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# Enforcement of EU Environmental Law: Taking stock of the evolving Union legal framework

Martin Hedemann-Robinson<sup>1</sup>

## I Introduction

Over 40 years have now passed since the European Union first launched its initial policy programme<sup>2</sup> on the environment and close to 30 years since the environment was first officially recognised as a constituent component of the Union's constitutional framework by virtue of the Single European Act 1986.<sup>3</sup> Since then, the EU's common environmental policy has come to establish itself as a major element of the Union's political mandate as reflected notably in Article 3 of the Treaty on European Union (TEU) as well as Articles 191-193 of the Treaty on the Functioning of the EU (TFEU). Specifically, Article 3(3) TEU requires the Union to fashion the internal market consonant with 'the sustainable development of Europe' and based on *inter alia* 'a high level of protection and improvement of the quality of the environment'. Article 191 TFEU anchors the Union's environmental policy to the principles of precaution, preventive action, proximity and polluter pays. These legal foundations have paved the way for the adoption of some 200 pieces of EU legislation across a wide range of environmental topic areas, including notably in relation to the water, waste, air quality, climate change, nature and chemicals management sectors. The European Commission has assessed that these measures constitute the bedrock of much of the national environmental policies of the EU-28 member states, estimating that some 80% of environmental laws adopted at the national level in the Union are based upon EU environmental legislation.<sup>4</sup> Moreover, Article 11 TFEU, the so-called integration principle, stipulates that environmental protection requirements must be integrated into the definition and implementation of Union policies and activities. Accordingly, environmental protection needs are, as a matter of EU constitutional law, required to be internalised within the development of EU policies across

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<sup>2</sup> The first environment action programme of the (then) European Economic Community was adopted in November 1973 (OJ 1973 C112/1).

<sup>3</sup> OJ 1987 L169. The SEA established the legal framework for the development of a European Community environmental policy by incorporating Title VII (Arts.130r-t) within the former European Economic Community Treaty (as subsequently superseded by the TFEU).

<sup>4</sup> Environment Directorate General (DGENV), European Commission: *Management Plan 2013* (14.1.2013) at p17 (Ref ARES(2013) 416906).

the piece and not just within the specific parameters of the Union's environmental policy. This principle has profound implications for the development of other Union policies that have direct or indirect impacts on the environment such as those in relation to the internal market, energy, transport, fisheries and agriculture, foreign affairs and fiscal matters.

To what extent, though, are the environmental commitments entered into at EU level properly safeguarded? At the heart of any environmental policy, whether adopted at national, regional or international level, lies the issue of enforcement. For unless an environmental policy instrument is duly applied and implemented as anticipated and required by the legislative decision-maker(s), its words are liable to remain but pious sentiments and aspirations on a statutory page. The difference between 'greenwash' and environmental law becomes negligible without proper law enforcement machinery being in place. This challenge is all the more acute within the context of the EU, a supranational regional organisation with a mandate to craft a single market space, where trust and credibility in supranational decision-making is prone to become undermined if the writ of Union law does not run effectively at national level across the constituent member states. Notably, poor and/or patchy levels of law enforcement impair the delivery of agreed common high environmental standards as well as fragment trading conditions and distort competition within the single market area.

This article considers to what extent the Union has developed effective legal means to ensure that its wide range of environmental policy instruments are properly enforced, both at the national level of member states as well as at the EU institutional level. In addition to providing an overview of and critical reflections on the principal aspects of the Union's developing legal framework concerning the enforcement of EU environmental law, it also focuses on a particular important emerging element of the Union's enforcement architecture, namely the EU's policy concerning minimum environmental inspection requirements. Whilst it is apparent, as this article intends to highlight, that the Union has established and to some extent enhanced various legal instruments intended to assist in ensuring the due application of EU environmental norms, it is also clear that in many respects these legal tools have remained underdeveloped and of limited effectiveness. The issue of enforcement has not been treated at EU level with the degree of seriousness it deserves; for several years it could have been regarded as but a 'Cinderella' component of EU environmental policy. However, as will be explored in this article, in more recent times there have been some significant moves to enhance the degree of EU involvement in this area.

It is important to bear in mind from the outset in an analysis of this kind that under the Union's constitutional framework<sup>5</sup> specific powers and responsibilities have been set down for both EU institutions and member states regarding the issue law enforcement. These provisions have been enshrined in the EU's treaty framework since its origins in the 1950s. As far as EU institutional level is concerned, both the European Commission as well as the Court of Justice of the EU (CJEU) are charged with particular duties to oversee proper application of Union law by the member states. Specifically, the Commission is required under Article 17 TEU to 'ensure the application of the Treaties,<sup>6</sup> and of measures adopted by the institutions pursuant to them' and 'oversee the application of Union law under the control of the [CJEU]'. The principal mechanisms at the disposal of the Commission to ensure application of EU (environmental) law are the powers laid down in Articles 258 and 260 TFEU enabling it to take legal action against defaulting member states (the so-called

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<sup>5</sup> Namely, the TEU and TFEU.

<sup>6</sup> *Ibid.*

infringement procedures). Under Article 19 TEU the CJEU is vested with the task of ensuring that ‘in the interpretation *and application* of the Treaties the law is observed’ [my emphasis]. By virtue of Article 4(3) TEU, which enshrines the principle of sincere co-operation, the Union’s member states are *inter alia* required to ‘take any appropriate measure, general or particular, to ensure fulfilment of obligations arising out of the Treaties or resulting from the acts of institutions of the Union’. By way of complement to the formal legal legitimacy underpinning development of Union measures to supervise member state implementation of EU obligations, it is evident that there is considerable popular support within the Union for this. As far as the environmental policy area is concerned, a recent 2014 survey of EU public opinion carried out by the European Commission confirmed that 79% of EU citizens agree that the Union should be able to check that environmental laws are being correctly applied in the member states.<sup>7</sup>

In his publicised mission letter<sup>8</sup> of 1 November 2014 to Karmenu Vella (the newly appointed European Commissioner for the Environment, Maritime Affairs and Fisheries) the European Commission President Jean-Claude Juncker makes a rather bold and telling assertion. Specifically, he asserts that the ‘EU has a well-developed environmental policy with a rather complete and mature legal framework’. On the surface it might appear that the President’s claim has some merit to it, taking into account in particular the range and depth of Union policy instrumentation developed and adopted to date in order to address substantive environmental protection issues. However, the Commission President’s appraisal is also rather misleading, at least as far as the area of EU environmental law enforcement is concerned. As this article aims to show, a more realistic assessment would be that the Union’s legal framework in this area is still a structure in progress, rather fragile still and some way off from being in a position to have a genuinely effective impact. Prior to considering the various components of the EU’s legal framework on enforcement of EU environmental law in turn, it is appropriate first to make some introductory general contextual remarks concerning the current state of implementation of EU environmental law in order to highlight the considerable gap that often exists between EU statutory requirements and the extent to which these are adhered to across the Union.

### **1.1 State of implementation of EU environmental law**

It is apparent from the European Commission’s regular reports on compliance with Union law that there remain serious deficiencies in relation to the state of implementation of EU environmental legislation in the member states. The Union’s environmental sector has stood out amongst EU policy sectors as having a persistently poor record in terms of member state compliance with EU legislative obligations.

