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# General Overview of EU Secondary Environmental Law



## 1. Introduction

Clearly, EU environmental law has a considerable impact on national policies, so much so that some even speak of a true *ius commune*. First created in the early 1970s, environmental law currently embraces more than two hundred directives and a

dozen regulations.[1] As almost 8 per cent of EU legislation is dedicated to the protection of the environment, this body of legislation has over time become relatively substantial, and national experts estimate that almost 80 per cent of their environmental law is in one way or another shaped by EU obligations.[2] Indeed, the scope of environmental law is striking. EU legal acts cover nearly all aspects of that policy, ranging from listed installations and pollution control, through waste management and nature conservation, to procedural requirements. It must also be added that the transposition of EU secondary law is a matter not 'simply' for 28 national legislatures, but rather around one hundred regional authorities, as jurisdiction over environmental matters has generally been devolved to sub-federal bodies such as regions and Länder. As a result, EU legal acts are binding on all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralized authorities, and those authorities are required to apply them.[3]

As is the case for national provisions which transpose or apply EU legislation, the latter rules themselves are difficult to master.

At first sight, given the technical and disparate nature of an area of law which ranges from climate change to genome diversity within a species population, the provision of such an overview certainly appears to be a tall order. For example, although global warming upsets the division of wild species and their natural habitats, nature's own conservation measures without doubt do not have much do to with emissions trading schemes (ETS) which aim to reduce $CO_2$ and other greenhouse gas (GHG) emissions.

Moreover, harmonization measures have been piled one on top of the other without any global vision. In contrast to certain Member States which have enacted environmental codes—Sweden, France, etc—EU law is still made up of disparate legal frameworks,[4] as is clear from the differences between the legal instruments employed as well as the diversity of legal basis.[5]

Furthermore, environmental law by no means aspires to stability: the instruments discussed in the following are subject to constant adaptation not only to scientific and technical progress, but also to decisions taken on an international level. Hemmed in by the principles of legal certainty, legislation is not well equipped to deal with this evolutionary dimension.

[1] Considering the spread of environmental preoccupation in many polities, no figure can genuinely be put forward. L. Krämer, *EC Environmental Law*, 6th edn (London: Sweet & Maxwell, 2007) 7.

[2] Eg Communication of the Commission on the midterm review of the Sixth Community Environmental Programme, COM(2007) 225 final, 3. As for the 12 States which joined the EU after 2004, the whole of their environmental law results from the implementation of secondary law obligations. See Krämer (n 1) 451. Most secondary law acts oblige national authorities regularly to inform the Commission of the implementation of the obligations. Those obligations were codified by Council Directive 91/692/EEC standardizing and rationalizing reports on the implementation of certain Directives relating to the environment ([1991] OJ L377/48).

[3] See, to that effect, Case C-103/88 *Costanzo* [1989] ECR I-1839, paras 30–3; Case C-243/09 *Fuß* [2010] ECR I-9849, para. 61 and the case law cited therein; and Case C-97/11 *Amia SpA* [2012] OJ C200/2, para. 38. See also K. Lenaerts and N. Cambien, 'Regions and the European Courts: Giving Shape to the Regional Dimension of Member States' (2010) 35 *EL Rev* 609.

[4] Sector-based codifications have taken place, notably in the sectors of water (Directive 2000/60/EC [2000] OJ L327/1), air (Directive 2008/50/EC [2008] OJ L152/1), waste (Directive 2008/98/EC [2008] OJ L312/3), and listed installations (Directive 2011/75/EU [2011] OJ L239/1).

[5] See Chapter 3, Section 4.

Language as much as style is also an obstacle.[6] Acting on the back of a phalanx of specialist associations, environmental law has, as a new area of law, given rise not only to principles specific to it—polluter pays, precautionary principle, etc—but also a jargon or blossoming of the most diverse acronyms—BAT, CBA, CDM, EIA, EMAS, ETS, GMOs, ILUC, IPPC, MAPP, SAC, SEA, SPA, WEEE, etc.[7]

Finally, due to the progressive integration of environmental considerations into various sectors—Common Agricultural Policy (CAP), transport, energy, foreign trade, cooperation and development, tourism, etc—EU law is called upon to become even more diversified and complex.[8]

As will be seen, Sections 2 and 3 discuss the validity of a flurry of national environmental measures that usually transpose EU obligations. In order to understand the rationale of these measures, Chapter 4 offers lawyers who are not specialists in environmental law an overview of the most important rules of EU secondary law no matter whether they were adopted pursuant to Article 192 or Article 114 TFEU. Hence, this chapter does not have the goal of furnishing an exhaustive inventory of the rules applicable in the numerous sectors of environmental protection law. Strictly speaking, it shall be limited, first, to setting out the principle sectors and, second, to highlighting the impact of EU law on the policing powers of the national authorities and, accordingly, on the practices of undertakings and their right to move goods and services freely within the internal market. Hence, this chapter will not address questions of comparative or international law unless this is necessary in order to understand the issue.

The discussion within this chapter will be structured in the following manner.

Given that EU secondary law addressing environmental issues is deeply embedded in its economic, social, and political context, the scope of this area of law cannot be grasped without first making an effort to understand the various factors which condition the emergence of a policy evolving on the back of ecological crises, technological innovation, and economic opportunities. These different factors are brought into the fold in Section 2.

The specific nature of certain institutional aspects, and particularly comitology and agencies, are underlined in Section 3.

[6] Examination of the various official language version of a technical annex to the EIA Directive shows that a procedural concept is likely to be subject to various interpretations. Given these divergences, 'one must go to the purpose and general scheme of the directive'. See Case C-72/95 *Kraaijeveld and others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paras 29–30. By the same token, the phrase 'likely to have [an] effect' used in the English-language version of Art. 6(3) of the Habitats Directive appears to be stricter than those used in other versions. It follows that each of those versions suggests that the test is set at a lower level than under the English-language version. See Opinion AG Sharpston in Case C-258/11 *Peter Sweetman* [2012] OJ C156, para. 48.

[7] Best Available Techniques (BAT), Cost–Benefit Analysis (CBA), Clean Development Mechanisms (CDM), Environmental Impact Assessment (EIA), Eco-Management and Audit (EMAS), Emissions Trading Scheme (ETS), Genetically Modified Organisms (GMOs), Indirect Land Use (ILUC), Integrated Pollution Prevention and Control (IPPC), major-accident prevention policy (MAPP), Special Area for Conservation (SAC), Strategic Environmental Assessment (SEA), Special Protection Area (SPA), and Waste Electrical and Electronic Equipment (WEEE).

[8] See Chapter 1, Section 5 and Chapter 3, Section 4.

Section 4 will sketch out a schema of the various forms of EU acts and instruments addressing environmental protection. This is followed, in Section 5, by analysis focusing on different policy sectors.

A final section deals with the challenges facing the growth of environmental law.

Most of the directives and regulations mentioned were adopted by the EC and not by the EU. For the sake of simplicity, the EC lawmaker is described as the 'EU' irrespective of when the measures were adopted.

## 2. Factors Influencing Environmental Law

### 2.1 Introductory remarks

In order to be able to navigate through the maze of this broad-sweeping branch of the EU, it is necessary to throw light on its main sources of influence. This exercise is all the more important as legal rules cannot be read in 'clinical isolation' from other disciplines such as science, economics, sociology, and political sciences. Moreover, a consideration and balancing of these different factors within the context of the decision-making process and, therefore, during judicial review of the proportionality and subsidiary nature of EU law, is set to become increasingly important in future.[9]

### 2.2 Science

First and foremost, the history of environmental law has been marked by a paradoxical relationship with science. Although this field of the law emerged in the early 1970s as a reaction to unlimited economic growth and progress by the over-powerful 'creator-man' who ended up destroying his own environment, science nonetheless occupies a central role. In particular, Articles 114(3) and (5) and 191(3) TFEU are testament to the key role played by scientific analysis in the adoption of secondary acts.

In order to explain the influence of science on EU secondary law, three factors need to be highlighted.

At first sight, science is the only credible tool for the pursuit of an environmental policy worthy of the name; it offers decision-makers and the population at large a snapshot of the state of the planet. And there are naturally scientists who uncover, identify, and pose ecological problems which need to be answered by the law. There are also experts who warn the general public of crises, even though the gap between scientists and the uninitiated can turn out to be baffling.

There are always sciences which take on a predominant role during the framing of environmental protection rules. Furthermore, scientific concepts progressively filter in through the drafting of legislation. The incorporation into legislation of the concepts of

[9] According to the Court of Justice, the discretion left to the EU institutions 'presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate'. See Case C-310/04 *Spain v Council* [2006] ECR I-7285, para. 122, noted by X. Groussot (2007) *CML Rev* 761–85. For an example of marginal review due to the 'complex economic and ecological assessments' carried out by the Commission in its control of national allocation plans for the allocation of GHG emission allowances, see Case T-374/04 *Germany v Commission* [2007] ECR II-4431, para. 81.

system,[10] ecosystem,[11] natural habitat,[12] species,[13] and sub-species[14] is testament to this. Similarly, arrangements inspired by ecological considerations, such as biogeographical regions[15], or transfrontier hydrographic basins,[16] transcend national boundaries and overturn traditional administrative divisions. Expressed in the form of technical prohibitions, discharge thresholds, or chemical concentrations, these technical standards put interdisciplinarity to the test. Hence, risk assessment currently occupies a central position in the drafting of regulations concerning chemical substances and genetically modified organisms (GMOs).[17]

Since health and environmental measures may mask protectionist measures, the EU Courts have elevated scientific assessment to a decisive criterion.[18] Indeed, it is always science which intervenes, at times decisively, during the course of annulment procedures for product safety regulations.[19] Even human rights no longer fall beyond the remit of scientific debate.[20]

That said, even though environmental law draws substantial inspiration from scientific facts, this does not affect its status as a legal discipline or, in other words, as a technique for managing the social order that is capable of regulating conflicts with its own conceptual tools.[21] Thus, the concepts of species, sub-species, GMOs, substances, and pollutants have a regulatory scope which does not necessarily follow the contours of scientific definitions. A striking example of this is that pollen contained in honey must be classified as an 'ingredient'.[22]

In addition, science can also be a killjoy, as the constant need to adapt legal rules to the evolution of scientific knowledge means that the lawmaker ends up continuously taking the rules intended to protect the environment back to the drawing board.[23]

[10] Framework Convention on climate change (Rio de Janeiro, 9 May 1992), Art. 1(3).

