features of the electricity market, the Court found that the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced. Having regard to all these considerations, the ECJ judged that in the current state of Community law concerning the electricity market, legislation such as the German *Stromeinspeisungsgesetz* was not incompatible with Article 30 EC Treaty.

Conclusions

Most of the national support schemes for renewable energies do not imply direct or indirect advantages through State resources to producers of renewable energy. As in the German case, such national schemes oblige either end-users of the supplied electricity, producers of the electricity or operators involved in the distribution of electricity to finance the generation of renewable energies. Thus, on the basis of the *Preussen Elektra* case, these national support schemes for

[61] In principle, these EC Treaty provisions are of application to electricity which is considered to be a product; Case C-393/92 *Almelo* (1994) ECR I-1477, para. 28.

[62] Case C-379/98 (n. 57 above) , para 70 et seq.

[63] Before the *Preussen Elektra* case, the ECJ referred to the integration principle only once; However, not in the context of environmental protection (Case C-180/96 *United Kingdom* v. *Commission* (1998) ECR I-2265, para. 99).

[64] Case C-379/98 (n. 57 above), para. 76.

renewable energies do not fall into the field of application of EC State aid rules.[65] As regards the compatibility of the German measure with Article 28 EC Treaty the judgment of the ECJ left various questions open. For example, it would have been worth discussing why, under the environmental protection perspective, the German promotion scheme is entitled to discriminate against renewable energies generated in other EU Member States. In fact, one of the key problems for justifying such measure is the well-established ECJ case-law,[66] according to which imperative requirements, such as environmental protection,[67] could not be relied on to justify national measures which were not applicable to domestic products and imported products alike. In spite of the explicit request of Advocate General Jacobs,[68] the Court did not clarify whether directly discriminatory measures can be justified by imperative requirements.

In future, the discussion on the environmental merits of national promotion schemes for renewable energies might become even more important when it comes to the compliance check with Article 28 EC Treaty. In the *Preussen Elektra* case, the ECJ based the justification for the German measure not only on environmental grounds, but also on the specific nature of the electricity market. In this context, the ECJ referred particularly to the difficulty to determine the origin of electricity and in particular the source of energy from which it was produced. This problem should in future be overcome, as Article 5 of the Green Electricity Directive requires Member States to ensure that the origin of electricity produced from renewable energy sources can be guaranteed according to objective, transparent and non-discriminatory criteria. Furthermore, Member States shall ensure that a guarantee of origin is issued to this effect in response to a request. In future, therefore, the ECJ is unlikely to be able to justify a national measure like the German *Stromeinspeisungsgesetz* on the basis of the difficulty in determining the origin of the electricity and in particular the source of energy from which it was produced. The Court will then have to limit the justification of possible distortions of intra-Community trade to environmental arguments.

II.2.3 Substitution of Fossil Fuels

The objective of Directive 2003/30 on the promotion of the use of biofuels or other renewable fuels for transport[69] ("Biofuels Directive") is to

[65] On the relation between support schemes for renewable energy and the EC State aid provisions Krieglstein, F., "Renewable Energy Schemes and EC State Aids Provisions", (2001) *European Environmental Law Review*, p. 51; Delvaux, B., "The EC State Aid Regime regarding Renewables: Opportunities and Pitfalls", (2003) *European Environmental Law Review*, p. 103.

[66] Case 178/84 *Commission* v. *Germany* (1987) ECR 1227.

[67] Case 302/86 *Commission* v. *Denmark* (Danish Bottles) (1988) ECR 4627.

[68] Opinion of Advocate General Jacobs on case C-379/98 (n. 57 above), para. 229.

[69] Directive 2003/30 (2003) OJ L 123, p. 42.

replace diesel or petrol for transport purposes with a view to meeting climate change commitments, ensuring environmentally friendly security of supply and promoting renewable energy sources (Article 1). Biofuels are liquid or gaseous fuel for transport produced from biomass (Article 2 para. 1 a). The Biofuels Directive does not require Member States to promote specific types of biofuels. and in practice Bioethanol, produced from sugar beets or cereal, and biodiesel, produced in particular from rape, are the most common biofuels.