It is widely recognised that the state of implementation is poor across a broad range of environmental policy areas, including notably in the waste management, nature protection, water and air quality sectors. A 2009 study<sup>9</sup> carried out by the EU association of environmental authorities IMPEL<sup>10</sup> assessed that in the region of 19% of transboundary waste

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<sup>7</sup> Special Eurobarometer 416 *Report on attitudes of European Citizens towards the environment* (September 2014) at Section VI.2.2. Available for inspection at: [http://ec.europa.eu/public\\_opinion/index\\_en.htm](http://ec.europa.eu/public_opinion/index_en.htm)

<sup>8</sup> Available for inspection at: [http://ec.europa.eu/commission/2014-2019/vella\\_en](http://ec.europa.eu/commission/2014-2019/vella_en)

<sup>9</sup> ESWI Consortium (2009) IMPEL-TFS Enforcement Actions II Enforcement of EU waste Shipment Regulation “Learning by Doing”, Interim Project Report (12.10.2009). Available for inspection via IMPEL website: <http://impel.eu>

<sup>10</sup> EU Network for the Implementation and Enforcement of Environmental Law.

shipments in the Union were illegal. In 2013 the European Commission published a report<sup>11</sup> confirming that some 14% of groundwater stations fail to meet minimum nitrate pollution standards stipulated by the EU Nitrates Directive.<sup>12</sup> In 2014 the European Environment Agency assessed that in the region of 21%, 14 % and 8% of the EU-28 urban population resides in areas where the exposure to particular matter (PM10), ozone (O<sub>2</sub>) and nitrogen dioxide (NO<sub>2</sub>) exceeds maximum EU limit values.<sup>13</sup> In 2011 an environmental consultancy study commissioned for the EU estimated that the annual cost of non-implementation of the Union's environmental *acquis* amounted to some €50bn.<sup>14</sup> Most recently, in March 2015 IMPEL has published a report<sup>15</sup> signalling general concerns with the state of implementation of a wide range of EU environmental legislative instruments (notably in the water, waste, nature protection, air quality, agricultural and chemical sectors) by member states, noting in particular a general lack of resourcing, skills and capacity at the level of national authorities responsible for environmental regulation and enforcement as well as inadequate levels of sanctions to deal with persons breaching EU environmental requirements.

Over several years, the EU environmental policy sector has been subject to a large number of infringement actions taken by the European Commission against defaulting member states under Articles 258/260 TFEU. According to the Commission's latest published data<sup>16</sup> on environmental infringement casework, currently it is the EU policy sector with the second largest number of complaints from the public concerning non-compliance (14%),<sup>17</sup> the largest number of open (ongoing) infringement cases pursued under Article 258 TFEU (26%)<sup>18</sup> and with the largest number of second round infringement cases currently pursued by the Commission under Article 260 TFEU (35%).<sup>19</sup> Moreover, as at the time of writing 45% of second round infringement rulings from the CJEU under Article 260 TFEU have concerned non-compliance with EU environmental law by member states.<sup>20</sup> In 2014 the Commission

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<sup>11</sup> COM(2013)683 final, *Commission Report on the Implementation of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources based on Member State reports for the period 2008–2011*, 4.10.2013.

<sup>12</sup> Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L375/1).

<sup>13</sup> EEA Report No5/2014 *Air quality in Europe — 2014 report*, 19.11.2014 (ISSN 1725-9177). Available for inspection at: <http://www.eea.europa.eu/publications/air-quality-in-europe-2014>

<sup>14</sup> COWI *The Costs of not implementing the environmental acquis* (September 2011) - Final Report (ENV.G.1/FRA/2006/0073). Available for inspection at: [http://ec.europa.eu/environment/enveco/economics\\_policy/pdf/report\\_sept2011.pdf](http://ec.europa.eu/environment/enveco/economics_policy/pdf/report_sept2011.pdf)

<sup>15</sup> IMPEL Final Report: *Challenges in the Practical Implementation of EU Environmental Law and how IMPEL could help overcome them*, 23.3.2015. Available for inspection at: <http://impel.eu/wp-content/uploads/2015/03/Implementation-Challenge-Report-23-March-2015.pdf>

<sup>16</sup> As may be gleaned from the Commission's Environment Directorate-General's website on infringement statistics for 2014 (<http://ec.europa.eu/environment/legal/law/statistics.htm>) as well as the Commission's latest report on EU law compliance (COM(2014)612 *European Commission Annual Monitoring Report on the Application of EU law (2013)*, 1.10.2014) (<http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-612-EN-F1-1.Pdf>).

<sup>17</sup> Namely, 520 out of 3,505 complaints registered in 2013 related to allegations of non-compliance with EU environmental law. (The sector with the highest number of complaints was justice and home affairs (16.8%).)

<sup>18</sup> Namely, 334 out of 1,300 open infringement cases related to suspected breaches of EU environmental law in 2013. The EU policy sector with next largest number of infringement cases opened in 2013 was tax (13%).

<sup>19</sup> Specifically, 40 out of 113 ongoing second round infringement cases in 2013 concerned alleged failures by member states to adhere to judgments made by the CJEU under Art.258 TFEU declaring non-compliance with EU environmental law.

<sup>20</sup> Specifically, 11 out of a total of 24 second round infringement rulings decided by the CJEU: Case C-387/97 *Commission v Greece (Kouroupitos landfill)* [1999] ECR I-3257; Case C-278/01 *Commission v Spain (Bathing Waters)* [2003] ECR I-14141; Case C-304/02 *Commission v France (Fishing Controls)* [2005] ECR I-6263; Case C-121/07 *Commission v France (GMO Controls)* [2008] ECR I-9195; Case C-279/11 *Commission v*

was pursuing 334 infringement actions against member states on account of non-compliance with EU environmental law. Whilst all member states were defendants in these open infringement cases, the member states with the highest number of legal proceedings being brought against them were Greece (36), Romania (30), Spain (30), Belgium (23), Poland (20), France (19), Italy (18) and the UK (16).

As the above points indicate, there remains considerable room for improvement by member states in the way in which they take steps to fulfil their EU environmental obligations. The track record of poor implementation is a long-standing one.

## II Principal Components of the EU's Legal Framework on Environmental Law Enforcement

It is apparent that over a period of several years the Union has undertaken steps to develop a legal framework so as to assist in the task of and enhance law enforcement at national level. The emerging framework, which this section of the article will consider, can best be described as having three key components to it:

- **Infringement proceedings (Arts.258/260 TFEU).** Specifically, these concern the particular legal proceedings that may be pursued by the European Commission against member states before the CJEU over statal failures to secure implementation of their EU environmental statutory obligations.
- **Civil society participation.** Specifically, this component relates to the series of measures adopted by the Union in order to enhance rights of access to justice for private persons for the purpose of securing adherence to EU environmental law, primarily under the auspices of the 1998 United Nations Economic Commission for Europe's (UNECE) Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded in Århus, Denmark (hereinafter referred to as the 'Århus Convention').<sup>21</sup>
- **Competent authorities.** This component covers the various initiatives undertaken by the EU with a view to assisting and enhancing the level of performance of national environmental authorities in policing the adherence to EU environmental requirements by the public and private sector.

All the components are important and mutually supportive and strengthening as illustrated in Diagram 1 below. However, ultimately the third component (relating to the performance of competent environmental authorities) is the most significant as a source for delivering better

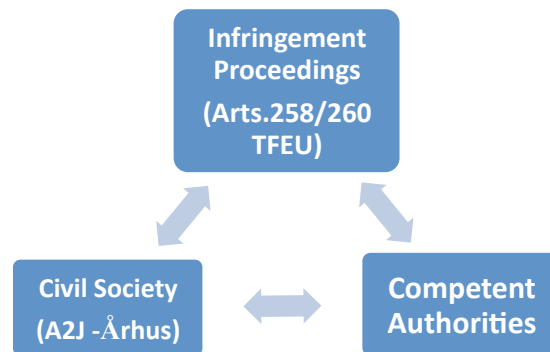
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*Ireland (EIA)* judgment of 19.12.2012; Case C-374/11 *Commission v Ireland (Waste Water Treatment Systems)* judgment 19.12.2012; Case C-533/11 *Commission v Belgium (Waste Water Treatment Systems)* judgment of 17.10.2013; Case C-576/11 *Commission v Luxembourg (Waste Water Treatment Systems)* judgment of 28.11.2013; Case C-196/13 *Commission v Italy (Illegal landfill sites)* judgment of 2.12.2014; Case C-378/13 *Commission v Greece (Illegal landfill sites)* judgment of 2.12.2014; and Case C-243/13 *Commission v Sweden (IPPC Directive)* judgment of 4.12.2014. All CJEU judgments may be inspected online via the Court's website at: <http://curia.europa.eu>

<sup>21</sup> 2161 UNTS 447. The text of the Convention is accessible on the following UNECE website: [www.unece.org](http://www.unece.org)

levels of compliance with EU environmental law and is the part I wish to focus on principally in this paper. The EU has a considerable amount of work yet to do in order to ensure that all three components function effectively. The rest of this section will appraise the individual components in turn.