[11] Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), Art. 1; European Parliament and Council Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] OJ L164/19, Art. 1(2)(a).

[12] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7, Art. 1(b).

[13] Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L51/3, Art. 2(s). Despite the concept of species being embroiled in controversy, the Court of Justice did not hesitate to define it as being 'the totality of all individual beings which form a reproducing community'. See Case C-507/04 *Commission v Austria* [2007] ECR I-5939, para. 235.

[14] Case C-202/94 *G. Van der Feesten* [1996] ECR I-355.

[15] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7–50, Arts. 1(c)(iii) and 4(2).

[16] European Parliament and Council Directive 2000/60/EC establishing a framework for EU action in the field of water policy [2000] OJ L327/1, Art. 2(13), (14), and (15).

[17] See the discussion of the precautionary principle in Chapter 1, Section 7.6.3.

[18] Scientific proof seems to take on more weight in sanitary disputes before the WTO Dispute Settlement Body. See A. Alemanno, *Trade in Food* (London: Cameron & May, 2007).

[19] Case T-229/04 *Sweden v Commission* [2007] ECR II-2437.

[20] *Tatar v Romania*, 27 January 2009, para. 104 (ECHR).

[21] E. Naim-Gesbert, *Les dimensions scientifiques du droit de l'environnement* (Brussels: Bruylant-VUB Press, 1999).

[22] Case C-442/09 *Bablok* [2011] OJ C311/7, para. 74.

[23] By requiring a periodical review of protection measures, substantive law is not outdone. Thus, the Kyoto Protocol must be periodically reviewed by the Conference of the Parties 'in the light of the best available scientific information . . .' See Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997), Art. 9. By the same token, measures contributing to the safety

The duration, content, rigour, and precision of legislation—and by extension legal certainty—may suffer from the constant adaptation of law to scientific facts.

From another point of view, an overzealous recourse to science has the effect of restricting the ambit of judicial review: limiting itself to ascertaining the existence of the scientific facts underlying a decision, rather than assessing them, the Courts need not resolve the complex problems, and may rely on the enlightened assistance of experts.[24] For instance, implementation of a precautionary measure should start with as complete a scientific assessment as possible and, where possible, identifying at each stage the degree of uncertainty attached to the results of evaluation of available scientific information.[25] On the ground that it may not substitute its assessment for that of the administrative authorities, the Court's remit is marginal, and only decisions that are manifestly unreasonable in the light of the conclusions of a scientific study are liable to be annulled.[26]

In fact, as the following examples show, the EU Courts have tended to extend their control of the scientific basis of EU acts.

- First and foremost, since it is 'of the utmost importance' scientific advice must be based on the principles of excellence, independence, and transparency.[27]
- The fact that a complete examination was not made of all the representative uses of a pharmacological product in order to assess the effect of the substance on wildlife means, in the eyes of the General Court, that the scientific dossier did not contain sufficient evidence.[28]

Similarly, national measures have to be backed by undisputable scientific facts.

- The proportionality of a national measure refusing to include a wild species in a 'positive list' with a view to marketing it requires from the Member States a 'specific analysis' of the risks on the basis of scientific studies.[29]
- The risks resulting from the export of dangerous waste to Member States which apply less stringent regulations 'must be measured, not by the yardstick of general considerations, but on the basis of relevant scientific research'.[30]
- An administrative measure adopted in order to counter the risk of the accidental introduction of exotic pathogenic organisms calls for 'an in-depth evaluation... carried out on the basis of the most reliable scientific data and the most recent results from international research'.[31]

of food adopted in accordance with the precautionary principle must regularly be reviewed according to new scientific developments (GFL Regulation [2002] OJ L31/1, Art. 7(2)).

[24] Case C-341/95 *Safety Hi-Tech* [1998] ECR I-4355, para. 54. [25] COM(2001) 1.

[26] Case C-180/96 *UK v Commission* [1998] ECR I-2265, para. 97; Case T-74/00 *Artegodan* [2002] ECR II-4945, para. 201; Case T-392/02 *Solvay Chemicals* [2003] ECR II-4555, para. 126; Case C-77/09 *Gowan* [2010] ECR I-13533, paras 55 and 82; and Case T-31/07 *Dupont de Nemours* [2013] OJ C156, paras 125 and 156.

[27] Case T-13/99 *Pfizer* [2002] ECR II-3305, para. 158; and *Dupont de Nemours* (n 26), para. 141.

[28] *Sweden v Commission* (n 19) paras 232–5.

[29] Case C-510/99 [2001] *Tridon* ECR I-7777, para. 58; and Case C-219/07 *Andibel* [2008] ECR I-4475, para. 41.

[30] Case C-277/02 *EU-Wood-Trading GmbH* [2004] ECR I-11957, para. 50.

[31] Case C-249/07 *Commission v Netherlands* [2008] ECR I-174, para. 51.

- The Member States are required to adopt conservation measures in favour of endangered bird species using the most up-to-date scientific data.[32]
- In order to preserve classified habitats from development or other activities likely to alter their ecological integrity, Article 6(3) of the Habitats Directive provides for a *sui generis* 'prospective impact study' of the environmental effects applicable to 'any plan or project... likely to have a significant effect thereon,...' Accordingly, the assessment is not deemed to be appropriate where reliable and updated data are lacking.[33] It flows from that that the experts conducting the assessment must show a high level of competence with respect to nature conservation issues.
- However, the principle of the independence of scientific experts may be called into question. When asked whether an authority responsible for drawing up a development plan may be designated as the sole scientific authority to be consulted under the Strategic Environmental Assessment (SEA) Directive,[34] the Court of Justice held that the directive did not prevent the authority from wearing two hats.[35] It follows that whilst the obligation to consult must be functionally separated, it need not be institutionally separated. By adopting such a minimalist approach to the obligation to consult provided for under the directive, the Court departed from the opinion of Advocate General Bot. It is clear that the Court's reading of the SEA Directive does not satisfy the objective of transparency in the national decision-making process pursued by the EU legislature. Indeed, it is the contribution of external expertise to that of the authority that creates and fuels debate, results in constructive criticism, and even offers alternative solutions to the planned project. Requesting the authority adopting the plan or the programme to be an independent expert in the procedure to which it is a party may appear to be somewhat schizophrenic.

Nevertheless, public authorities do not always have a monopoly over scientific knowledge. For instance, a review of the classification by national authorities of natural habitats for wild birds may be made by reference to scientific inventories drawn up by NGOs.[36]

Finally, as is clear from the following examples, there may be a considerable gap between the warnings issued by scientists and the risk management measures taken to counteract significant risks.

- Although British health and safety inspectors had been highlighting the danger for workers of exploiting asbestos since the start of the twentieth century,[37] it was

[32] Case C-355/90 *Commission v Spain* [1993] ECR I-4221, para. 24; and Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, para. 47.

[33] Case C-127/02 '*Waddenzee*' [2004] ECR I-7405, para. 54; Case C-404/09 *Commission v Spain* [2011] OJ C25/3, para. 100; and Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias e.a.* [2012] OJ C355/2, para. 128.

[34] European Parliament and Council Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.

[35] Case C-474/10 *Seaport* [2011] OJ C362/10.

[36] Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031; and Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, paras 51 and 55.

[37] D. J. Gee and M. Greenberg, 'Asbestos: from "Magic" to "Malevolent Mineral"' in *Late Lessons from Early Warnings: the Precautionary Principle 1896–2000* (European Environment Agency, Environmental Issue Report 22, 2001) 53.

necessary to wait until 19 March 1987 before the EU lawmaker adopted the first directive on the prevention and reduction of environmental pollution by asbestos[38] and until 26 July 1999 for the use of this ore to be banned completely by the EU.[39]

- In 1982, the European Commission identified 129 dangerous substances which should be subject, as a matter of priority, to harmonized water discharge standards in accordance with Water Framework Directive 76/464/EEC; only 17 of them were regulated during the course of the 1980s.
- Although the Intergovernmental Panel on Climate Change emphasized in its report of 2007 that a 0.2°C increase per decade could result in serious disruptions,[40] the Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, to which the EU is a party, provides for a reduction of total GHG emissions 'by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012' (Art. 3), which, in the eyes of the majority of the scientific community, is clearly insufficient to halt global warming.

## 2.3 Economy

Since environmental law may have a chilling effect, which can at times be significant, on commercial and industrial investments and may, depending on the circumstances, result in the delocalization of businesses, environmental policies give rise to serious doubts in the private sector. Consequently, the Commission proposal at the end of 2007 to reduce $CO_2$ emissions from cars to 120mg/m$^3$ per km,[41] unleashed the wrath of the German authorities anxious to protect their car industry, whilst it caused less hostility from French and Italian car manufacturers whose lighter vehicles were able to comply with the proposed thresholds. In 2012, the Commission's proposal further to reduce $CO_2$ emissions again faced strenuous opposition from the German car industry.[42] Nonetheless, environmental law contributes to the creation of new markets—such as recycling, green energy, green certification, etc—which guarantee the emergence of technologies that make more efficient use of natural resources and energy.

The Treaty takes this into account, since in elaborating its environmental policy, the EU must take into account, by virtue of Article 191(3) TFEU, 'the potential benefits and costs of action or lack of action'. Accordingly, new legal acts should only be adopted following a comparison between the costs of a policy and the consequences of inaction. Obviously, this is often an extremely delicate balancing act: the costs of the

[38] Council Directive 87/217/EEC on the prevention and reduction of environmental pollution by asbestos [1987] OJ L85/40.

[39] Commission Directive 1999/77/EC adapting to technical progress for the sixth time. Annex I to Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (asbestos) [1991] OJ L207/18.

[40] IPCC, *Climate Change 2007. The Physical Science Basis: Summary for Policymakers* (Geneva: IPCC, 2007) 10.

[41] COM(2007) 856 final.

[42] D. Keating, 'Porshe Proposals Fuel Noisy Traffic Debate' (Sept 2012) *European Voice* 8.

implementation of a new regulation may be calculated, whilst it is harder to quantify the benefits in terms of quality of life and the management of ecosystems.[43]

However, EU law remains wrought with contradictions: although granting State aids may enhance the optimal level of environmental protection, such subsidies at first sight contradict the polluter-pays principle enshrined in Article 191(2) TFEU.[44]

That said, there is no choice but to accept the fact that EU law is already characterized by economic considerations, as is shown by the following examples.