Again, as in the case of the Green Electricity Directive, indicative, rather than binding, targets are set (Article 3).[70] Along the lines set by the Green Electricity Directive the Commission shall, by 31 December 2006, draw up an evaluation report on the progress made in the use of biofuels and other renewable fuels in the Member States and – where appropriate – submit proposals for legislation on the basis of this report. If this report concludes that the indicative targets are not likely to be achieved for reasons that are unjustified and/or do not relate to new scientific evidence, these proposals shall address the question of national targets, including possible mandatory targets, in the appropriate form. Another similarity between the Green Electricity Directive and the Biofuels Directive is the gradual weakening of the initial Commission proposal in the course of the legislative procedure.[71] The change from a binding fixed proportion of biofuels as set out in the initial proposal to the final indicative target is just one illustration of this development.

III Environmental Protection and Nuclear Energy

III.1 Legal and Political Questions

Nuclear energy still counts for 35% of the overall energy production[72] within the EU 15. The new Member States also rely heavily on nuclear energy, as only Cyprus, Malta and Latvia do not use nuclear power plants and only two new Member States have committed themselves to shut down nuclear reactors due to safety issues.[73] Despite the importance of nuclear energy within the national energy mix, EC energy policy classifies nuclear energy as one of the "undesirable" energy carriers,[74] which is primarily motivated with risks

[70] The reference value for the targets which are set on the national level is 2%, calculated on the basis of energy content, of all petrol and diesel for transport purposes placed on their markets by 31 December 2005. For 31 December 2010 the reference value shall be 5.75%.

[71] See Delvaux, B. (n. 39 above), p. 73.

[72] Commission, Green Paper "Towards a European strategy for the security of energy supply" COM (2000) 769, p. 14.

[73] Lithuania: Ignalina 1 and 2; Slovakia: Bohunice VI.

[74] COM (2000) 769, p. 31.

related to the safety of reactors and problems of managing and safely stockpiling nuclear waste.

In 1957 the EURATOM Treaty established the European Atomic Energy Community. In remarkable contrast to the EC Treaty, neither the objective of the EURATOM Treaty (Article 1) – creating the conditions necessary for the speedy establishment and growth of nuclear industries –, nor any other of its provisions refer explicitly to environmental protection considerations. An equivalent provision to the integration principle of Article 6 EC Treaty is not part of the EURATOM Treaty. Thus, existing EURATOM Treaty measures on nuclear safety and nuclear waste management had to be based on EURATOM Treaty Articles, which refer to the protection of the health of workers and of the general public (Article 2b EURATOM Treaty[75]): Article 30 EURATOM Treaty requires the establishment of basic standards within the Community for the protection of the health of workers and the general public against the dangers arising from ionizing radiations; Article 31 EURATOM Treaty defines the procedure for drafting and adopting those basic standards; Article 32 EURATOM Treaty provides that, at the request of the Commission or of a Member State, those basic standards may be revised or supplemented in accordance with the same procedure. According to Article 33 EURATOM Treaty it remains the competence of each Member State to lay down the appropriate provisions, "whether by legislation, regulation or administrative action" to ensure compliance with the basic standards.

By judgment of 10 December 2002, the ECJ confirmed that under Articles 30 to 32 EURATOM Treaty the Community possesses legislative competence to establish, for the purpose of health protection, an authorisation system which must be applied by the Member States.[76] The Court held that such protection could not be achieved without controlling the sources of harmful radiation, which was initially contested by the Council. In other words these provisions justify Community action on the safety of nuclear power stations.

III.2 Safety of Nuclear Installations

In spite of the competence confirmed by the ECJ, the EU has so far not taken effective measures to deal with the safety of nuclear installations. Community "action" in this area has been limited to a "non-binding acquis" built on fundamental common principles, which has been developed in the course of some form of co-operation between the Member States using this technology. The legislative follow-up to this co-operation consisted in the adoption of a Council Resolution on the technological problems of nuclear safety requesting the Member States to *continue to collaborate effectively* at Community

[75] The Community shall establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied.