*Diagram 1: Principal EU-level components re enforcement of EU Environmental Law*



## 2.1 Infringement Procedures (Articles 258/260 TFEU)

The infringement procedures set out in the EU treaty framework constitute the most well-established component of the Union's framework for enforcing EU environmental law. Under Article 258 TFEU the European Commission has the power to take legal action against member states defaulting on their EU obligations, ultimately bringing them before the CJEU (known as 'first round' infringement proceedings). If the CJEU finds against the defendant, a judicial declaration may be made by the Court confirming non-compliance has occurred. Since the entry into force of the Lisbon Treaty on 1 December 2009, first round proceedings have been enhanced to some extent. Specifically, the CJEU has acquired the power to impose a penalty payment and/or lump sum not exceeding an amount specified by the Commission where the case concerns a failure by the member state to notify the Commission of measures to transpose a legislative EU directive into national law by the requisite deadline set by the legislative instrument (so-called 'non-communication' cases).<sup>22</sup> In practice penalty payments are used where the infraction is ongoing at the time of the judicial ruling, the CJEU stipulating a payment to be paid in regular intervals until the breach is remedied. A lump sum fine may be imposed as a distinct financial penalty, in practice used in particular to take account of the seriousness and impact of a failure to honour EU obligations up until the time of the judicial ruling. By virtue of Article 260(1) TFEU member states are required to take the necessary measures to comply with the (first round) judgment of the CJEU. Where a member state fails to take such steps, under Article 260(2) TFEU the Commission has the option of bringing further (second round) legal proceedings against the member state concerned, ultimately before the CJEU. Where it finds that a defendant member state has failed to honour its first round judgment, the CJEU may impose a penalty payment and/or lump sum fine. Whilst the Commission may and does in practice propose the level of financial sanctions,<sup>23</sup> the CJEU is not bound by its recommendations.<sup>24</sup>

<sup>22</sup> See Art.260 (3) TFEU. See also Commission Communication *Implementation of Article260 (3) of the Treaty* (OJ 2011 C12/1) published on 15.1.2011.

<sup>23</sup> The Commission has set out guidance for determining recommended levels of financial penalties in individual cases. See Commission Communication SEC (2005)1658 *Application of Article 228 of the EC Treaty* Adopted

There is little doubt that the infringement procedures have been and continue to be used by the European Commission as key legal tool to hold member states to account for breaches of EU environmental law and legislation. Several hundred infringement judgments have been handed down over the years since the origins of the EU's common environmental policy in the 1970s. The author has gleaned from the CJEU's case database (InfoCuria<sup>25</sup>) that over 550 infringement judgments had been handed down by the Court by the end of 2014 concerning breaches of EU environmental law by member states.<sup>26</sup> It is also evident that the procedure has been given a sharper edge in the wake of successive treaty reform, notably with the introduction since 1993 (with the entry into force of the Maastricht Treaty) of the Commission having the possibility of requesting the CJEU to impose financial penalties via second round infringement proceedings and more recently since December 2009 (with the entry into force of the Lisbon Treaty) with the introduction of the possibility of financial penalties being requested from the CJEU in first round infringement actions involving non-communication cases as well as a shortening of the administrative pre-litigation procedure for second round infringement cases. The new fining powers in relation to non-communication cases are particularly relevant to the environmental sector, given that they concern failures to transpose EU directives into national law, the core legislative instrument used in the EU environmental policy field.

However, for procedural as well as resource-related reasons the impact of the infringement procedures on the state of implementation of EU environmental law is set to remain limited. Procedurally, the infringement procedure remains a cumbersome legal procedure. It is usually a protracted affair, with first round proceedings taking up to 5 years, and a total of 10 years required on average before a second round penalty judgment is handed down.<sup>27</sup> Overall, the level of financial penalties set by the CJEU (in light of Commission recommendations) is relatively modest, faring quite unfavourably with the level of fines that may be handed down in EU competition cases. For example, a serious long-term nation-wide mismanagement of waste in Italy was punished by the CJEU in a December 2014 second round judgment with a six monthly penalty payment of €42.8m together with a lump sum of €40m.<sup>28</sup> Whilst at first glance such sums might appear to be substantial, they pale into insignificance when compared with the fines that may be imposed by the Commission in cases of non-compliance with EU competition law, where penalties of up to 10% of global turnover of defendants may be imposed. For instance, in 2013 a fine of €1.7bn was imposed by the Commission on eight multinational banks operating cartels in the financial derivatives sector covering the

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on 13.12.2005 (OJ 2007 C126) and which may be inspected on the following EU Commission website:

[http://ec.europa.eu/eu\\_law/infringements/infringements\\_260\\_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_260_en.htm)

<sup>24</sup> As confirmed consistently by the CJEU. See most recently at para. 52 of its judgment in Case C-378/13 *Commission v Greece (Illegal landfill sites)* judgment of 2.12.2014.

<sup>25</sup> Accessible at: <http://curia.europa.eu/juris/recherche.jsf?cid=667272>

<sup>26</sup> Specifically, I have identified 552 environmental infringement judgments from the database. A decade ago, Ludwig Krämer calculated that 330 environmental infringement judgments had been handed down as at the end of 2005 (see Krämer L, *Statistics on environmental judgments by the EC Court of Justice (2006) JEL* at 411 (Table 4)). Accordingly, the Commission's infringement casework continues apace with the number of environmental infringement judgments accumulated over the thirty year period between 1976-2005 having increased by 60% within just ten years thereafter.

<sup>27</sup> These figures are based on research by the author from the CJEU's case reports of its environmental infringement judgments. Detailed analysis of the duration of infringement litigation is contained in Ch5 of Hedemann-Robinson M, *Enforcement of EU Environmental Law: Legal Issues and Challenges* 2<sup>nd</sup> ed. (2015 Routledge).

<sup>28</sup> Case C-196/13 *Commission v Italy (Illegal landfill sites)*, judgment of 2.12.2014.