- REACH Regulation, which was subject to more than 40 economic impact studies, provides for the intervention of a Committee for Socio-Economic Analysis, which formulates an opinion on every measure intended to control or prohibit the placing on the market of dangerous substances.[45]
- The Water Framework Directive requires the Member States to follow a 'pricing policy' with a view to encouraging users to use water resources 'efficiently'.[46]
- Public authorities may only require the use of best available techniques (BAT) in the exploitation of large industrial facilities provided that they are determined 'under economically and technically viable conditions, taking into consideration the costs and advantages'.[47]
- Member States may use economic instruments, for example by adopting differentiated tax rates, in order to promote the collection of used batteries.[48]
- The ETS Directive, which implements the Kyoto Protocol, established for the first time a trading market in GHG emissions allowances from certain industrial sectors. The purpose of the ETS Directive is to establish an efficient European market in GHG emission allowances, with the least possible diminution of economic development and employment. Accordingly, the reduction of GHG emissions 'must be achieved, in so far as possible, while respecting the needs of the European economy'.[49]
- Finally, the Commission now requires the subjection of all draft legislation included in its working programme to an *Integrated Impact Assessment*, which has the goal of analysing the ecological, economic, and social impact of draft regulations.[50]

[43] Few ecosystem services have explicit prices. Services such as crops, livestock, fish, or water are most likely to be priced in markets on the account that they are directly consumed. See TEEB, *The Economics of Ecosystems and Biodiversity. Mainstreaming the Economics of Nature* (Malta: Progress Press, 2010).

[44] Chapter 12, Section 3.3.4. [45] REACH, Arts 64 and 71.

[46] European Parliament and Council Directive 2000/60/EC establishing a framework for EU action in the field of water policy [2000] OJ L327/1, Art. 9 (1) and (2). See H. Unnerstall, 'The Principle of Full Recovery in the EU Water Framework Directive. Genesis and Content' (2007) 19:1 *JEL* 29–42.

[47] European Parliament and Council Directive 2008/1/EC concerning integrated pollution prevention and control (IPPC) [2008] OJ L24/8, Art. 2(12)(b); European Parliament and Council Directive 2010/75/EU on industrial emissions [2010] OJ L334/17, Arts 3(10)(b) and 11(b).

[48] European Parliament and Council Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators [2006] OJ L266/1, Art. 9.

[49] Case T-178/05 *UK v Commission* [2005] ECR II-4807, para. 60.

[50] Commission Communication COM 2002/276 on Impact Assessment (COM(2002) 276 final); Commission Communication, Better Regulation for Growth and Jobs in the European Union, COM(2005) 97 (March 2005).

## 2.4 Civil society

The absence of a genuine environmental policy is likely to wreak havoc. By way of illustration, inhabitants of Campania, exasperated by the accumulation of waste, ignited fires in piles of refuse, which was harmful for their own health.[51] In addition, for a long time the solitary exercise of power related to the administrative tradition of secrecy has created considerable inertia against the participation of the general public in technical and technological choices which may cause harm to the environment.

Thanks to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, environmental law increasingly adopts an informatory and participatory perspective.[52] As a result, a number of EU legislations have increased transparency, participation, and accountability with respect to environmental issues. In particular, efforts have been undertaken with a view to improving the quality of information on the environmental performance of products and undertakings. When better informed of the risks, the public are able to make their views heard without coming up against a wall of secrecy. Moreover, in numerous areas (eg operating permits, the placing on the market of substances which pose health and environmental risks,[53] and public procurement[54]) various forms of participation (eg public inquiries or prior consultation) are now a matter of course. A final example is the directive on environmental liability under which environmental NGOs are the watchdog of both the authority and the operator in relation to environmental damage.[55]

As is well known, environmental policy has always been at the forefront of legal developments: the participation provided under environmental law has led to Treaty law advances which we all know. For instance, the principle of transparency as stated in Articles 1 and 10 TEU and Article 15 TFEU 'enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system'.[56] Similarly, the right to information in environmental matters preceded the

[51] Case C-297/08 *Commission v Italy* [2010] ECR I-1749, para. 103. See also *Di Sarno v Italy*, 10 January 2012.

[52] W. Howarth, 'Aspirations and Realities under the Water Framework Directive: Proceduralisation, Paticipation, and Practicalities' (2009) 21:3 *JEL* 391–417.

[53] European Parliament and Council Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms [2001] OJ L106/1, Art. 7(4).

[54] By virtue of Directive 2004/18, contracting authorities may use eco-labels to define specifications in terms of performance or functional requirements in the conditions of tender, inasmuch as these eco-labels were adopted by national authorities after consulting all stakeholders, among whom were consumers as well as environmental organizations. See European Parliament and Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L351/44, Art. 23(6).

[55] European Parliament and Council Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56, Arts 12 and 13.

[56] Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, para. 39; Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055, para. 54; and Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR* [2010] ECR I-11063, para. 68.

As with the problem of the chicken and the egg, we no longer know whether EU law originates from international law or vice versa. In any event, as is clear from the origins of the precautionary principle—a creation of German administrative law, which subsequently became part of international law, then also EU law, thus applying to all Member States—the relations between different legal spheres are particularly complex. EU law has even ended up 'renationalizing' environmental policy, both by offering an extremely broad margin of discretion to national authorities, and also by virtue of the conceptual ambiguities littered throughout the texts.[63]

Moreover, as the *ATAA* case shows, the potential risk of conflict between EU law and international law is real.[64]

One last point needs to be made: although pollution does not recognize boundaries, EU secondary law seems to have neglected the coordination of national policies.[65] Environmental policy is, above all, a national matter.[66]

## 3. Institutional Aspects

### 3.1 Institutions

Though the EU institutions do not have any special features of note with regard to the environment, a brief discussion of this issue is warranted to make clear the baseline against which EU secondary law unfolds.[67]

The European Council has been increasingly active in addressing climate change issues.[68] As far as the Council of the Union is concerned, the Environment Council meets in principle once every three months and includes the ministers or secretaries of state with responsibility for environmental protection. Given that environmental policy is closely related to other regulatory issues, environmental questions may also be considered by the Council when sitting in another configuration or even, if they take on a political dimension, within the General Affairs configuration of the Council.[69] As the Presidency among the 28 Member States rotates every six months, the country in charge is likely significantly to shape the political agenda: as a matter of course, Council

[63] See Sections 6.1 and 6.2. [64] Case C-366/10 *ATAA* [2011] OJ C49/7, paras 46–111.

[65] See, however, the obligations of cooperation or coordination in matters of evaluation of the impacts of transboundary projects (European Parliament and Council Directive 85/337/EC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40, Art. 7), of the crossing of thresholds of atmospheric pollution due to transboundary pollution (Council Directive 96/62/EC on ambient air quality assessment and management [1996] OJ L296/55–63, Art 8(6)), of international river basin districts (European Parliament and Council Directive 2000/60/EC establishing a framework for EU action in the field of water policy [2000] OJ L327/1, Art. 3(3), (5), and (6)), and of common plans to fight against transboundary air pollution (European Parliament and Council Directive 2008/50/EC on ambient air quality and cleaner air for Europe [2008] OJ L152/1, Art. 25).

[66] See European Parliament and Council Directive 2000/60/EC establishing a framework for EU action in the field of water policy [2000] OJ L327/1, Art. 13(4).

[67] As regards the integration of environmental concerns in the institutions' organization, see Krämer (n 1) 37–51.

[68] See, eg, ETS Directive 2003/87/EC, Art. 10(a) and (13). [69] Art. 16(6) TEU.

positions mirror the national interests of the Member States.[70] Since the beginning of this policy, conflicts which oppose the 'green' Member States to the others have not abated.[71] Moreover, the watering down of a number of Commission proposals, ranging from chemicals to the greening of CAP, is testament to the competitive concerns embedded in the Council.[72] COREPER plays an important role in the preparation of the Council's business[73] and may set up specific working groups for areas related to environmental policy.

The European Parliament boasts a Committee on Environment, Public Health and Food Safety (ENVI). Given that most EU measures aiming at protecting the environment must be adopted in accordance with the ordinary legislative procedure (OLP),[74] the Parliament's powers have been greatly enhanced. Like the European Commission, the Parliament can be viewed as a supranational body, whereas the Council of the Union is more intergovernmental.

Since it is responsible for submitting legal acts to the Council and to the Parliament as well as for controlling the proper application of environmental law by Member States, the European Commission occupies a central position within the institutional framework. In 1978, the Commission set up a Directorate-General with responsibility for this portfolio and a commissioner has been granted specific responsibility for questions relating to that area. In 2009, due to the specific features of the climate policy, another commissioner was placed in charge of a specific policy concerning the fight against global warming. Acting under the authority of these two commissioners, two Directorates-General fulfil an essential administrative role. That aside, the role of the Commission in enforcing environmental law should not be overlooked.[75]

The ambiguity contained in the sheer number of directives and regulations adopted over the last decade seems to be the result of numerous political compromises struck during the legislative drafting procedure. These ambiguities are rooted in the elaboration of draft texts by the Commission Services. Whilst permanent contact between the EU administrative authorities and the lobbies offers an antidote to the famous technocratic drift, a practice of which Brussels bureaucrats are often accused, they also give rise to concessions on the level of protection sought. In addition, the OLP, which is frequently used,[76] nurtures a culture of compromise. Whereas transactions within the European Parliament are the result of ideological differences, settlements reached in the Council reflect differences in national interests. The culmination of this evolution is

[70] Weales et al. have stressed that 'agendas and priorities were established on the basis of one-off preferences of national governments'. See A. Weales et al., *Environmental Governance in Europe* (Oxford: OUP, 2000) 42.

[71] A. Héritier et al., *Ringing the Changes in Europe: Regulatory Competition and Transformation of the State* (Berlin/New York: de Gruyter, 1996).

[72] The sharpest illustration is the watering down in 2012 of the Commission's proposal to make one-third of CAP direct payments conditional on specific environmental criteria. Member States favoured greater flexibility as regards the 'green' measures to be chosen.

[73] Art. 240(1) TFEU.

[74] Arts 114(1), 192(1), and 194(2) TFEU. See the discussion in Chapter 3, Section 4.3.1.