[76] Case C-29/99 *Commission* v. *Council* (2002) ECR I-11221, para. 75 and 89.

level in 1975[77] and in the adoption of Council Directive 96/29/Euratom laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation.[78] Directive 96/29/Euratom provides, *inter alia*, that the Member States are required to submit certain management and control practices involving a hazard from ionising radiation to a system of reporting and prior authorisation and to ensure the radiation protection of the population in normal circumstances. The discussion on the safety of nuclear installations intensified with the perspective of EU enlargement with some new Member States still operating Soviet-design nuclear reactors. Further to assessments of the state of art and modus operandi of nuclear energy generation in the accession countries, the European Council, at the Laeken Summit of 2002, undertook to maintain a high level of nuclear safety in the Union and stressed the need to monitor the security and safety of nuclear power stations.[79]

On 30 January 2003, the Commission adopted a proposal for a EURATOM directive setting out basic obligations and general principles on the safety of nuclear installation.[80] The way of setting standards for the safety of nuclear installations is predetermined in Article 33 EURATOM Treaty. Accordingly, basic standards are to be worked out by the Commission after obtaining the opinion of a group of scientific experts from the Member States which are appointed by a Scientific and Technical Committee. In practical terms, the development of European safety standards will take into account the results of the work of the International Atomic Energy Agency (IAEA) in the field of nuclear safety. These safety standards will have to be respected by undertakings responsible for the nuclear installations (Article 7). Member States will have to establish an independent safety authority, which carries out nuclear safety inspections (Articles 3 and 8). Other elements of this proposal cover the handling of operating incidents, the guarantee of adequate financial resources to support the safety of nuclear installations and the monitoring of application of this Directive. The monitoring will include verifications of safety authorities. Member States have to submit once a year a report on the measures taken to fulfil their obligations under this proposed directive. As all Member States – with the exception of Estonia and Malta – are parties to the Nuclear Safety Convention concluded under the auspices of the IAEA and are thus already obliged under international law to comply with the Nuclear Safety Convention's nuclear safety standards, the added value of the EURATOM proposal is to allow

[77] Council Resolution of 22 July 1975 (1975) OJ C 185, p. 1. This Council Resolution was updated by Council Resolution of 18 June 1992 on the technological problems of nuclear safety (1992) OJ C 172, p. 2.

[78] Directive 96/29/Euratom (1996) OJ L 159, p. 1.

[79] Communication from the Commission of 6 November 2002 "Nuclear safety in the European Union", COM (2002) 605 of 25 October 2002, p. 2.

[80] Commission, COM (2003) 32 of 30 January 2003.

the Commission to monitor this compliance and to launch EURATOM infringement procedures before the ECJ in the case of non-compliance.

III.3 Management and Stockpiling of Nuclear Waste

Today the supervision and control of shipments of radioactive waste between Member States and into and out of the Community is governed by Directive 92/3/Euratom.[81] This Directive sets up a system of authorisation requirements for shipments of radioactive waste. Directive 92/3/Euratom also provides for strict limitations and criteria regarding third countries to which radioactive waste may be exported. Article 4 para 1 in conjunction with Annex I point 3 b Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive)[82] requires that EIAs are carried out for the construction of installations designed for the final disposal or for the long-term storage of radioactive waste. Existing Community legislation does, however, not foresee specific rules for ensuring that spent nuclear fuel and radioactive waste is safely managed throughout the whole disposal process.

Together with the proposal for a EURATOM directive setting out basic obligations and general principles on the safety of nuclear installations, the Commission also adopted a proposal for a EURATOM directive on the management of spent nuclear fuel and radioactive waste.[83] The main objective of the Proposal is to ensure the proper management of spent nuclear fuel and radioactive waste so that humans and the environment are adequately protected against radiological hazards. To achieve this objective, Member States must minimise the production of radioactive waste and take all necessary steps to ensure the safe management of radioactive waste. This provision is framed by the requirements to set up a regulatory body entrusted with the implementation of the respective regulatory framework, the provision of adequate financial resources and the creation of programmes for the management of radioactive waste.