European Economic Area.<sup>29</sup> The levels of fines imposed in infringement cases are not set with any degree of precision in terms of assessing the level of environmental and other damage that may have been perpetrated as a result of non-compliance. In addition, the element of deterrence does not feature strongly amongst the principal factors used for calculating individual financial sanctions in (environmental) infringement proceedings. Moreover, the Commission's prosecutorial powers are heavily restricted, having no powers to hold investigations or impose obligations upon member states (or private operators for that matter) found to be at fault. Such powers have been vested in the Commission since the early 1960s in relation to breaches of EU competition law.<sup>30</sup>

In addition to various procedural constraints posed by the infringement procedures, the European Commission is also faced with the problem of limited resources when contemplating use of the infringement procedure. On average the Commission's services within its Environment Directorate-General provide usually no more than 2 desk officers for environmental infringement casework per member state. Accordingly, the Commission can only reasonably be expected to take on but a fraction of casework for the EU-28. With the adoption of its 2008 Implementation Communication<sup>31</sup> (and even before that) it has been evident that the Commission has come to institute a system of prioritising environmental infringement cases which foresees increasing focus being paid to the so-called non-conformity and non-communication cases, namely cases concerning non-compliance of member state laws with EU environmental legislation, and only very serious and endemic instances of bad application (namely failures of member states to ensure practical adherence to EU environmental norms).<sup>32</sup> In the long term this prioritisation framework, which is a crystallization of a broader Commission initiative<sup>33</sup> to streamline infringement casework across EU policy sectors, is likely to mean that the other components of the Union's framework on EU environmental law enforcement (discussed in sections 2.2. and 2.3 of this article) will be expected to shoulder more of the casework relating to deficient application and implementation of EU environmental legislation. However, this structural realignment of the Commission's approach to environmental infringement proceedings will probably take some time yet to bed down. Currently, so-called 'bad application' infringement cases continue to dominate the Commission's caseload, constituting 56% of ongoing environmental infringement cases as at the end of 2014.<sup>34</sup>

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<sup>29</sup> See the following EU Press Releases: IP/13/1208 and MEMO/13/1090, Brussels, 4 December 2013. (Available for inspection at: <http://europa.eu/rapid/search.htm>).

<sup>30</sup> See notably Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L1/1) and Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L24/1).

<sup>31</sup> COM(2008)773 Commission Communication *Implementing EC Environmental Law*, 18.11.2008.

<sup>32</sup> The 2008 Implementation Communication signals that the Commission is to focus on the following three priority areas: (1) non-communication cases; (2) failure to comply with CJEU judgments (second round casework); and (3) breaches of EU law, including non-conformity cases, raising issues of principle or having particularly far-reaching negative impact for citizens. The latter category would include notably: (a) non-conformity issues; (b) systemic breaches of environmental quality norms or other requirements presenting serious adverse consequences or risks for health or for aspects of nature having high ecological value; (c) breaches of core strategic obligations upon which fulfilment of other EU environmental obligations depends; and (d) breaches concerning large infrastructure projects or interventions involving EU funding and/or significant adverse impacts (COM(2008)773 at section 3.3).

<sup>33</sup> COM(2007) 502, Commission Communication *A Europe of Results – Applying Community Law*, 5.9.2007.

<sup>34</sup> Specifically, 189 out of 325 environmental infringement cases being handled as at the end of 2014 by the Commission, as reported on its Environment Directorate-General's (DG ENV) website: <http://ec.europa.eu/environment/legal/law/statistics.htm>. Statistical data from the DG ENV site indicate that bad application cases have constituted the largest contingent of environmental infringement casework since 2008 apart from 2009: 54% (2013); 66% (2012); 64% 2011; 52% (2010); 31% (2009); 49% (2008).

## 2.2 Enhancement of civil society participation

Over the last decade or so the EU has taken a range of legislative measures to enhance the possibilities for individuals (including NGOs) to be able to participate in ensuring better state of implementation of EU environmental law. This process has been underpinned in particular by virtue of the EU's membership of the 1998 Århus Convention. The Union ratified its accession to Århus in 2005,<sup>35</sup> a step that is binding on both on the Union as well as member states under EU law.<sup>36</sup> The Convention essentially requires contracting parties to take measures to ensure that citizens are guaranteed rights to access information concerning the environment, rights to participate in certain decisions affecting the environment (notably in planning approval procedures relating to development projects) as well as rights securing effective access to environmental justice. For the purposes of this article, focus will be placed on the impact of the access to justice guarantees stipulated by Århus (so-called 'third pillar' of the Convention).

Article 9 of the Århus Convention requires contracting parties to take a number of measures to facilitate the possibility of individuals being able to seek administrative and judicial review of breaches of their national environmental laws. Specifically, Article 9 stipulates that each Party is to ensure that in three types of situations the public should have access to independent legal review of decisions, omissions and acts concerning the following areas: access to environmental information (Article 9(1)); public participation in certain decisions relating to the environment (Article 9(2)) and contraventions of environmental law by public authorities or private persons (Article 9(3)). The commitment to access to justice in the Convention is supported by some common flanking provisions in Article 9(4)-(5) which apply to all three types of review procedure and contain some generally worded requirements on the conduct, expense and transparency of procedures. Article 9(4) stipulates some minimum general requirements that must be respected by the relevant administrative or judicial review procedures, including notably that each contracting party must provide 'adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive'. Article 9(5) obliges the contracting parties to ensure that the public is provided with access to information about access to judicial and administrative review procedures as well 'consider' the establishment of 'appropriate' mechanisms to remove or reduce financial and other barriers to access to justice.

Notwithstanding the Union's accession to the Århus Convention, for two key reasons it is reasonable to expect that civil society's role in terms of assisting in improving upon the state of compliance with EU environmental legislation is likely to remain relatively limited, albeit important. As discussed below, these reasons concern the limited extent to which the Union has implemented its obligations under Århus on access to environmental justice as well as the finite resources available to non-governmental environmental organisations.

### 2.2.1 *Partial implementation of Århus*

It is true that the EU has adopted a number of instruments intended to implement the access to justice obligations contained in Århus, both in relation to the national level of EU member

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<sup>35</sup> Council Decision 2005/370 on the conclusion, on behalf of the EC, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L124/1).

<sup>36</sup> See Art.216(2) TFEU.

states as well as in relation to the EU institutional level. As far as EU member state level is concerned, the Union has adopted provisions securing access to environmental justice in EU directives on access to environmental information,<sup>37</sup> public participation in certain environmental decision-making,<sup>38</sup> and environmental liability.<sup>39</sup> This article does not intend to discuss the individual access to justice provisions of these particular EU instruments, which are appraised in detail elsewhere.<sup>40</sup> As far as the EU institutional level is concerned, in 2006 the Union adopted a regulation (Regulation 1376/2006) commonly referred to as the 'Århus Regulation' containing some provisions intended to facilitate access to review for private individuals of EU decision-making in accordance with the requirements of the Århus Convention.<sup>41</sup> The access to justice provisions of this EU statutory instrument will be considered later below in this section. Notwithstanding the fact that number of EU instruments facilitating access to environmental justice have been adopted, it is however evident that the Union has only partially implemented Århus's third pillar and does not seem capable or willing to do so for some time yet.

As far as facilitating access to environmental justice at EU member state level is concerned, there remain significant gaps in coverage with no Union access to justice provision, for instance, in relation to the areas of water, waste and air quality policy. Whilst the Commission proposed a 'horizontal' directive<sup>42</sup> for the implementation of the third pillar of Århus in 2003, this legislative initiative access never received sufficient political support from the member states in Council in order to become adopted. The proposal was eventually quietly withdrawn last May 2014 by the Commission,<sup>43</sup> which has yet to come forward formally with an alternative legislative proposal. The silence on the part of the current Commission college on this subject jars with recent commitments declared by the Union on access to environmental justice. In 2012, the previous Environment Commissioner Jan Potočnik made this issue a political priority, declaring that a directive on access to justice in environmental matters was 'indispensable'.<sup>44</sup> Moreover, the Union's Seventh Environment Action Programme (2013-2020)<sup>45</sup> promises that under its auspices 'Union citizens will have access to justice in environmental matters and effective legal protection, in line with the Århus Convention and developments brought about by the entry into force of the Lisbon Treaty and recent case law of the European Union'.<sup>46</sup> Specifically, the EAP7 stipulates that it

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<sup>37</sup> See Art.6 of Directive 2003/4 on public access to environmental information (OJ 2003 L41/26).

<sup>38</sup> Originally, the relevant access to justice provisions were contained in Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Directives 85/337 and 96/61 (OJ 2003 L156/17) which has been superseded by Art.11 of Directive 2011/92 on the assessment of certain public and private projects on the environment (OJ 2012 L26/1) and Art. 25 of the recast Directive 2010/75 on industrial emissions (OJ 2010 L334/17).

