

EUROPEAN UNION ENVIRONMENTAL LAW AND POLICY

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Despite the financial crisis in the Eurozone (EUR), and economic instability threatening Europe and the global economy in 2011, the European Union (EU) is working to build up a zone of stability, democracy and sustainable development whilst maintaining cultural diversity, tolerance and individual freedoms.

In October 2011 an EU Commissioner confirmed EU plans to require all non-EU carriers to land from an airport in the territory of an EU member state from January 2012 to participate in its emissions trading system, despite threats from 26 countries, including India, the US and China, to lodge a formal protest against the EU's new rules at the UN's International Civil Aviation Organisation.¹

On 29 September 2011 the European Parliament passed a resolution on developing a common position for the EU ahead of the United Nations (UN) Conference on Sustainable Development (Rio+20) in Rio de Janeiro in June 2012. The resolution called on the European Commission and Council of Europe to ensure that a strong and unified EU position is submitted to the UN before 1 November 2011, as an input to negotiations starting early in 2012. The Summit aims to secure a renewed political commitment to sustainable development, to assess progress and gaps in the implementation of the outcomes of previous major summits on sustainable development, and to address new and emerging challenges. The resolution called for a range of measures, including that the European Commission and the Council of Europe ensure that the Summit results not only in statements of good will, but also in tangible actions, targets and ways of measuring them, and accountability mechanisms. The resolution described a 'green economy' as the entire economy functioning within the limits of sustainability in respect to biodiversity, maintaining ecosystem services, climate protection and use of natural resources, with a focus on human, environmental and natural capital. In addition, the resolution called for the recognition of the principle of non-regression in the context of environmental protection as well as fundamental rights.²

These are just two examples providing a welcome reaffirmation of the EU's global and regional commitment to 'responsible' sustainable development, and its integration into the heart of both member states governments' and EU institutions' policies.³

This article examines broader progress by the EU in the implementation of sustainable development, and environmental laws and policies in recent years. It provides a brief historical overview, describes the main players, and discusses briefly some environmental infringement proceedings.

Evolution

European environmental policy gained recognition in the Single Europe Act 1986 (SEA) and in the 1992 Maastricht Treaty establishing the European Union (TEU). Various environmental measures were passed on the basis of Art 94 or Art 308 of the TEU. Later environmental policies were based on Art 95 and 174–6 of the TEU.⁴ In the late 1950s and early

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1 R Sehgal, 'Airline carbon tax to stay: EU', *The Asian Age* 5 Oct 2011 accessed <<http://www.asianage.com/india/airline-carbon-tax-stay-eu-916>>.

2 'European Parliament resolution of 29 September 2011 on developing a common EU position ahead of the United Nations Conference on Sustainable Development' (Rio+20), accessible at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0430+0+DOC+XML+V0//EN>>.

3 Consolidated Version of the Treaty Establishing the European Community (the EU Treaty), 24 December 2002, Official Journal of the European Communities C 325/33, viewed 29 October; <http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf, Articles 2, 3 and 6 TEU>.

4 Article 174 TEU included commitments to a high level of protection, the precautionary principle, the preventive action principle, rectification of environmental damage at source, and that the polluter should pay. Contextual issues are also specified: http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf

1960s members of then the European Community (EC) passed important environmental legislation on safety standards related to radiation or the control of dangerous chemicals.⁵ These were linked to the development and modernization of the industrial sector in Europe. However, 'environmental policy' developed only in the 1970s when there was growing concern about the harmful effects of economic development and growth, as also occurred elsewhere. In the light of the transboundary effects of air and water pollution (such as acid rain in Germany), the heads of state and governments of EC member states decided during the Paris summit in 1972 to push forward the development of a common environmental policy. The European Commission published in 1973 the first European Environmental Programme (EAP). That programme defined the general principles for environmental policy including prevention, action at source and polluter pays. These were progressive for the time, and remain core principles for EU environmental policy today.