[75] M. Hedemann-Robinson, *Enforcement of EU Environmental Law* (London: Routledge-Cavendish, 2007).

[76] Arts 114(3) and 192(1) TFEU. See the discussion in Chapter 3, Section 4.3.1.

that compromises must necessarily be struck by a 'trilogue' or within the Conciliation Committee.[77]

Certain less well-known institutional arrangements, such as the competences of committees and agencies operating in this area, will be discussed in the next two sections.

## 3.2 Scientific committees and comitology

It is important at the outset to distinguish between 'expert groups' created by the Commission itself and the committees (or 'comitology'). The latter provide expertise to the Commission with a view to advising it in preparing and implementing its policy, whereas comitology committees assist the Commission in the exercise of the implementing powers that have been conferred upon it by basic legal acts.

Given the importance of the place occupied by science, the policy pursued by the Commission must be clarified in the light of independent and impartial scientific opinion.[78] Moreover, a Scientific Committee on Health and Environmental Risks (SCHER) may be called upon to give opinions to the Commission on health and environmental risks relating to pollutants and other biological and physical factors or changing physical conditions which may have a negative impact on health and the environment.[79] On the other hand, the Commission has not established a committee of experts on the conservation of ecosystems which would be in a position to address broader ecological problems.

Whilst they may play a significant role in the growth of environmental policy, these committees do not fall within the ambit of comitology *stricto sensu*. Indeed, the executive competences delegated to the Commission were overseen by several types of committee which operated for a number of years in accordance with so-called comitology procedures.[80]

Comitology makes it possible to establish a dialogue between the EU executive and the national administrations, a technique which offers clear advantages both for the Commission as well as for the Member States. On the one hand, the Commission avails

[77] Art. 294(10)–(12) TFEU.

[78] See, notably, the Scientific Review Group put in charge of studying all questions of scientific matters relating to the trade in wild exotic species (Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L51/1, Art. 18(1)) and the ORNIS Committee concerning the protection of birds.

[79] The tasks of this committee are set in the Annex I.2 to Commission Decision 2008/721/EC setting up an advisory structure of Scientific Committees and experts in the field of consumer safety, public health, and the environment ([2008] OJ L241/21).

[80] Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/4. Amended by Council Decision 2006/512/EC [2006] OJ L200/11. See the following doctrinal analyses: C. Joerges and E. Vos, *EU Committees* (Oxford: Hart Publishing, 1999); T. Christiansen and E. Kirchner (eds), *Committee Governance in the EU* (Manchester: Manchester University Press, 2000); M. Andenas and A. Türk (eds), *Delegated Legislation and the Role of Committees in the European EU* (The Hague: Kluwer Law, 2000); G. Roller, 'Komitologie und Demokratieprinzip' (2003) 3 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 249–78; C. F. Bergström, *Comitology* (Oxford: OUP, 2005); C. Demmke, 'Comitology in the Envrionmental Sector' in M. Andenas and A. Türk (eds), *Delegated Legislation and the Role of the Committees in the EC* (London: Kluwer, 2000).

itself of the scientific and technical expertise that is indispensable in order for it to carry out its tasks. On the other hand, since they are made up of national civil servants, these committees control the executive tasks of the Commission. Finally, these committees also help the Commission better to devise the technical rules which the national civil servants will subsequently have to apply. After the sectors of energy and transport as well as undertakings, environmental policy is the sector which has generated the most committees. In 2010, out of a total of 259 committees, 32 committees attached to the Environment Directorate General and four working on climate change were operating according to Comitology Decision 1999/468/EC.[81]

With the entry into force of the Lisbon Treaty, comitology underwent significant change. A distinction has been drawn, first, between legislative and non-legislative acts and, second, between delegated and implementing acts. Indeed, Articles 290 and 291 TFEU provide for two possible means for the EU lawmaker to confer powers on the Commission. The lawmaker may either 'delegate' to the Commission the power to adopt acts of a quasi-legislative nature (Art. 290 TFEU) or confer implementing powers of an executive nature on the Commission (Art. 291 TFEU).

The first innovation relates to the possibility granted by the EU lawmaker to empower the Commission to adopt 'non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act' in accordance with Article 290 TFEU. Accordingly, a delegation of power is possible only in a legislative act, irrespective of whether the legislative act was adopted jointly by the Parliament and the Council. This is a sharp departure from previous practice on account that previously the Commission had to consult a committee in order to get an opinion. That obligation has been abolished in favour of much greater control by the EU lawmaker. Indeed, both the European Parliament and the Council may decide to revoke the delegation or to veto the Commission's proposal (Art. 290(2) TFEU).

It should also be noted that the definition of delegated acts in Article 290(1) is very similar to that of acts that are subject to the regulatory procedure with scrutiny (RPS).[82] In both cases the acts in question are of general application and seek to amend or supplement certain non-essential elements of the legislative instrument.[83] In particular, the term 'supplement' encapsulated in Article 290 TFEU blurs the dividing line between delegated acts and implementing acts.

The second innovation should attract the attention of environmental lawyers. Article 291(2) TFEU provides that 'where uniform conditions for implementing legally binding Union acts are needed', legislative acts shall confer implementing powers on the Commission. In contrast to the delegated acts, the implementing acts 'execute' the legislative act without amendment or supplementation'.[84]

[81] The majority of these committees operated under several procedures. European Commission, Report from the Commission on the working of Committees during 2010, COM(2011) 879 final.

[82] The entry into force of the new Comitology Regulation does not affect the RPS referred to in Art. 5a of Comitology Decision 1999/468/EC. Accordingly, the RPS will continue to apply to all basic acts which make reference to it until those acts are formally amended.

[83] Communication from the Commission on the Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, para. 2.1.

[84] P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011) 5 *EL Rev* 672.

Pursuant to Article 291(3) TFEU, the European Parliament and the Council, in accordance with the OLP, enacted Regulation 182/2011 that lays down 'the rules and general principles concerning mechanisms' for comitology.[85] This regulation enables Member States to exercise control of the implementing powers exercised by the Commission by virtue of Article 291(2) TFEU. In contrast to delegated acts, here we find the traditional comitology structure, albeit with significant changes.[86] The five procedures (advisory, management, regulatory, safeguard, and RPS) set out in Council Decision 1999/468/EC are replaced by just two basic procedures (advisory and examination). Consequently, former regulatory and management procedures are abolished.[87] Comitology has thus been simplified.[88]

The committees falling within the ambit of the new comitology can be classified according to the following schema.

*Advisory committees* have no power other than that to give an opinion to the Commission, and the latter need only take it into consideration.[89] In contrast to examination committees, these committees operate prior to the decision-making stage.

On the other hand, the *examination committees*, combining elements of the former management and regulatory committees, operate after the framework acts have been adopted. These committees are competent to examine acts of general scope designed to implement basic acts as well as specific implementing acts with a potentially important impact, among which are acts relating to 'the environment, security and safety, or protection of the health or safety, of humans, animals or plants'.[90] The Commission has to seek a qualified majority in favour of its proposal in order to be empowered to adopt the implementing act. If the committee is unable to obtain a qualified majority for or against the proposal, the Commission is called upon to reconsider and resubmit its proposal to the committee. Indeed, the Commission's proposal cannot be adopted if it is not in accordance with the opinion of the committee, except in very exceptional circumstances. Moreover, in case the committee votes by qualified majority against the Commission's proposal, the Commission is not empowered, as it was previously, to forward it to the Council[91] and must forward its

[85] European Parliament and Council Regulation (EU) No. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13. Regulation (EU) No. 182/2011 thus repealed Council Decision 1999/468/EC.

[86] EIPA, *Delegated & Implementing Acts. The New Comitology* (Maastricht: EIPA, 2011) 15.

[87] Account must be taken of the fact that there were no criteria for choosing between regulatory and management committees. It was therefore a matter for EU legislative bodies. Should the EU lawmaker decide to disregard them, they will have to give reasons for their choice (Council Decision 1999/468/EC, Art. 2(2)). In contrast to the former management procedure, the regulatory procedure envisaged a more important role for the Council and provided, subject to certain conditions, for the intervention of the European Parliament. The Court of Justice has reviewed the discretion of the EU institutions. The Commission, which viewed the management procedure more favourably, has on two occasions—LIFE Programme and Forest Focus—challenged the regulatory procedure chosen by the Council and the Parliament on the ground that these institutions had disregarded the criteria laid down in Decision 1999/468/EC. See Case C-378/00 *Commission v Parliament and Council* [2003] ECR I-937; and Case C-122/04 *Commission v Parliament and Council* [2006] ECR I-2001.

[88] Regulation (EU) No. 182/2011 [2011] OJ L55/13, recitals 8 and 9.

[89] Regulation (EU) No. 182/2011, Art. 4(1) and (2).

[90] Regulation (EU) No. 182/2011, Art. 2(2)(b)(iii).

[91] The saga of placing GMOs on the market is interesting on more than one account. In the vast majority of cases, regulatory committees disagreed with the Commission's proposals for the marketing of GMOs. As

proposal to the Appeals Committee.[92] Henceforth, the European Parliament and the Council have the right of scrutiny that enables them to pass a non-binding resolution if they believe that the proposed measure exceeds the implementing powers provided for in the basic act.

With respect to environmental issues, the new examination committees are called upon to play a key role on the ground that they take action especially in relation to measures concerning the protection of the health or safety of humans, animals, or plants. Since their remit covers authorization procedures for products that pose a risk, such as GMOs, these committees should still exercise considerable powers. Whilst it is normally a matter for the Commission to implement legislative acts, the legislative instruments discussed later specify the extent of the executive competences thereby conferred on the Commission, as well as the manner in which it must exercise them.

To conclude, the choice between delegated powers and implementing powers is not a purely academic exercise: the attitude of the institutions remains a matter of political strategy rather than of strict legal analysis. In fact, the role of the European Parliament is dwarfed by the Article 291 procedure.[93] Given that most of the national representatives taking part in the advisory and examination committees report to their ministers, the Council is likely to be much more favourable towards supporting implementing procedures rather than delegated procedures, notwithstanding the fact that it has no formal veto. Accordingly, the Council is likely *de facto* to seek to regain ground that it had lost *de jure* with the new comitology procedures. Table 4.1 summarizes the institutional advantages and drawbacks of each category.