<sup>39</sup> See Arts.12-13 of Directive 2004/35 on environmental liability (OJ 2004 L143/56).

<sup>40</sup> See eg. Hedemann-Robinson (2015) *op cit* FN26 and Wennerås, P, *The Enforcement of EC Environmental Law* (2007, Oxford).

<sup>41</sup> Regulation 1367/2006 on the application of the provisions of the Århus Convention to access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies (OJ 2006 L264/13) commonly referred to as the 'Århus Regulation'.

<sup>42</sup> COM(2003)624 Commission Proposal for a Directive of the European Parliament and the Council on access to justice in environmental matters, 24.10.2003.

<sup>43</sup> COM(2003)624 was included in the following item in the Official Journal of the EU: *Withdrawal of Obsolete Commission Proposals* (OJ 2014 C153/3).

<sup>44</sup> Speech by Janez Potočnik "The fish cannot go to court" –the environment is a public good that must be supported by a public voice": EU Press Release SPEECH/12/8356 Brussels, 23.11.2012.

<sup>45</sup> Decision 1386/2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' (OJ 2013 L354/171).

<sup>46</sup> Para.62, *ibid.* (This commitment is housed within the EAP7's Priority Objective 4: To maximise the benefits of Union environment legislation by improving implementation).

shall ensure by 2020 that ‘the principle of effective legal protection for citizens and their organisations is facilitated’, requiring in particular ‘that national provisions on access to justice reflect the case law of the Court of Justice of the European Union’.<sup>47</sup>

The case law of the CJEU in relation to the area of access to environmental justice at national level has had some but ultimately limited impact on assisting in securing adherence to the third pillar obligations contained in the Århus Convention. Whilst the Court has recognised that EU accession to the Convention is a legally binding commitment on the Union and member states under Union law,<sup>48</sup> in the *Slovakian Brown Bear* case<sup>49</sup> it rejected arguments claiming that the key Convention provision on access to justice (Article 9(3)) has direct effect. Accordingly, private individuals may not as a matter of EU law rely upon the requirements Article 9(3) directly before member state courts. However, the CJEU has acknowledged the Convention provision to have indirect effects, in that national courts of the member states are required to interpret national law ‘in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Convention.’<sup>50</sup> Such indirect legal effects are, though, self-evidently of much weaker enforcement value and essentially dependent upon the degree to which national courts are able and willing under national rules of statutory interpretation to construe national laws in line with Article 9(3) requirements. Enforceability may well become particularly challenging in the face of an unambiguously worded national statute in conflict with the terms of Århus.<sup>51</sup> On the other hand, the CJEU has taken the opportunity to enhance private individuals’ rights of access to justice before national courts when the matter concerns a directly effective EU environmental norm. Specifically, in *Janecek*<sup>52</sup> the Court held that the plaintiff had a right as a matter of Union law to seek judicial redress before the national courts in order to enforce a directly effective stipulation contained in a former EU directive on ambient air quality<sup>53</sup> requiring member states to ensure the adoption of a plan indicating measures to be taken in the short term where there is a risk of EU legislative limit values and/or alert thresholds on air quality being exceeded. This was so, even though the particular EU directive did not provide for any specific minimum requirements relating to access to justice at national level.

Efforts to ensure compliance with Århus’s third pillar at the level of EU decision-making have been likewise unsatisfactory. Opportunities for individuals to challenge the legality of EU measures alleged to contravene EU environmental law are overly limited, and have been so since the inception of the Union in the 1950s. The root of the problem lies with the very strict legal standing (*locus standi*) requirements contained within the TFEU for private persons seeking judicial review. Specifically, barring one relatively minor exception, Article 263(4) TFEU requires private plaintiffs to demonstrate that they are both directly and individually concerned by a disputed EU measure in order to gain access before the General Court of the EU in order to plead for an annulment of the act on grounds of the latter’s

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<sup>47</sup> See paras. 65(e) and 65(v), *ibid*.

<sup>48</sup> In accordance with Art.216(2) TFEU.

<sup>49</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK (WOLF Forest Protection Movement) v Slovakian Environment Ministry* [2011] ECR I-1215.

<sup>50</sup> Para.s 50-51 of judgment in Case C-240/09.

<sup>51</sup> This is so, for instance, in the UK where case law on the rules of statutory interpretation would appear to exclude the possibility of an international norm being relied upon to distort the meaning of clearly worded national legislation. See eg. *Garland v British Rail* [1983] 2 AC 751; *Duke v Reliance Ltd* [1988] AC 618.

<sup>52</sup> Case C-237/07 *Janecek v Bavaria* [2008] ECR I-6211.

<sup>53</sup> Art.7(3) of former Directive 96/62 on ambient air quality assessment (OJ 1996 L296/55) as subsequently repealed and superseded by Dir.2008/50 on ambient air quality assessment and management (OJ 2008 L152/1).

alleged illegality.<sup>54</sup> The requirement of individual concern has meant that legal standing for private persons to challenge the legality of EU environmental measures under Article 263 TFEU is effectively ruled out, given that since the 1960s CJEU has interpreted this to mean that the private plaintiff must be affected by the EU measure ‘by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually’.<sup>55</sup> Given that the vast majority of EU environmental measures are designed to impact generally upon the public, it is usually impossible for a private person to demonstrate individual concern. This has been a long-standing and serious problem experienced those wishing to pursue public interest environmental judicial review litigation at EU level, illustrated by cases such as *Stichting Greenpeace*<sup>56</sup> and *Danielsson*<sup>57</sup>. The 2007 Lisbon Treaty introduced an exception in relation to regulatory EU acts, in respect of which private individuals are only required to demonstrate they are directly concerned. However, the impact of this change is relatively slight in relation to the environmental sector. Not only does the treaty amendment concern but a small fraction of EU environmental instruments, the requirement of direct concern is not necessarily straightforward to fulfil in the context of a public interest litigant, who may not be considered in a judicial sense directly impacted by the measure.

As is well-known, in 2011 the Compliance Committee of the Århus Convention delivered a report notably critical of the strict legal standing requirements for judicial review under EU law.<sup>58</sup> This was by way of a follow up to a complaint filed to the Committee in December 2008 by the non-governmental environmental organisation (NGEO) ClientEarth. In its (interim) report, the Committee considered that the legal standing requirements of direct and individual concern set down in EU law as interpreted by the CJEU conflicted with the requirements of Article 9(3) of the Århus Convention. The Committee decided to reserve final judgment on the complaint, though, effectively waiting to see what impact certain changes pending at the time (namely the Lisbon Treaty 2007 amendments as well the introduction of the Århus Regulation) would have on the EU legal order in the light of judicial interpretation from the CJEU.

However, it appears that those particular EU statutory developments have not made any significant impact on the issue of access to justice at Union institutional level. Notably, post-Lisbon the CJEU has confirmed its traditional restrictive stance on legal standing of private persons in judicial review cases. Specifically, this occurred in the recent *Inuit Tapiriit Kanatami* litigation.<sup>59</sup> This case involved an annulment action brought by a number of natural and legal persons in 2010 which challenged the legality of a 2009 EU regulation<sup>60</sup> adopted jointly by the European Parliament and Council of the EU which imposed restrictions on

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<sup>54</sup> The specific grounds for seeking an annulment are set out in Art.263(2) TFEU, namely: lack competence, infringement of an essential procedural requirement, infringement of the founding EU treaties (TFEU/TEU) or of any rule of application relating to their application, or misuse of powers.

<sup>55</sup> Case 25/62 *Plaumann v Commission* [1963] ECR 95 (para. 107 of judgment).

<sup>56</sup> Case C-321/95P *Stichting Greenpeace et al v Commission* [1998] ECR I-1651.

<sup>57</sup> Case T-219/95R *Danielsson et al v Commission* [1995] ECR II-3051.