In 1997 the Treaty of Amsterdam incorporated a high level of protection and improvement of the quality of the environment as an independent goal of the TEU, rather than as an incident of economic growth. Article 176 was also adopted so that protective measures adopted under Art 175 could not prevent any member state from maintaining or introducing more stringent protective measures compatible with the TEU. These must be notified to the Commission. A Protocol was also annexed to the TEU on animal welfare subject to respect for member states' laws and customs. A Protocol on the Application of the Principles of Subsidiarity and Proportionality was also adopted.

EU reforms faltered in 2000, 2002 and 2007, but in 2009 the 2007 Lisbon Treaty (TFEU)⁶ came into effect. That Treaty gave priority to the EU's objective of promoting sustainable development in Europe, and for dealing with climate change. The Lisbon Treaty also included provisions for a sustainable energy policy, including energy efficiency and savings and the development of new and renewable energy sources.

Craig and de Burca note that while the co-decision and cooperation procedures of Art 251–2 TEU, and qualified majority voting (QMV) applied to single market-related measures, unanimity in the Council and consultation with the European Parliament were required for environmental policy not linked with the internal market.⁷ Despite this more formal status there was nevertheless a rapid expansion of the 'environmental acquis' (the total body of applicable law), and at the turn of the 20th century about 300 environmental directives and regulations were in place.

The main environmental players

The key players in EU environmental law and policy are the European Commission, the Council of Europe, the European Parliament, the European Court of Justice, various environmental interest groups and the European Ombudsman. There is constant consultation, collaboration and cooperative decision-making activities involving these stakeholders, based on sometimes competing and conflicting aims, goals and interests. European environmental law and policy is successful today because it provides an opportunity for those who care about the preservation of nature (civil society and non-government organisations in developed EU member states such as Sweden, Denmark, Finland, Germany, Netherlands and Austria) to express their views at global, local, regional national and supranational levels. On the other hand, the broader EU community and concerned civil society has yet to demonstrate its full commitment to 'responsible' sustainable development, and to appreciate the imperative for this in the face of continuing environmental degradation.

Following the coming into effect of the Lisbon Treaty in 2009 a European Commissioner for Climate Change, Ms Connie Hedegaard (a former Danish Minister for Climate and Energy) was appointed as one of 24 Commissioners. The person appointed as Commissioner for the Environment was a former Slovenian Minister for European Affairs, Dr Janez Potocnik. The permanent officials who work in the European Commission, and who form the Brussels bureaucracy, are organised into Directorates General (DG). The DG for the Environment has a total budget EUR 2.143b for the period 2007–13.

⁵ A Lenschow, 'Environmental policy – contending dynamics of policy change' in H Wallace and W Wallace (eds.), *Policy-Making in the European Union*, 4th ed (OUP, 2000) ch 12.

⁶ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *Official Journal of the European Union*, C 306, Vol 50, 17 December 2007: <http://eurlex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>

⁷ P Craig and G De Burca, *EU Text, Cases and Materials*, 3rd ed (OUP, 2003)

The EU has a number of formal legal methods for developing environmental law and policy, including regulations, directives, and decisions. Soft law methods include action programmes and plans, guidelines, communications, policy statements, and declarations by the European Council. International treaties and agreements are also an available means for influencing policy development. Through the use of an Art 241 TFEU procedure, the Council increasingly requests the Commission to submit legislative proposals. The content of the Commission proposal will be the result of interaction between the Commission, interests groups, national experts, and senior civil servants. Close collaboration and consultation within those groups will occur before the proposal begins its journey. The Commission will maintain a general supervisory overview, in order to ensure that rules are uniformly and properly applied within member states. It has also become increasingly common for the Commission to exercise direct administrative responsibility for the implementation of certain environmental policies (e.g. food safety).

EU Environmental policy-making is most often driven by the fact that one or more member states has approved significant new environmental protection laws, leading to pressure to upgrade standards in the rest of the Union. Part of the policy process in Brussels is characterized by the need to balance the politics, interests, and norms of the 'green' member states with the pressures for economic development and financial restraint felt by the sceptics. So, the politics of environmental policy within the EU is multi-layered and its formulation often resembles a 'leader-laggard' dynamic process.