One last point may be worth making here. To make matters more complex, 'Comitology' Regulation (EU) No. 182/2011 of 16 February 2011[94] did not have the effect of abrogating the RPS introduced by Council Decision 2006/512/EC.[95] The RPS

the Commission could not obtain the approval of these committees, which were decided by qualified majority, the proposals were sent to the Council. Generally speaking, the Council was divided. In accordance with Council Decision 1987/373/EEC ([1987] OJ L197/33), the Commission's draft could only be rejected by unanimity. Given that several Member States supported the placing on the market of GMOs, it was impossible for the Council to reject the proposal. As a result, the Commission was able to grant the licences despite strong objections from a majority of Members States. See, eg, Commission Decision 1997/98/EC ([1997] OJ L31/69). See M. Lee, *EU Regulation of GMOs* (Cheltenham: Edward Elgar, 2008) 71. Under Council Decision 1999/468/EC, this extreme scenario was removed. The Council was empowered to reject the Commission's proposal by qualified majority; however, the Council was unable to reach such a majority either for or against the proposal. It followed that the Commission was still empowered to authorize the placing of the market of GMOs. As a result, several Member States had recourse to safeguard clauses (Directive 2001/18/EC, Art. 23) in order to prevent the marketing of GMOs authorized by the Commission. The Commission and the Council strongly disagreed on the validity of such safeguarding clauses. See M. Weimer, 'Applying Precaution in EU Authorisation of GM Products—Challenges and Suggestions for Reform' (2010) 16:5 *ELJ* 624–57.

[92] Regulation (EU) No. 182/2011, Art. 6.

[93] C. Blumann, 'Un nouveau départ pour la Comitologie' (2012) *CDE* 38; J. Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law' (2012) 19 *CML Rev* 913.

[94] European Parliament and Council Regulation (EU) No. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13.

[95] Although Regulation (EU) No. 182/2011 introduced considerable changes to existing comitology mechanisms, nonetheless the RPS 'shall be maintained for the purposes of existing basic acts making reference thereto'. See Art. 12(2) and recital 21.

Table 4.1 Non-legislative acts

| | Delegated acts | Implementing acts |
|---|---|---|
| **Lawmaking process regarding the adoption of environmental protection acts** | EP (absolute majority); Council (qualified majority)<br>Case-by-case approach (objectives, scope, duration, conditions) | EP (absolute majority); Council (qualified majority) |
| **Nature of the powers conferred to the Commission** | Quasi-legislative nature | Executive nature |
| **Material conditions** | '[N]on-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act' | '[W]here uniform conditions for implementing legally binding Union acts are needed' |
| **Formal condition** | The word 'delegated' is inserted in the title of the act | The word 'implementing' is inserted in the title of the act |
| **Comitology** | Absence of committees | Advisory and Examination committees<br>If the Examination Committee votes by qualified majority against the proposal, the Commission may forward the act to the Appeals Committee |
| ***Ex post* supervisory role of conferring institutions** | Right of veto: EP and Council may object to the delegated act on any ground | Right of scrutiny: EP and Council may pass non-binding resolution |
| **Revocation** | EP and Council may revoke the delegation | No revocation |

covers the adoption of measures with a general scope designed to amend non-essential elements of a basic instrument adopted by co-decision (eg amendments to the field of application of the instrument due to the addition of new appendices). Several environmental directives make reference to that procedure.[96] Furthermore, RPS allows the Council and Parliament to carry out a prior check, irrespective of whether a negative or positive opinion is given.[97]

[96] This procedure was added to a number of environmental directives (water, waste management, eco-design ...). Eg, Council Regulation (EU) No. 333/2011 establishing criteria determining when certain types of scrap metal cease to be waste under Directive 2008/98/EC on waste management ([2011] OJ L94/2) has been adopted by the Council in accordance with the regulatory procedure with scrutiny. Since the committee had not issued its opinion on the measures proposed by the Commission, the Council adopted the regulation concerned under the 1999 'Comitology' Decision. The European Parliament did not object to the measures proposed.

[97] This procedure was added in a number of environmental directives (water, waste management, eco-design ...). In May 2010 the Council made use of its right of veto on draft measures in one environmental case. It opposed the adoption of a draft Commission Directive related to the use of organic solvents in certain paints and varnishes and vehicle refinishing products. The draft measure was consequently not adopted.

## 3.3 Agencies

The agencies, which are distinct from EU institutions and endowed with legal personality and financial autonomy, are EU public law bodies which, by virtue of the specific missions conferred on them concerning technical and scientific issues, play an increasingly important role in the protection of the environment which complements that of the European Commission.

It should be noted that these various agencies, the competences of which touch on environmental matters, were not created under the Treaty but, rather, under the terms of regulations adopted either by the Council or by the two branches of the legislature. On an institutional level, there is a question over the practicability of a fragmentation of these administrative structures. There is no doubt that these agencies are largely controlled by the Commission which has the power to propose directors for nomination, is consulted in relation to working plans, and places representatives on their management boards. However, since at the same time one of their goals is the pursuit of a policy of decentralization and geographic dispersion, they undoubtedly undermine the centralizing role of the Commission.

With respect to environmental protection, a swathe of functions are conferred on the agencies. By way of illustration, the regulatory decisions in chemicals policy, such as those relating to the registration, authorization, restrictions, classification, and labelling under the REACH and CLP Regulations,[98] are backed by opinions of the European Chemicals Agency (ECHA), whereas the placing on the market of GMOs and pesticides is subject to the opinion of the European Food Safety Agency (EFSA). Moreover, the European Environment Agency (EEA) provides for regular surveys of the state of the environment. Table 4.2 illustrates the main environmental tasks performed by several EU agencies.

Clearly, these agencies enjoy an undeniable advantage, including scientific expertise, independence, and autonomy from EU procedures.

**Table 4.2** Agencies endowed with environmental tasks

| Agencies | Framework regulations | Environmental tasks |
|---|---|---|
| European Environmental Agency (EEA) | Regulation 1210/90/EEC | Information on the state of the environment |
| European Food Safety Agency (EFSA) | Regulation 178/2002/EC | Scientific opinion on risk assessment regarding food and feed safety |
| Community Fisheries Control Agency (CFCC) | Regulation 2847/93/EEC | Coordination of fisheries control and inspection activities |
| European Aviation Safety Agency (EASA) | Regulation 1592/2002/EC | Environmental certification of aircraft and related products |
| European Chemicals Agency (ECHA) | Regulation 1907/2006/EC | Implementation of REACH |
| European Maritime Safety Agency (EMSA) | Regulation 1406/2002/EC | Marine pollution preparedness and response |

[98] European Parliament and Council Regulation (EC) No. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L396/1; and European

It is important to consider whether the decisions adopted by these agencies may be subject to internal and judicial review.

First, the decisions or omissions of these agencies may be subject to an internal review procedure.[99]

Second, with respect to judicial review, the situation varies.[100] Whilst certain decisions adopted by the ECHA concerning the assessment of files may be subject to an appeal before an appeal board and thereafter before the General Court,[101] opinion given by the scientific committee of EFSA cannot be treated as an act falling within the ambit of Article 263 TFEU, since it is a preparatory instrument which does not produce binding legal effects capable of affecting the applicants' interests by bringing about a distinct change in their legal position.[102]

That said, in the event that the Agency's scientific opinion is defective, there is a knock-on effect on the legality of subsequent decisions taken by the Commission, which are subject to review before the Courts. Even though the General Court has found that it cannot substitute its opinion for the opinion given by a scientific committee, it nonetheless oversees the functioning of the committee in question, the compliance of its opinion with EU law, and the reasons given for its decisions.[103]

The question also arises as to whether the decision taken by the Commission or by the Council, where it departs from the Agency's opinion, is likely to be annulled. In this connection, it should be noted that the General Court requires any institution wishing to disregard scientific opinion 'to provide specific reasons for its findings by comparison with those made in the opinion', and the justification 'must be of a scientific level at least commensurate with that of the opinion in question'.[104] Since the Commission does not have the same type of scientific expertise as the agencies, it would appear to be difficult to circumvent such a requirement.[105] Consequently, the Commission rarely disregards EFSA's scientific opinions.

## 4. Legal Acts, Self-Regulation, and Case Law

### 4.1 Introductory comments

Environmental policy enshrined in Title XX TFEU is based on both legal acts as well as non-legal instruments. Moreover, the institutions encourage non-institutional actors

Parliament and Council Regulation Regulation (EC) No. 1272/2008 on classification, labelling and packaging of substances and mixtures [2008] OJ L353/1.

[99] European Parliament and Council Regulation (EC) No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13, Arts 2(1)(c) and 10(1).

[100] M. Chamon, 'EU Agencies between *Meroni* and *Romano* or the Devil and the Deep Blue Sea' (2011) 48 *CML Rev* 1071–2.

[101] REACH Regulation, Arts 91–4. See Case T-96/10 *Rütgers Germany GmbH and Others v ECHA* [2013]; Case T-95/10 *Cindu Chemicals BV and Others v ECHA* [2013].

[102] Case T-311/06 *FMC Chemical and Arysta Lifesciences v EFSA* [2008] ECR II-88, paras 67 and 68; and Case T-397/06 *Dow AgroSciences v EFSA* [2008] ECR II-90, paras 59 and 60.

[103] Case T-74/00 *Artegodan v Commission* [2002] ECR II-4945.

[104] Case T-123/03 *Pfizer v Commission* [2004] ECR II-1631, para. 199.

[105] A. Alemano and S. Mahieu, 'The EFSA before the European Courts' (2008) 5 *European Food and Feed L Rev* 325.

to negotiate agreements. It is the aim of this fourth section to address the issue of this flurry of legal acts as well as the variety of soft law instruments (atypical legal acts) that are adopted alongside binding legal acts. Also, the case law is of paramount importance.

## 4.2 Legal acts

Neither Article 192 nor Article 114 TFEU specify that a particular legal act should be used in order to harmonize environmental measures. Accordingly, environmental policy is based on the five legal acts listed in Article 288 TFEU (directive, regulation, decision, recommendation, and opinion). At present, a somewhat haphazard method has influenced the choice of these legal instruments in the environmental field.

It should at the outset be noted that in environmental matters there has always been a mismatch with traditional legal categories. Some directives are so precise and restrictive that they end up looking like regulations.[106] By contrast, other directives framed in more fleeting terms—such as the draft framework directive on soils—bear more resemblance to declarations of intent.