According to Article 2 b) i) of Directive 75/442/EEC on waste as amended by Directive 91/156/EEC[84] ("Waste Framework Directive"), radioactive waste is one of those categories of waste which shall be excluded from the scope of this Directive where they are already covered by other legislation. According to the ECJ[85], the term "other legislation" used in this stipulation may refer to national legislation[86]. To be regarded as "other legislation" within the meaning of Article

[81] Directive 92/3 (1992) OJ L 35, p. 24.

[82] Directive 85/337 (1985) OJ L 175, p. 40 as amended by Directive 97/11, (1997) OJ L 73, p. 5.

[83] COM (2003) 32 of 21 January 2003.

[84] Directive 91/156 (1991) OJ L 78, p. 32.

[85] ECJ case C-114/01 *Avesta Polarit Chrome Oy* (2003) ECR I-8725, para.49.

[86] The position is not indisputable. If the term "other legislation" was understood as covering other than Community legislation, for example national or regional rules, nuclear wastes would be exempted from

2(2)(b)(i) of Directive 75/442, national legislation must, however, contain precise provisions organising the management of the respective categories of waste.[87] Consequently, not all national legislation covering nuclear wastes qualifies for an exemption of the respective wastes from the scope of Directive 75/442. Besides, as yet, other Community legislation providing for specific rules ensuring that radioactive waste is safely managed throughout the whole disposal process does not exist. It could be therefore concluded that as yet waste management legislation, be it national legislation or the Waste Framework Directive, applies to the management of nuclear waste.

IV Outlook

A review of existing Community energy policy shows that the integration of environmental protection requirements into energy policy is more than just a theoretical concept. In particular, the EC Commission has made many efforts to ensure the development of energy policies that promote environmental protection. However, many of the initiatives in this direction have only recently been implemented and, thus, practical experiences with the concrete effects of these initiatives are still in short supply and it is too early to assess the success of these measures. Nevertheless, certain shortcomings of the measures and evolution of policy in the energy domain are already apparent.

The legislative evolution of integrating environmental protection requirements into energy policy shows that Member States tend to be less ambitious in this area than the Commission. Accordingly, few pro-active initiatives can be expected in those areas, where Member States employ veto rights in the EC legislative process. This is particularly deplorable, as two of the main fields where further environmental protection action in the energy sector is needed fall within the scope of such specific Member State rights: according to Article 175(2) EC Treaty provisions primarily of a fiscal nature and measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply are adopted by a unanimous Council Decision. Energy taxation legislation contains provisions primarily of a fiscal nature and clearly falls within the remit of Article 175(2) EC Treaty. The energy taxation Directive 2003/96 is a telling example for a text adopted under the

Directive 75/442 at national or regional level. This consequence could hardly be in line with the intentions of the EC legislature, whose aim was – see Directive 75/442, 5th recital – to minimise disparities between Member States' laws on waste disposal and recovery, as such disparities may affect the quality of the environment and interfere with the functioning of the internal market. In this sense Ludwig Krämer in: Florian Ermacora – Ludwig Krämer: *Die Umsetzung des Europäischen Umweltrechts in Österreich* (2000) Wien: Verlag Österreich, p. 216.

[87] Case C-114/01 (n. 85 above), para.52.

unanimity procedure in the Council[88] and not much more could be expected from the discussions on the Commission proposal for directive for a minimum harmonisation of diesel fuel excise duties.[89] This situation puts the viability of internalising external (environmental) costs at EC level into question, although the Commission recognised at various instances that environmental taxes can be highly effective in both cost and environmental terms.[90] Barriers to the introduction of the adoption of environmental tax legislation are particularly regrettable as various Member States hesitate to adopt such legislation at national level due to concerns about limitations of the competitiveness of national industry. The unanimity requirement for EC tax legislation will remain unchanged after the entry into force of the Constitution for Europe.[91]

A second area, where the requirement for unanimity in the Council could impede pro-active EC environmental protection legislation in the energy sector relates to nuclear energy. Currently, the phase-out of nuclear energy is envisaged by all but three of the EU 15 Member States which are at present operating nuclear power plants.[92] There is little doubt that a Community phase-out decision for nuclear energy would significantly affect a Member State's choice between different energy sources and the general structure of its energy supply and thus fall under the unanimity requirement of Article 175(2) EC Treaty. Consequently, any such measure could realistically not be taken at EC level, even if it might be well justified both under environmental protection and internal market aspects.