To resolve roadblocks, the Commission resorts to soft law where it is impossible to secure the passage of a regulation or directive, or where it believes that this is a better way to reach a particular policy goal. For example, the Commission resorted to the use of a Communication to achieve goals on environmental funds, which it had been unable to attain through the passage of a directive because of deadlock in the Council. It has also used circulars in the place of formal decisions where Council approval was not forthcoming.

The Commission has developed principles to govern its dealings with interest groups. It distinguishes between profit and non-profit organizations. It may consult such groups on an ad hoc basis, or through an advisory committee. It uses Green and White Papers and the like as a mechanism for eliciting the views of such groups. Interest-group pressure at the Community level is expected.

Environmental interest groups (EIGs) have found the Environmental DG very receptive. In fact, officials from other DGs often complain that it has been captured by 'green' interests. Typically, the environmental portfolio of the responsible Minister has not been viewed as one of the most desirable; certainly commissioners involved with industrial and financial affairs have been perceived as more important than commissioners for the environment.

Seven EIGs are at the core organizations representing environmental interests at the European level: the European Environmental Bureau (EEB), Friends of the Earth (FoE), Greenpeace International, the World-Wide Fund for the Nature (WWF), the Climate Network Europe (CNE), the European Federation for Transport and Environment (T&E), and Bird Life International. Their number of staff is small and their financial resources are modest. The costs of organizing at the European level are onerous for the voluntary/non-profit sector. Powerful groups are likely to make their voices heard irrespective of whether formal participatory rights exist. So the Commission often has an important mediation role to play in developing a legislative package acceptable to Parliament, the Council and itself. All EIGs, except Greenpeace, also receive some Commission funding for regular operations. From 2002–06 EUR 32m was made available to support environmental civil society organisations (CSOs) and non-government organisations (NGOs) registered in the member states, old and new, and other countries. In recent years, however, this funding policy has come under critical scrutiny.

Brussels-based EIGs concentrate on environmental policy and law formulation. Here they act both as a pressure group, mobilizing the general public or member states, and as think-thanks, offering expertise and detailed information from the ground. The Commission regularly employs interest group representatives on temporary contracts in order to internalize this expertise. During the decision-making phase, EIGs use public campaigns, and direct contacts with member governments and MEPs to ensure the desired majorities. At this stage the national members of the Brussels-based

groups assume an important role. National CSOs and/or NGOs are crucial during the implementation and enforcement phase of EU environmental law. In addition to national legal action, EIGs use the complainant's procedure to inform the Commission of any gap in implementation that is detected in a member state.

The European Ombudsman (EO) is another important actor, currently Dr Nikiforos Diamandouros of Greece. He receives complaints from EU citizens or resident third-country nationals or legal persons, concerning maladministration in the activities of the Community institutions or bodies, and conducts inquiries for which he finds ground, either on his own initiative or on the basis of complaints submitted to him direct or through a member of the European Parliament (MEP).⁸

So far, the majority of complaints seem to relate to the Commission, and the subject matter of the most frequent complaints includes transparency, access to information, and environmental issues. Only the EU and not national institutions is subject to the EO's jurisdiction, and they must supply information requested and give access to files, except where grounds of security are pleaded.

The first appointed EO, Mr Jacob Söderman of Finland (1995–2003), held a number of own-initiated inquiries, including in 1996 on public access to documents held by a number of EU institutions and bodies. He adopted a decision to the effect that failure to make adequate rules governing public access to documents constituted maladministration.⁹ On 6 September 2001 the European Parliament unanimously adopted the EU Code of Good Administrative Behaviour. This promotes citizens' fundamental rights to good administration under Art 41 of the Charter of Fundamental Rights of the EU¹⁰ which was proclaimed at the Nice Summit in December 2000. In addition, the European Parliament and the Council adopted the Regulation on Public Access to Documents in 2001.

The EO's internal management targets are to acknowledge receipt of complaints within one week, their admissibility within one month and close inquiries within one year, unless there are exceptional circumstances which justify a longer inquiry.