As a result of an EU policy in favour of subsidiarity, EU environmental law consists more of directives than regulations. Accordingly directives, and more specifically framework directives, spearhead EU harmonization. The provisions of these framework directives are generally worded in very general terms, whilst regulations may be extremely precise.[107] By prescribing broad objectives but leaving the choice of implementation to Member State authorities, framework directives are well tailored to take into account the diversity of administrative and legal culture in the EU. In so doing, the lawmaker increases the discretion of national authorities in the choice of form and appropriate means for implementing EU law. In tolerating—let alone encouraging—administrative diversity, these directives keep uniformity at bay. Clearly, the extent of such discretion compounds the difficulties faced by the European Commission in verifying the compliance of EU environmental law in 28 Member States.

The Court of Justice has, for example, held that when national courts review the legality of measures to combat agricultural pollution, they must take account of the discretionary power of the Member States, which is presupposed by the complex nature of the assessments concerning the impact of the spreading of nitrates.[108] Similarly, Member States are endowed with broad discretion when they are required to ensure that their land-use policies take into consideration the need to maintain appropriate distance between Seveso establishments and buildings for public use.[109]

[106] See Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances ([1967] OJ 196/1) and Council Directive 76/769/EEC relating to restrictions on the marketing and use of certain dangerous substances and preparations ([1976] OJ L262/201), which are very detailed insofar as they guarantee the good functioning of the internal market.

[107] See the degree of precision reached by European Parliament and Council Regulation (EC) No. 1013/2006 on the shipment of waste ([2006] OJ L190/1) and European Parliament and Council Regulation (EC) No. 2037/2000 on substances that deplete the ozone layer ([2000] OJ L244/1).

[108] Case C-293/97 *Standley* [2004] ECR I-2603, para. 37.

[109] Case C-53/10 *Franz Mücksch* [2011] OJ C319/5, paras 40–1.

That said, this discretion is by no means unfettered. As will be discussed, in a swathe of cases, the Court of Justice has interpreted rather narrowly the Member States' room for manoeuvre.[110]

Nonetheless, given the importance conferred on subsidiarity, directives are likely to remain dominant in the environmental realm.

Let us turn to the issue of regulations, which for a long time played a secondary role.[111] As far as internal market policy is concerned, regulations have been privileged as a means of enhancing a level playing field for traders, in particular with regard to harmonization of the placing of certain goods posing environmental and health risks on the market and control of the import, export, or transfer of goods involving ecological risks—chemical products, GMOs, etc. Indeed, the preference of regulations based on Article 114 TFEU could be explained by the fact that the more flexible nature of a directive entails a genuine risk of market fragmentation. There have been developments in recent years, principally in the area of product safety where regulations have been more prevalent. For instance, chemicals (REACH and CLP Regulations), pesticides, and GMOs have been harmonized thanks to the adoption of regulations. Given that these sectors are product-related, it comes as no surprise that the EU institutions have lately favoured regulations adopted pursuant to Article 114 TFEU. Where these regulations require Member States to establish enforcement agencies and to develop enforcement policy, these are not self-executing.

Regulations have also been adopted under Article 192 TFEU with the aim of formalizing voluntary forms of participation for businesses—see, for example, the regulations on eco-labels or on environmental audits and where it is necessary to implement obligations flowing from international agreements to which the EU is a party.[112] On occasion, a choice has been made, within the context of environmental policy, for regulations aiming to set out product standards or to ban the import of species threatened with extinction.[113] Moreover, in some cases directives are amended, or even completed, by regulations.[114] On the other hand, the EU lawmaker has never used regulations to ensure the protection of water or the air, or the regulation of noise.

[110] See Section 4.5.

[111] Under ex Art. 100 EEC, the use of a directive was the only means by which the Council could enact legislation regarding the establishment of the common market. Prior to the SEA, most legislative acts were adopted pursuant to that provision. See Chapter 1.

[112] Regulation (EC) No. 2037/2000 on substances that deplete the ozone layer, see earlier in this chapter; Regulation (EC) No. 1013/2006 on the shipment of waste, see earlier in this chapter; Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein, see earlier in this chapter.

[113] Council Regulation (EEC) No. 348/81 on common rules for imports of whales or other cetacean products [1981] OJ L39/1; Council Regulation (EEC) No. 3254/91 prohibiting the use of leghold traps in the EU and the introduction into the EU of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards [1991] OJ L308/1.

[114] See European Parliament and Council Regulation (EC) No. 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC [2006] OJ L33/1; European Parliament and Council Regulation (EC) No. 850/2004 on persistent organic pollutants and amending Directive 79/117/EEC [2004] OJ L158/1. See also Art 19(3) of European Parliament and Council Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the EU ([2003] OJ L275/32–46) empowering the European Commission to enact regulations.

So far, decisions have also been adopted in order to establish an organ, finance environmentally friendly projects, harmonize administrative forms,[115] reject national plans for the allocation of GHG emission allowances,[116] determine the ecological criteria for the award of an EU label,[117] lay down the BAT for listed installations,[118] and to authorize State aids intended to cover investments to combat pollution or agreements with anti-competition effects.[119]

On the other hand, the institutions have shown themselves to be less fond of recommendation and opinion. Whilst recommendations have regularly been adopted by the OECD or by the Council of Europe in environmental matters,[120] this instrument has not been privileged by the Commission, which is generally able to ensure the adoption of its proposals for environmental law directives.[121] Finally, express provision has been made for certain advisory procedures, particularly regarding the recycling of packaging waste[122] and the conservation of natural habitats.[123]

## 4.3 Atypical acts

The EU increasingly acts through a melange of resolutions, declarations of intent, Green and White Papers, action plans and programmes, codes of conduct, and contracts—all somewhat spellbinding instruments which replace action with the mere shadow of action. As is the case for international environmental law, EU law hence abounds with instruments of ambiguous legal status. This soft or 'muffled' law is viewed not

[115] See eg: Commission Decisions 94/741/EC concerning questionnaires for Member States' reports on the implementation of certain Directives in the waste sector [1994] OJ L296/42; and Commission Decision 94/774/EC concerning the standard consignment note referred to in Council Regulation (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community [1993] OJ L310/70.

[116] European Parliament and Council Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32–46, Art. 9(2).

[117] European Parliament and Council Regulation (EC) No. 1980/2000 on a revised EU eco-label award scheme [2000] OJ L237/1–12.

[118] The Commission is empowered by Art. 13(5) of European Parliament and Council Directive 2010/75/EU on Industrial Emissions ([2010] OJ L334/17) to adopt decisions encapsulating the conclusions of the best available technique documents which are non-binding.

[119] For examples, see Part III.

[120] Recommendation of the OECD Council of 21 April 2004 on material flows and resource productivity.

[121] See Commission Recommendation 1999/125/EC on the reduction of $CO_2$ emissions from passenger cars ([1999] OJ L40/49) and the recommendations taken relating to the automotive sector on the reduction of $CO_2$ emissions (see Section 5); and Commission Recommendation 96/733/EC concerning Environmental Agreements implementing EU directives [1996] OJ L333/59 (see later). Likewise, given that Member States may take appropriate measures to avoid the unintended presence of GMOs in other products (Directive 2001/18/EC, Art. 26a), the Commission has adopted two successive recommendations on the development of national strategies and best practices to ensure the coexistence of genetically modified crops with conventional and organic food. See Opinion AG Bot in Case C-36/11 *Pioneer Hi Bred Italia* [2012] OJ C355/5, paras 3–7. Though not constituting binding sources as such, recommendations are likely to have relevance for national disputes insofar as national courts are bound to take them into account when they are likely to shed light on binding legislation (Case C-322/88 *Grimaldi* [1989] ECR I-4407).

[122] European Parliament and Council Directive 94/62/EC on packaging and packaging waste [1994] OJ L365/10–23, Art. 6(6).

[123] A. García Ureta, 'Habitats Directive and Environmental Assessment of Plans and Projects' (2007) 2 *JEEPL* 84–96.

## 6. Challenges Faced by EU Environmental Law

### 6.1 A law of unresolved compromises

In its various guises, this branch of law is one of unresolved compromises. The EU institutions and the Member States are continuously mediating to resolve tensions between opposing interests, which are only partially appeased; they are never totally eliminated. Often the law does not have the goal of settling conflicts of interest: it limits itself to putting in place more or less refined procedures for treating such conflicts.

Since most human activities have an impact on the environment, the policies implemented in order to protect it seek more to regulate them rather than eliminate them completely. For example, different impact assessment procedures or arrangements for the granting of permits do not aim to eliminate pollution but to balance economic growth with the expectations of the public for a clean environment. As a result, sectoral measures only rarely contain absolute prohibitions on polluting or on harming the environment. In the absence of a power to remove nuisances, it is limited to the bounds of the acceptable. And where the law enacts a regime of prohibitions, it is generally subject to compromise, be it the prohibition of chemicals or the prohibition to exceed emission thresholds for industrial pollutants.[220] The courts are therefore constantly called upon to weigh up and decide between the interests at play, in particular with the assistance of the principle of proportionality.

The same applies to EU legislation. The first generation of directives with their clear content now belong to a 'paradise lost'. When drafting them, their framers did not have to give consideration, on the one hand, to the fact that the Commission would one day have to oversee the effective application of these legal acts and, on the other hand, the judicial activism of the Court of Justice which has placed emphasis on the *effet utile* of environmental directives, the direct effect of some of their provisions, as well as the obligation for national courts to interpret national law in conformity with the directives. The consequences of a judgment declaring that a Member State has breached an environmental directive now require negotiators to exercise caution, since it has meant that the drafting of a preamble to a directive has been transformed into a veritable free-for-all. Negotiators therefore tend to sit on the fence and adopt formulae that are open to more than one interpretation, and in relation to which each may vindicate their own point of view. Obviously, the ambiguities flowing from late-night compromises struck either in the Council or in the Parliament run counter to the principle of legal certainty.[221]

At best, there has been an abdication of legislative power as a result of the conferral of powers to the Commission; at worst, where a particular legislative act turns out to be too restrictive, it gives rise to remedial operations, as was the case for the watering down of the protection regime for wild bird habitats after the *Leybucht* judgment.[222]

[220] REACH Regulation, Art. 60(4). With respect to the possibility of national authorities setting out less stringent emission values than those set out in the BAT conclusions, see IE Directive 2010/75/EC, Art. 15(4).