<sup>58</sup> Report of the Compliance Committee: *Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union* (ECE/MP.PP/C.1/2011/4/Add.1), 14.4.2011. For a detailed analysis of the Compliance Committee’s report see eg. Marsden S, ‘Direct Public Access to EU Courts: Upholding Public International Law via the Aarhus Convention Compliance Committee’ (2012) 81 *Nordic Jl. of International Law* 175.

<sup>59</sup> See judgment of the General Court in Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council* [2011] ECR II-5599 and on appeal before the Court of Justice Case C-583/11P *Inuit Tapiriit Kanatami and Others*, judgment of 3.10.2013.

<sup>60</sup> Regulation 1007/09 (OJ 2009 L216/1).

trade in seal products within the EU. Specifically, the regulation only permitted the placing on the single market of seal products resulting from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. Both the European Parliament and Council, supported by the Commission, claimed the legal action should be ruled inadmissible on grounds that the private plaintiffs lacked the requisite legal standing, specifically that none of them were individually concerned by the EU regulation. The litigation ultimately came before the CJEU on appeal in 2013, the General Court having dismissed the action in 2011 for want of legal standing on the part of the plaintiffs.<sup>61</sup> The CJEU<sup>62</sup> agreed with the General Court, concluding that the plaintiffs failed to meet the requirements of individual concern as the contested Union regulation, adopted by way of legislative procedure, was generally worded and applied indiscriminately to any seal product trader falling within its scope.<sup>63</sup> The CJEU was unconvinced that the member states had intended to alter the legal position on legal standing through the 2007 Lisbon Treaty.

Recent case law of the CJEU<sup>64</sup> has also served to restrict the impact of the access to review provisions contained within the Århus Regulation. By virtue of Article 10(1) of the Århus Regulation, a NNGEO meeting certain criteria<sup>65</sup> is entitled to request a Union institution or body, which it considers has adopted an administrative act or failed to adopt such an act contrary to EU environmental law, to undergo an internal review of its conduct. Administrative acts are defined in the Århus Regulation as being limited to any measure of ‘individual scope’.<sup>66</sup> The litigation in question concerned the requests from two NNGEOs to the European Commission for the latter to undertake an internal review of certain EU measures, one being a Commission decision to give the Netherlands more time to comply with EU air pollution requirements concerning nitrogen oxides (NOx), the other concerning an EU regulation stipulating certain maximum pesticide levels in food. The Commission refused to undertake a review of either measure, on the grounds that they did not concern the plaintiffs individually as required by the terms of the Århus Regulation. Both NNGEOs brought annulment proceedings before the General Court of the EU in respect of the Commission’s decision to refuse to conduct an internal review, claiming that this amounted to a contravention of Article 9(3) of the Århus Convention. Article 9(3) stipulates in essence that contracting parties grant members of the public access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities<sup>67</sup> which contravene provisions of the environmental law of the contracting party. The General Court issued its judgments in 2012,<sup>68</sup> finding in favour of the plaintiffs. It annulled the Commission’s decisions to refuse to undertake a review, holding that the requirement of individual scope under Article 10(1) of the Århus Regulation contravened the requirements contained in Article 9(3) of the Århus Convention, as ratified by the Union.

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<sup>61</sup> Case T-18/10 *Inuit Tapiriit Kanatami*, op cit. FN58.

<sup>62</sup> Case C-583/11P *Inuit Tapiriit Kanatami and Others*, op cit. FN58.

<sup>63</sup> Para.73 of judgment, *ibid*.

<sup>64</sup> Judgments of the General Court in Case T-396/09 *VerenigingMilieudefensie, Stichting Stop Luchtverontreiniging Utrecht v Commission*, judgment 14.6.2012 and in Case T-338/08 *Stichting en Milieu & Pesticide Action Network Europe v Commission* together with the judgment of the Court of justice of the EU on appeal in Joined Cases Case C-401-403/12P *Council, EP and Commission v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, judgment of 13.1.2015 (available for inspection on CJEU’s curia website: [www.curia.eu](http://www.curia.eu)).

<sup>65</sup> As set out in Art.11 of the Århus Regulation 1367/06 op cit FN40.

<sup>66</sup> Art.2(1)(g) *ibid*.

<sup>67</sup> ‘Public authority’ is defined in Art.2(2)(d) of the Århus Convention as including the institutions of any regional economic organisation party to the international agreement.

<sup>68</sup> Judgments of the General Court in Case T-396/09 and Case C-338/08 op cit FN63.

However, on 13 January 2015 the General Court's decision was overruled by the CJEU on appeal. The CJEU held that the EU's ratification of the Århus Convention did not lead in this instance to the violation of Article 10(1) of the Århus Regulation. The CJEU noted that it was already established in its jurisprudence that Article 9(3) of the Convention did not have direct effects within the EU legal order. Moreover, whilst the CJEU conceded that it had held previously in certain cases<sup>69</sup> that that EU secondary legislation adopted to implement an international agreement should be construed in the light of the rules of the international agreement, in this particular instance that strict review approach was not warranted given that notably Article 10(1) of the Århus Regulation does not make specific reference to the Convention, confer a specific Convention right on individuals nor does it implement specific detailed obligations contained in an international agreement. The CJEU noted with regard to the latter point that Article 9(3) of the Convention gives contracting parties broad discretion in determining the rules concerning administrative or judicial procedures.

As a result of the CJEU's judgment it would appear that opportunities for members of the public to seek review of EU acts adopted in contravention of Union law, already very restricted, have been curtailed yet further. Unless a person is able to demonstrate that they are individually affected by the contested act, it appears from the CJEU appeal ruling that they have no standing under the Århus Regulation to require the decision-making body of the EU to undertake an internal review of its measure. This latest EU judicial ruling would appear to set the Union on collision course with the Århus Convention's Compliance Committee, which is set to complete its appraisal of the ClientEarth complaint to it of EU rules on access to environmental justice at some point. However, even if the Compliance Committee were to declare the EU in non-compliance with third pillar obligations of the Århus Convention, it is questionable what impact such a finding might have. As Macrory points out, the Committee does not have any specific sanctioning powers.<sup>70</sup> Under the Convention, the Meeting of the Parties (MOP) may decide on appropriate measures to bring about compliance, including the provision of advice and assistance and/or the adoption of recommendations.<sup>71</sup> In sum, the enforcement tools at the disposal of the Århus authorities are relatively soft, namely adverse publicity as well as possible pressure exerted by contracting parties. In addition, findings and recommendations from the Compliance Committee or MOP have, formally speaking, no legal force within the EU legal order. Accordingly, unless the EU member states decide to make further treaty changes to Article 263 TFEU or the CJEU elects unilaterally to change its interpretation of the treaty article's *locus standi* provisions, neither of which appears likely to occur, the EU's legal position on access to justice in respect of Union level decisions is set to remain in its current restrictive state.

### 2.2.2 Resource factors

Over and above the implementation difficulties experienced by the EU in relation to Århus's third pillar, it is important to take account also of the ultimately finite impact that civil society participation can bring to bear on the issue of non-compliance. Significant resource challenges and limitations confront private individuals and organisations seeking to take up a law enforcement role of a financial, legal and technical nature that should not be underestimated. Financial limitations include, in particular, factors such as legal costs<sup>72</sup> and

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<sup>69</sup> Such as CJEU judgments in Case 70/87 *Fediol* [1989] ECR 1781 and Case C-69/89 *Nakajima* [1991] ECR 2069.

<sup>70</sup> Macrory R, European Court backs down on Aarhus ruling *ENDS Report* (March 2015) Issue 481 at p24.

<sup>71</sup> Decision I/7 *Review of Compliance* adopted by the Meeting of the Parties, Lucca, Italy (2002).