Implementation

The effective implementation of EU environmental law uses a combination of means including formal legal methods such as regulations, directives and decisions, as well as numerous soft law methods such as action programmes and plans, guidelines, communications, policy statements, and declarations. Consultation, impact assessment and the preparation of legislation are important, but monitoring, compliance and enforcement have become increasingly significant in recent years. International treaties and agreements also assist in the pursuit of the EU's external policies and aims. Community law and national law are interdependent and both apply to citizens of EU member states.¹¹ Under the EU Treaty, various articles provide for infringement proceedings.¹²

EU Treaty environmental infringement proceedings are conducted exclusively before the European Court of Justice (ECJ). Given the seriousness of the accusation, the referral of the Court must be preceded by a preliminary procedure in which the member state is given the opportunity to submit its observation. If the dispute is not settled at that stage, either the Commission¹³ or another member state¹⁴ may institute an action in the Court. In practice the initiative is usually taken by the Commission. The Court investigates the complaint and decides whether the Treaty has been infringed. If found in breach, the offending member state is required to take the measures needed to conform.

8 Article 228 TFEU provides for the appointment of the European Ombudsman by the European Parliament.

9 Decision 616/PUBACH/IJH 1998 OJ C44/9.

10 Official Journal C 303, 14 December 2007.

11 Art 10 of the TEU provides that member states shall take appropriate measures to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community; shall facilitate the achievement of the Community's tasks and abstain from measures which could jeopardise the attainment of the objectives of the Treaty.

12 Including Arts 257–61, 263–67, 267–70 TFEU.

13 Art 258 TFEU.

14 Art 259 TFEU.

If a member state fails to comply with a judgment given against it, the EU Treaty offers the possibility of a Court ruling ordering it to pay a lump-sum or a penalty.

More common types of proceedings include breaches of the obligation to cooperate¹⁵ or inadequate implementation or failure to give proper effect to Community environmental law.¹⁶

The Commission publishes with its annual reports on monitoring the application of EU law a list of ECJ judgments with which member states have not yet complied, and an indication of the action to be taken against the State. There are constraints however. The Commission has neither the time nor the resources to detect and pursue every instance of national infringement of environmental law. There are also pragmatic and political reasons why the Commission, even if it possessed the capacity to monitor all infringements, might wish to exercise political discretion and not to pursue to judgment every member state's breach. Moreover, enforcement action successfully brought before the ECJ does not necessarily lead to compliance.

Conclusions

EU environmental law and policy is far from static. It is constantly updated to take account of new threats and emerging sciences and technologies, based on available scientific and technological data. It is open to new ideas about the best policy or instrument for dealing with environmental issues. It is not framed in a vacuum, but is responsive to the views of industry and other stakeholders who have a right to expect a high quality of life for themselves and their children. An EU pilot project is on the track to improve the speed and efficiency of problem-resolution processes.

There is some dissatisfaction with enforcement procedures in the EU. There are few limits on the Commission's discretion, and there are few avenues for complaint by civil society and non-governmental organisations. Some aspects have been addressed in response to pressure from the EO. The effectiveness of environmental infringement proceedings has arguably been enhanced slightly by the penalty payment procedure which is actively used by the Commission in its enforcement strategy, under Articles 260 and 261 TFEU. EU environmental legislation lies behind some 80% of national environmental legislation, and therefore, the main form of dispute settlement used by the Commission is negotiation. Litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of the EU environmental law.

The EU's environmental law and policy is based on the conviction that economic growth, social progress and environmental protection all help to improve the quality of life, but also to save biological diversity and nature for future generations. What is more, they are interlinked. A careful balance must be struck between them if development in the EU is to be sustainable, responsibly – in other words, if future generations are also to be able to enjoy a better quality of life. Worst case scenarios are not excluded.

15 E.g. Case C-96/81, *Commission v. Netherlands* [1982] ECR 179

16 E.g. Case C-265/95, *Commission v. France* [1997] ECR J-6959; Case C-121/07 *Commission of the European Communities. v. French Republic* (Failure of a member state to fulfil obligations).