[221] B. Beijen, 'The Implementation of European Environmental Directives: Are Problems Caused by the Quality of the Directives?' (2011) *EEELR* 150–63.

[222] Case C-57/89 *Commission v Germany* [1991] ECR I-883.

There is a question whether the quality of EU law has become inversely proportional to the number of texts that have been enacted. Without doubt, secondary legislation has now drawn close to international environmental law with its fuzzy objectives, domino legal mechanisms, etc. Finally, compromise texts raise the spectre of judicial activism which may be required to untangle the web of contradictory legislation.

## 6.2 Opposing logics of deceleration/flexibility and acceleration/stringency

Two opposing logics of deceleration/flexibility and acceleration/stringency conflict head-on.

On the one hand, it is when the legal bases for EU action are at their firmest—where the legal principles underlying this branch of law are enunciated by the Courts when ruling on hard cases—and when the values are most clearly proclaimed in both the TEU and TFEU that legislative output in environmental protection matters slows down—in accordance with the principle of subsidiarity and the fixation with concerted action. This branch of law appears to be the sacrificial victim to recent political developments—Better Regulation, Smart Regulation, etc—under which, according to the logic of deregulation, the law was called upon to climb down from its pedestal in order to engage with market requirements.[223]

First, since the early 1990s there has been a marked reduction of proposed environmental legislation. Second, the reduction in quantity of legislation went in parallel with a reduction of the binding character of new EU secondary law obligations. Third, there has been a marked tendency not to set out common environmental standards, such as emission values. In particular, there has been no willingness to fix limit values for discharges of hazardous substances into waters. The obvious expression of this trend has been the IPPC and Industrial Emissions (IE) Directives in which standardized emission limit values have been replaced by BAT. As a result, the fixing of emission values has not been decided at EU level but at national, and even, local level.[224]

Against the backdrop of the far-reaching calling into question of the traditional functions of the State, environmental law no longer takes the form of a system of unilateral constraints which impose on social actors a definition of the common good or the general interest. Public law constraints are simply one of many instruments, the role of which is in any event called into question. Nevertheless, a new form of regulation appears to be taking the place of the 'hard law' advocated by the partisans of State regulation. Self-regulation mechanisms (eco-auditing, eco-labelling) or contractual agreements (referred to in the jargon as *negotiated environmental* agreements) have the wind in their sails.[225]

[223] Until the Fifth Environmental Action Programme, environmental policy was primarily addressed to the EU level with legislation. The fifth programme reversed that trend in fostering other instruments complementing the traditional command and control approach. Even though the different strategies and communications aiming at promoting better regulation are deemed to encompass all EU legislation, environmental law has been considerably affected by this exercise of legislative simplification. See also I. Lynch-Fannon, 'Legislative Policy, Law and Competitiveness' (2009) 15:1 *ELJ* 98–120.

[224] IE Directive 2010/75/EC, Art. 15(3).

[225] As such, the eco-label (European Parliament and Council Regulation (EC) No. 66/2010 on the EU Ecolabel [2010] OJ L37/1) is based on a voluntary scheme rather than on a classical regulating scheme. See also the discussion in Part III, Introduction.

On the other hand, the growth in environmental harmonization did not take place in a smooth fashion. When confronted with problems of an unprecedented scope, such as climate change and the depletion of the ozone layer, EU law moves rapidly apace. Indeed, EU institutions intervene in certain sectors with all their strength, as shown by the gamut of new legislation on renewable energy, pesticides, climate change, chemical substances, and so on. In particular, the sector related to climate change is undergoing speedy developments. Therefore, in spite of the fact that the carbon market constitutes a 'new and complex system' calling for a 'progressive approach', it is destined to see significant developments over the coming years.[226] By contrast, more well-established sectors have trouble making progress—regulation of the disposal of dangerous substances in water—due to reticence on the part of certain national authorities. Finally, entire sectors—maritime law, land planning—have been completely neglected on the ground that these areas of law fall within the purview either of international or national law.

## 6.3 Opposing logics of market integration and environmental protection

From another perspective, secondary legislation is also torn between the need to find solutions to the problems facing Member States and the requirements of the internal market.

On account of its economic foundations, the EU seeks above all to guarantee the functioning of the internal market. Yet the market is by its very nature not particularly susceptible to strong State regulation, which generally calls for the implementation of policies with the goal of protecting vulnerable environmental media such as aquatic ecosystems undergoing radical changes due to eutrophication, or species threatened with extinction. Although the Lisbon Treaty called for a more nuanced approach, Treaty law remains strongly wedded to a hierarchy of values favouring economic integration. Whereas the functioning of the internal market benefits from the direct effect of economic rights, the achievement of the objective of a heightened level of environmental protection by virtue of Article 3(3) TEU, Article 191(1) TFEU, and Article 37 EUCFR is dependent, in the first place, on the determination of EU institutions to reach this target by way of appropriate regulatory arrangements and, second, the goodwill of national authorities to free the financial and human resources necessary to guarantee the effectiveness of secondary legislation. Moreover, the subsidiarity test relating to environmental policy is decidedly more pronounced than it is in relation to internal market policy.

## 6.4 Opposing legal cultures

The fact that successive enlargements have led to the abandonment of the style of the Romano-Germanic family of legal systems has hardly helped matters. The Franco-German regulatory hierarchy model has been replaced by an Anglo-Saxon style

[226] Case C-127/07 *Arcelor* [2008] ECR I-9895, paras 60 and 61.

procedural model which is particularly marked in matters relating to the protection of the water and the air. There is no doubt that this new approach has been able to impose itself because it is less easy to identify a common denominator when dealing with 28 legal systems rather than 15. Both the differences between the various legal cultures as well as the changes in ecological conditions on a continental scale have contributed to making secondary legislation less readable.

## 6.5 Enforcement

Given that Article 197 TFEU refers to an 'effective implementation of Union law by the Member States',[227] another issue touches on the question of inefficacy of EU environmental law. Here it is necessary to face hard facts: the main weakness of EU rules is, as recognized by the Commission, their lack of efficacy, with directives appearing as paper tigers due to the hesitancy, criminal activities,[228] or even bad faith, on the part of certain national authorities and the difficulties encountered by the European Commission in pursuing infringements before the Court of Justice. Evidence of this can be found in the first three orders for 'dual infringement' issued against a Member Sate pursuant to Article 260 TFEU due to non-compliance with a Court of Justice judgment concerning environmental directives.[229] In certain cases, the bad faith is such that the Court condemns the Member States for 'generally and persistently failing to fulfil its obligation to ensure a correct implementation' of the directives.[230] The fact that 10 per cent of parliamentary questions and 35 per cent of petitions processed by the Committee on Petitions address the issue of the incorrect application of secondary law is testament to the lack of proper enforcement of EU environmental law.[231]

Despite the delays, omissions, and inadequacies of national regimes, Court rulings condemning national failings are not frequent. There are various reasons which account for a certain degree of impunity.

To begin with, proceedings initiated by individuals before national courts have not met with success. Restrictions imposed on the interest to sue, the duration of court proceedings, and the financial risk to which applicants expose themselves create obstacles to the invocation before the national courts of an incorrectly transposed EU law provision.[232] The interest to sue is in particular subject to the rider that the majority

[227] P. Nicolaides and M. Geilmann, 'What is Effective Implementation of EU Law?' (2012) 19:3 *MJ* 383–99.

[228] The presence of criminal activity in the waste management sector cannot justify the failure by that Member State of fulfilling its obligations under Directive 2006/12/EC (Case C-263/05 *Commission v Italy* [2007] ECR I-11745, para. 51; Case C-297/08 *Commission v Italy* [2010] ECR I-1749, para. 84).

[229] As regards the transposition of waste management directives, see Case C-387/97 *Commission v Greece* [2000] ECR I-5047. As regards the transposition of the bathing waters directive in Spain, see Case C-278/01 *Commission v Spain* [2003] ECR I-14141. With respect to fisheries, see *Commission v France* (n 152).

[230] With respect to waste management, see Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, para. 139. As regards fisheries, see *Commission v France* (n 152), para. 39.

[231] Communication on implementing European Community Environmental Law (COM(2008) 773/4, p. 10).

[232] N. de Sadeleer, G. Roller, and M. Dross, *Access to Justice in Environmental Matters and the Role of NGOs* (Groeningen: Europa Law, 2005).

of environmental rules at an EU level has less the goal of creating individual rights than of putting in place procedures which enable national administrations to reconcile environmental protection with economic development. This has two consequences. First, the monopoly on the implementation of EU legislation has the effect of removing control by the courts.[233] Second, given the failure to establish individual rights, private parties and environmental NGOs are not in a position to benefit from the procedural guarantees (principle of effectiveness, availability of remedies, precise and clear implementation of directives[234]) progressively put in place by the Court of Justice.

The second problem relates to the Commission, as Guardian of the Treaties, and the hope that it may pursue these infringements relentlessly. Here too there are numerous pitfalls.[235] First, the Commission is not sufficiently well informed. Since it does not have any general powers of inspection, nor a body of inspectors, the control exercised by the Commission over the national authorities is largely based on reports transmitted by the Member States on the one hand,[236] and on complaints made by the victims of violations of EU law on the other. Moreover, the commencement of infringement proceedings is invariably due to the incorrect transposition of directives rather than to flagrant violations of EU law—destruction of protected habitats, illegal use of rubbish dumps, etc—or the absence of any policy worthy of the name—for example, in the area of waste management. Besides, the Commission does not have the human resources to pursue all of the infractions that are notified to it. Hence, although the number of infringement proceedings has increased, the cases dealt with within the ambit of infringement procedures represent merely the tip of the iceberg.[237]

The third hurdle relates to the fact that the doctrines of direct effect, consistent interpretation, and State liability are subject to important limitations. First, the direct effect doctrine cannot apply to broadly framed obligations that are usually laid down in environment directives.[238] In addition, directives do not have horizontal effect.[239]

[233] By virtue of Art. 23 of Directive 2010/75/EU on Industrial Emissions, Member States are called upon to set up a system of environmental inspections of listed installations.

[234] Case C-204/09 *Flachglos Torgau* [2012] OJ C98/2, para. 60.