<sup>72</sup> One example of this problem is the issue of cross-undertaking in damages in the context of judicial review proceedings in England and Wales. Where an applicant seeks an interim injunction preventing further action pending final judgment, they are required to provide an undertaking in damages covering any loss of profits to

limited staff resources available to be allocated to assist with enforcement litigation. Legal barriers include notably a lack of investigatory powers for private persons for the purpose of securing evidence of breaches of law. Technical limits include difficulties in overcoming scientific knowledge barriers and equipment challenges for the purpose of gleaning sufficient evidence to underpin legal action. These factors may serve as significant constraints as to the extent to which NGEOs are able and/or willing to engage in public interest environmental litigation.<sup>73</sup>

### 2.3 Competent authorities and law enforcement

The third component of the Union's framework on enforcement of EU environmental law, namely that relating to the role of competent authorities, constitutes arguably the most important aspect of the Union's effort in enhancing the state of implementation of EU environmental law. The role of competent authorities, specifically public authorities charged with responsibility for overseeing the correct implementation of environmental law at EU member state level, cannot be underestimated. They play a crucial part in law enforcement, particularly in deterring, detecting and rectifying breaches of environmental law as well as holding perpetrators to account. They are invariably vested with substantially greater powers and resources than either the European Commission or civil society for the purposes of overseeing compliance. However, studies over the years (such as those carried out or sponsored by either European Commission or the IMPEL network<sup>74</sup>), have noted that the quality and effectiveness of national competent authorities varies greatly in the environmental sector. Undoubtedly weaknesses in competent authority structures, strategy and resourcing have served to undermine efforts to ensure that EU environmental obligations are complied with on the ground.

From its inception the EU has always had an expressly recognised interest and responsibility for ensuring that member states take requisite measures to ensure proper application of Union law. This is underscored by the so-called 'good faith' clause enshrined within the EU treaty framework contained in Article 4(3) TEU, which places a general legal duty on member states to take active steps to ensure adhere to EU obligations as well as engage in sincere co-operation with the Union for this purpose.<sup>75</sup> The CJEU has held that a number of implicit obligations incumbent on member states (including their competent authorities) relevant to law enforcement flow from Article 4(3) including: the duty to proceed with same degree of

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be forfeited in the event of the applicant losing the case. This may involve a considerable sum, in particular if the case concerns a dispute over proposed major development projects. This can effectively price NGEOs out of this type of remedy as exemplified in the litigation over the development of thermal oxide nuclear processing at Sellafield as well as a port development on Lappel Bank mudflats in Sheerness (see *R v HMIP ex parte Greenpeace* [1994] 1 WLR 570 and Case C-44/95 *R v Secretary of State for the Environment, ex parte RSPB (Lappel Bank)* [1996] ECR I-3805).

<sup>73</sup> For an analysis of key challenges confronting private entities considering engaging in public interest environmental litigants, see eg. Ch10 of Bell S/McGillivray D/Pedersen O, *Environmental Law* 8<sup>th</sup> ed (2013 Oxford) at pp336-353.

<sup>74</sup> See eg. the 2011 COWI and 2015 IMPEL reports on implementation of EU environmental law cited in FN13-14.

<sup>75</sup> Art.4(3) TEU states:

“Pursuant to the principle of sincere co-operation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”



vigilance in detecting breaches of EU law as with national law<sup>76</sup>; the duty to ensure that EU infringements are penalised with effective, proportionate and dissuasive sanctions<sup>77</sup>; and the duty of due diligence to review decision-making so as to ensure conformity with EU law.<sup>78</sup> For many years, though, the question of EU involvement in setting minimum requirements for national competent authorities in the environmental sector remained extremely politically sensitive to the member states. The introduction of the subsidiarity principle within the EU treaty framework in the 1990s by virtue of the Maastricht Treaty, currently enshrined in Article 5(3) TEU,<sup>79</sup> underpinned several member states assumptions that the organisation of competent authority structures and operations should be considered to remain an essentially national preserve.

By the early 2000s, however, the political climate had evolved sufficiently so as to allow the Union to begin to develop an emerging legal framework providing for certain minimum requirements for competent authorities regarding enforcement of EU environmental law, both in relation to the aspect of sanctions in respect of non-compliance as well as in the field of environmental inspections. With respect to the issue of sanctions, two EU legislative instruments stand out in this regard, namely the 2004 EU Environmental Liability Directive (ELD)<sup>80</sup> and the 2008 EU Environmental Crimes Directive (ECD).<sup>81</sup> The ELD obliges member states to ensure that their national competent authorities take steps to hold operators account for instances of significant environmental damage and oversee remediation of damaged sites. The ECD obliges member states to penalise serious breaches of EU environmental law through the use of effective, proportionate and dissuasive criminal sanctions. Both the ELD and ECD have been subject to substantial discussion elsewhere<sup>82</sup> and, for reasons of space, will not be considered in any detail for the purposes of this paper.

As far as the area of environmental inspections is concerned the EU has also passed a range of general and specific measures stipulating minimum requirements for competent authorities. The EU's involvement and increasing interest in the area of environmental inspections is both relatively recent and still emerging. There have been long-standing concerns about the effectiveness of a number of environmental inspectorate systems in several member states. Various studies (such as those sponsored by the European

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<sup>76</sup> See eg. Case C-68/88 *Commission v Greece* [1989] ECR 2965 (esp. paras.23-24 of judgment).

<sup>77</sup> See eg. Case C-354/99 *Commission v Ireland* [2001] ECR I-7657 (at para. of 46 judgment).

<sup>78</sup> Case C-72/95 *Aannemersbedrijf P K Kraaijeveld BV* [1996] ECR I-5403.

<sup>79</sup> Art.5(3) TEU stipulates:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National parliaments ensure compliance with principle of subsidiarity in accordance with the procedure set out in that Protocol.”

<sup>80</sup> Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L143/56).

<sup>81</sup> Directive 2008/99 on the protection of the environment through criminal law (OJ 2008 L328/28).

<sup>82</sup> On the ELD see for example: Ch12 of Hedemann-Robinson (2015), op cit FN26; Betlem, G/Brans, E, (eds) *Environmental Liability in the EU: The 2004 Directive compared with US and Member State Law* (2008, London, Cameron May); Wilde, M, *Civil Liability for Environmental Damage: Comparative Analysis of Law and Policy in Europe and the US* 2<sup>nd</sup> edn (2013, Wolters Kluwer). On the ECD see for example: Ch13 of Hedemann-Robinson (2015), op cit FN26; Cardwell, P/ French, D/Hall, M, ‘Tackling Environmental Crime in the EU: The Case of the Missing Victim?’ (2011) 1 *Env Liability* 35; Hedemann-Robinson, M, ‘The Emergence of European Union Environmental Criminal Law: A Quest for Solid Foundations: Parts I and II’ (2008) 16(3) *Environmental Liability* 71 and 16(4) *Environmental Liability* 111.

Commission<sup>83</sup> or by undertaken by IMPEL<sup>84</sup>) have revealed and/or confirmed widely differing types and quality of environmental inspection systems across member states. Differences are often marked in terms of resourcing, number of agencies involved as well as supervision strategies employed (eg. quantitative /qualitative, deterrence-based/educative-based). Environmental inspection is obviously a key element in the law enforcement toolbox, not least given its preventative dimension in assisting in efforts to minimise instances of non-compliance arising.