Among the most remarkable developments as regards the integration of environmental protection requirements into EC energy policy are the proposed measures on energy efficiency. The Commission proposal for a directive on energy end-use efficiency and energy services contains innovative measures. It is, however, questionable whether these measures are ambitious enough, in particular if the expected watering down during the course of the legislative procedure is taken into consideration. It is particularly difficult to understand in this respect why the mandatory energy efficiency target set out in the Commission's proposal accounts for only 1%, while, according to the Commission, the

[88] The legal basis for Directive 2003/96 (n. 40 above) was Article 93 which requires a unanimous Council vote for tax provisions.

[89] Commission, COM (2002) 410 of 17 July 2002.

[90] See for example Commission Communication on the Sixth Environmental Action Programme of the European Community, COM (2001) 31 of 24 January 2001, p. 15.

[91] Article III-62 of the Treaty establishing a Constitution for Europe (provisional consolidated version adopted by the Conference of the Representatives of the Governments of the Member States, CIG 86/04, 25 June 2004).

[92] Sweden, Spain, the Netherlands, Germany and Belgium have adopted or announced a moratorium. Only Finland, France and the United Kingdom from the EU 15 continue to operate nuclear power plants.

energy efficiency potential amounts to 18%.[93] In addition, one has to warn against any further softening of the measure by making the proposed targets indicative as happened with the Green Electricity Directive. As in other areas, which are characterised by the need to take a variety of individual mechanisms to achieve a given environmental goal, target-setting has its merits also in the field of energy efficiency legislation. However, making such targets indicative might limit the ambition of Member States to take all necessary measures to achieve the respective environmental objectives.[94]

Future energy policy could be significantly affected – at least indirectly – by the emission trading scheme established under Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61.[95] On the one hand, various measures strengthening the integration of environmental protection requirements into EC energy policy might become redundant if the trade with CO2 certificates leads to an increased recourse to renewable energies or to the improvement of energy efficiency. It is, however, clear that the regime of tradable certificates as established today can not entirely compensate specific environmental protection measures in the energy field, as households, small enterprises and traffic are excluded from this trading scheme. On the other hand, the potential success of such scheme might lead to deliberations about the use of a similar instrument in other areas related to the energy sector. In this sense, the Commission itself mentions the possible introduction of tradable energy efficiency certificates ("white certificates").[96] The Commission considers this to be a possible next step in the near future.

Less significant for the integration of environmental protection requirements into energy policy is the expected impact of the adoption of the Constitution for Europe. The new energy chapter, which would be introduced by the Constitution, basically confirms the existing objectives of EC energy policy, including the promotion of energy efficiency and saving and the development of new and renewable forms of energy.[97] Also the provision of a proper legal basis for measures in the energy sector[98] can hardly be expected to change the overall Community approach in this area.

[93] Communication from the Commission "Action Plan to Improve Energy Efficiency in the European Community", COM (2000) 247, at 4.

[94] See also Zhang Shu Yu (n. 54 above), p. 174 et seq.

[95] Directive 2003/87 (2003) OJ L 275, p. 32.

[96] Explanatory Memorandum to the Proposal COM (2003) 739 of 24 November 2003, p. 5.

[97] Article III-157 para 1(c) of the Treaty establishing a Constitution for Europe (provisional consolidated version adopted by the Conference of the Representatives of the Governments of the Member States, CIG 86/04, 25 June 2004).

[98] Article III-157 para 2 of the Treaty establishing a Constitution for Europe.