[235] P. Wennerås, *The Enforcement of EC Environmental Law* (Oxford: OUP, 2007), 75–169, 251–304; N. de Sadeleer and C. Poncelet, 'Chronique de jurisprudence. Droit de l'environnement, 2009–2012' (2012) *CDE* 489–586.

[236] The Commission is likely to take into account national case law as well as reports of national jurisdictions, such as the Greek Council of State. See Case C-103/00 *Commission v Greece* [2002] ECR I-1147.

[237] Enforcement of wildlife protection obligations is a good case in point. Although the status of most EU protected species is deemed to be unfavourable (EEA (n 203)), the Commission has brought only a few actions for infringements. See Case C-103/00 *Commission v Greece* [2002] ECR I-1147 (sea turtle *Caretta caretta*); Case C-117/00 *Commission v Ireland* [2002] ECR I-5335 (red grouse); Case C-209/02 *Commission v Austria* [2002] ECR I-1211 (corncrake); Case C-518/04 *Commission v Greece* [2006] ECR I-42 (vipers); Case C-342/05 *Commission v Finland* [2007] ECR I-4713 (wolves); and Case C-340/10 *Commission v Cyprus*, 2012/C 133/09 (snakes).

[238] L. Krämer, 'The Implementation of EC Environmental Directives within Member States: Some Implications of the Direct Effect Doctrine' (1991) 3:1 *JEL* 39; J. Holder, 'A Dead End for Direct Effect? Prospects for Enforcement of EC Environmental Law by Individuals' (1996) 8:2 *JEL* 313. There are various examples in the case law. See Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava* [1994] ECR I-485, para. 14; and Case C-240/09 *Lesoochranárske zoskupenie* [2011] ECR I-9967, para. 51.

[239] See to this effect, in particular, Case C-103/88 *Fratelli Costanzo* [1989] ECR I-1839. Account must be taken, however, of the fact that in *Wells*, the Court admitted that an individual is entitled to invoke the direct effect of EIA Directive 85/337 (codified by Directive 2010/75/EC). Accordingly, this would not

Second, the doctrine of consistent interpretation cannot lead to *contra legem* interpretation.[240] Moreover, that doctrine is unlikely to be invoked in the absence of at least some framework of national legislation to interpret. Third, the *Francovich* doctrine is essentially restricted to compensation whilst environment protection requires a preventive approach. Furthermore, that doctrine can be applied inasmuch as EU law confers rights on individuals, which is hardly the case in environmental law.

This inability to ensure the proper application of EU law by civil society raises a real fundamental problem. In addition to being the arbiters of opposing interests, national administrations are not the anointed owners of the environment which, as a *res communes*, belongs to everyone. Although environmental protection concerns us all, control over the transposition and application of these obligations has hitherto involved a binary relationship (Commission–Member States), rather than a threefold one (civil society–Commission–Member States). Under these circumstances, the reconciliation between economic development and environmental protection, within the context of a policy of sustainable development, turns out to be a vain hope.

We therefore need to speak of a law (*droit*) *of* the environment and not of a right (*droit*) *to* environmental protection.

That said, trade-related directives based on Article 114 TFEU have a better chance of being transposed at some stage rather than environmental directives based on Article 112 TFEU.[241] Indeed, with respect to environmental standards applying to products, the pressure of the market is a strong deterrent for national authorities to avoid non-compliance. Foreign competitors already complying with the harmonized standards have a positive interest in ensuring compliance across the internal market.

## 7. Conclusions

Painting a portrait of EU environmental law is certainly a challenge. However, at this stage of our reflections it is possible to sketch out an overview without making too many compromises.

(i) An initial observation points to the disparate nature of this area of law. This brief overview of the EU regulations and directives has given us the impression of a largely unfinished edifice, consisting of an array of disparate rules, scattered throughout different sectoral regimes, and with legislation varying widely between them. Despite the existence of a host of programmes, the scope and pace of legislations has resulted from an ad hoc approach rather than a coherent policy. Moreover, the protection regimes are tied to instruments enacted in accordance with different policies, adopted in accordance with specific procedures, pursuing distinctive goals and elaborated

amount to 'inverse direct effect' depriving another individual or individuals, such as the owners of a quarry, of their rights. Indeed, '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'. See Case C-201/02 *Wells* [2004] ECR I-723, para. 57.

[240] Case C-8/81 *Becker* [1982] ECR 53.

[241] D. Toshkov, 'Embracing European Law: Compliance with EU Directives in Central and Eastern Europe' (2008) 9:3 *European Union Politics* 372–402.

without any general overview. Besides which, EU law is also dependent on international legal developments. Although the EU has moved steadily forwards in some areas, it has laboured for long periods to achieve only modest gains in other areas.[242] Therefore, the structuring of EU legislation is inspired less by the model of the symmetrical arrangement of French-style gardens familiar to the seventeenth-century landscape gardener André Le Nôtre, and rather more by the composition of a typical English park. This diversity can end up leaving national authorities, businesses, and civil society utterly nonplussed. Furthermore, as is the case with other sectors of public law, the EU legislation discussed in this chapter has diverged, has been delegated to contract-based solutions, and has become proceduralized. These tendencies increase the weight of rules drawn up more by technical experts than by lawyers.

This 'Balkanization' of secondary law is a result both of the variety of legal bases as well as the diverse nature of harmonization measures. Whereas, in accordance with the White Paper on European Governance, the EU lawmaker relied on Article 192 TFEU when adopting directives enacted in order to protect ecosystems or to regulate certain types of pollution, on the other hand the lawmaker invoked Article 114 TFEU when adopting regulations governing the placing on the market of products or substances which are harmful to the environment. However, the parallels stop there, as there has been an increasing tendency to diversify the acts, where regulations modify directives and vice versa.

Furthermore, the obligation contained in Article 11 TFEU to take environmental considerations into account within other policies exacerbates the proliferation of rules of any kind which are more or less directly related to environmental protection. Due to the many overlaps and mutual intermingling of these rules, different aspects of EU law which touch on environmental matters are hardly set in stone; this gives rise to recurrent boundary disputes. Since integration erases any claim to freedom of action, this discipline looks more like a crossroads than a walled garden.

There is a question whether it is even possible to rationalize EU law in this area; which would appear to be somewhat difficult, in view of the articulation of the various policies and their legal bases. Although EU secondary law is the lynchpin around which national law unfolds, national transpositions are, however, often belated. Once adopted, national regulations may differ significantly in their form and substance. As a result, environmental law still differs significantly from one Member State to another, and even from one region to another. As a result, centrifugal forces begin to pull harder than their centripetal opposites.

(ii) A second point to be made is that the EU regulatory approach to protect the environment is still incomplete. In fact, unlike the Member States, the EU is not capable of regulating every environmental issue, and nor does it seek to be able to do so. The need to comply with the principle of subsidiarity prevents the Union from harmonizing in areas of law where the Member States are better placed to enact legislation: mobile phone masts, nuisances created by small industrial facilities, town

[242] C. Lister, *EU Environmental Law* (Chichester: Wiley, 1996) 17.

planning, etc. Additionally, the very nature of harmonization in the area of shared competence is flexible. There is no doubt that certain matters fall rather significantly within the purview of subsidiarity (small sized listed installations, green urban belt, urban sprawl, heritage, etc) whilst other sectors have been almost completely harmonized (movement of waste, hazardous product authorizations, restrictions on the placing on the market or use of chemical substances, etc).

(iii) Third, one should also bear in mind that this is a branch of law which struggles to keep abreast of the times. Whilst the formal aspect may be unsatisfactory, what about the substance? Here there is also a risk of losing ourselves in conjecture. Even though one could dispute the fact that EU policy follows the principle of the lowest common denominator, once again it is necessary to face hard facts. The policy is not particularly innovative, given that it generally limits itself to incorporating the *acquis* of certain Member States. Accordingly, in spite of the accumulation of directives and regulations, along with the resulting national rules, the pressure on ecosystems continues to grow, natural spaces have been seriously diminished, natural habitats are shrinking, species are disappearing at a worrying rate, chemical substances are continuing to accumulate, coasts are ever more smothered in concrete, and so on. The gap between the rules and the problems which the law is supposed to regulate has never been so marked.

One might plausibly hope that this discipline is driven more by the desire to anticipate new risks—GMOs, nanotechnology, etc—than by the need to make up for past mistakes—contaminated soils. However, various aspects of this policy adopt a more reactive than proactive approach. The catalogue of gloom-laden directives—Seveso, Erika, floods, etc—amplifies this feeling of a law of catastrophes. Undoubtedly, for new risks this branch of law is progressing at snail's pace.

Furthermore, one might expect that this great variety of rules will remain in step with the state of the art in science. However, measures to combat global warming, to promote the conservation of biodiversity, or to protect consumers against the risks posed by toxic chemical substances generally fall well short of what scientists call for. The law also bears its own responsibility for this. A hot topic amongst politicians, the precautionary principle—resulting from the need to take into account uncertainty identified by scientists—has keenly felt the difficulties of making its mark in a legal world generally branded with the badge of certainty.

As far as the economic dimension of harmonization measures is concerned, we are still waiting three decades later for the integration into the prices of goods and services of externalities in accordance with the polluter-pays principle. Similarly, the issue of environmental policy funding, a responsibility of the Member States by virtue of Article 192(4) TFEU, has not received sufficient attention. Due to the scarcity of financial means made available by the EU LIFE Fund, the Member States do not take this serious policy seriously enough. In spite of the fact that it embraces hundreds of directives, from an economic point of view, it amounts to little more than a flat-footed colossus.

Finally, acting in the spirit of the principle of subsidiarity, the EU lawmaker is now more inclined to use framework directives of a programmatic nature in order to protect various ecosystems such as the marine environment. By increasing the margin of

appreciation of the Member States, these new directives accentuate the differences between the respective national approaches. Harmonizing measures are therefore limited to the objectives, and there are various ways to achieve them. Without doubt, this development takes account of the fact that it is harder today to harmonize national legislations than it was in the past. Indeed, the environmental problems confronting the 28 Member States are markedly different from those encountered by the nine heavily industrialized countries which made up the EEC at the outset of its environmental policy. Moreover, the more this branch of law has a tendency to fragment and dissipate, the greater the importance of the clarifications from the Court of Justice, following preliminary references, on the *effet utile* of these directives.