Owing to political resistance and sensitivities on the part of several EU member states, EU engagement in the subject of inspections had proceeded rather tentatively for a number of years. However, subsequent to a 1996 Commission proposal<sup>85</sup> that common guidelines be developed for national inspectorate systems, in a 1997 resolution<sup>86</sup> the Council of the EU invited the Commission to draft guidelines on the basis of work carried out by IMPEL. This engagement ultimately culminated in 2001 with the adoption of a non-binding instrument on national environmental inspection systems, namely Recommendation 2001/331<sup>87</sup> providing for minimum criteria for environmental inspections (RMCEI) under the aegis of the Union's Sixth Environment Action Programme<sup>88</sup> (EAP6) (2001-2012). Still in force, the aim of the RMCEI is to improve the level of effectiveness of member state inspectorate systems for both environmental protection reasons as well as reasons concerned with distortion of competition<sup>89</sup> within the single market. The personal scope of the RMCEI is limited to covering installations whose air emissions, water discharges and/or waste disposal or recovery activities are subject to authorisation, permit or licensing requirements under EU law.<sup>90</sup> Essentially, this concerns installations subject to integrated pollution prevention and control requirements, now regulated primarily by the Industrial Emissions Directive 2010/75.<sup>91</sup> The recommendation stipulates that member states should observe a range of minimum criteria regarding the planning of inspections,<sup>92</sup> organisation of routine and non-routine site visits,<sup>93</sup> investigations into suspected serious breaches,<sup>94</sup> as well as filing reports on and evaluating next steps with respect to site visits.<sup>95</sup> In essence, the RMCEI constituted

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<sup>83</sup> See eg. COWI/ECORYS/CE *Impact assessment study into possible options for revising Recommendation 2001/331 providing for minimum criteria for environmental inspections - Final Report for the European Commission* (2011) (ENV.G.1/FRA/2006/0073); IEEP/BIOIS/ECOLOGIC, *Study on inspection requirements for waste shipments – Final Report for the European Commission* (ENV G.4/FRA/2007/0067).

<sup>84</sup> See eg. 2003 report of the IMPEL Secretariat 'Short overview of the organisation of inspection in the EU member states, Norway and acceding and candidate countries'. See also IMPEL reports on inspections regarding waste shipments: Seaport Projects I-II (2003-6), Verification of Waste Destinations Projects I (2003-6) and Enforcement Actions Projects I-III (2008-12). An overview is provided for on the IMPEL website at: <http://impel.eu/cluster-2/>

<sup>85</sup> COM(96)500 Commission Communication *Implementing Community Environmental Law*, 22.10.1996.

<sup>86</sup> Council Resolution of 7 October 1997 on the drafting, implementation and enforcement of Community environmental law (OJ 1997 C321/1).

<sup>87</sup> Recommendation 2001/331 providing for minimum criteria of environmental inspections in the member states (OJ 2001 L118/41).

<sup>88</sup> Decision 1600/2002 (OJ 2002 L242/1).

<sup>89</sup> Namely, to ensure that market operators are subject to commensurate levels of scrutiny and accompanying costs for the purpose of EU environmental law compliance irrespective of their location within the Union.

<sup>90</sup> Paragraph II(1)(a) RMCEI.

<sup>91</sup> Directive 2010/75 on industrial emissions (integrated pollution prevention and control) (recast) (OJ 2010 L334/17) which has succeeded the earlier IPPC legislation, namely former IPPC Directive 96/61 (OJ 1996 L257/26) as consolidated by Directive 2008/1 (OJ 2008 L24/8).

<sup>92</sup> Paragraph IV RMCEI.

<sup>93</sup> Paragraph V RMCEI.

<sup>94</sup> Paragraph VII RMCEI.

<sup>95</sup> Paragraph VI RMCEI.

an important milestone for EU policy on environmental inspections, in establishing some core benchmarks for national inspectorate systems.

In 2007 the Commission undertook a review<sup>96</sup> of the effectiveness of the RMCEI and a number of significant shortcomings were identified. Several member states had failed to implement its requirements by the 2002 deadline set in the instrument.<sup>97</sup> The Commission reported that implementation of the instrument was unclear or partially complete in most member states, with only five countries<sup>98</sup> assessed as having reached a high level of implementation.<sup>99</sup> The Commission also found that the RMCEI had been interpreted differently between member states so as to create disparities over the types of installations covered and also that the material scope of the instrument was too narrow, excluding a range of activities and sectors with significant impacts on the environment subject to EU legislation (such as waste shipments, protected habitat sites, wildlife trafficking and chemical and hazardous substance use). Moreover, various terms in the RMCEI had been interpreted differently by member states with significant consequences for implementation. The Commission initially decided to aim for a revision of the Recommendation (thereby rejecting use of a legally binding measure) coupled with steps to introduce targeted binding minimum inspection standards through sectoral legislation.

In parallel with initially tentative steps to revise the RMCEI, the EU has first gradually, then steadily, built up a range of sectoral legislative provision in relation to minimum standards on environmental inspections carried out by national competent authorities. The following environmental sectors now contain certain minimum inspection obligations under EU legislation: industrial emissions,<sup>100</sup> major accident hazards involving dangerous substances,<sup>101</sup> waste management,<sup>102</sup> ozone depleting substance management,<sup>103</sup> geological storage of carbon,<sup>104</sup> scientific experimentation on animals,<sup>105</sup> the civil nuclear industry<sup>106</sup> as well as the common fisheries policy (CFP).<sup>107</sup> The EU legislative provisions on environmental inspections vary in terms of detail and stringency. This is partly as a tailoring according to the perceived requirements for an individual sector and partly as a result of when individual legislative instruments were adopted. The pursuit of a 'sectoral track' approach to inspection regulation has been followed for essentially pragmatic reasons. Particular environmental

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<sup>96</sup> SEC(2007)1493 *Commission Report on implementation of Recommendation 2001/331 providing for minimum criteria for environmental inspections*, 14.11.2007.

<sup>97</sup> Paragraph X RMCEI.

<sup>98</sup> Belgium, Germany, Ireland, the Netherlands, Sweden and the UK.

<sup>99</sup> See p 20 of SEC(2007)1493 *op cit.* FN95.

<sup>100</sup> Directive 2010/75 on industrial emissions (integrated pollution prevention and control) (recast) (OJ 2010 L334/17).

<sup>101</sup> Directive 2012/18 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Directive 96/82 (OJ 2012 L197/1) ('Seveso III').

<sup>102</sup> Directive 2008/98 on waste and repealing certain Directives (OJ 2008 L312/3), Directive 1999/31 on the landfill of waste (OJ 1999 L182/1), Directive 2006/21 on the management of waste from extractive industries and amending Directive 2004/35 (OJ 2006 L102/15), Directive 2012/19 on waste electrical and electronic equipment (WEEE) (recast) (OJ 2012 L197/38) and Regulation 660/2014 amending Regulation 1013/2006 on shipments of waste (OJ 2014 L189/135).

<sup>103</sup> Regulation 1005/2009 on substances that deplete the ozone layer (recast) (OJ 2009 L286/1).

<sup>104</sup> Directive 2009/31 on the geological storage of carbon dioxide and amending various Directives (OJ 2009 L140/114).

<sup>105</sup> Directive 2010/63 on the protection of animals used for scientific purposes (OJ 2010 L276/33).

<sup>106</sup> Art.35 EAEC (Euratom Treaty).

<sup>107</sup> Regulation 768/2005 establishing a Community Fisheries Control Agency and amending Regulation 2847/93 (OJ 2005 L347) in conjunction with Regulation 1224/2009 establishing a Community control system for ensuring compliance with the rules of the CFP (OJ 2009 L343).

sectors have been prioritised for EU legislative attention according to the perceived level of environmental risk of activities and/or overall record amongst member states on implementation. This approach has led to a great variation in terms of range, specificity and intensity of inspection obligation across sectors, sometimes difficult to justify.

With the adoption of its Seventh Environment Action Programme (EAP7) (2013-2020)<sup>108</sup> the EU's position on the issue of environmental inspections has become more ambitious.<sup>109</sup> Notably, an express commitment has been enshrined within EAP7 Priority Objective 4<sup>110</sup> on developing legally binding instrumentation on minimum inspection standards as well as the promotion of support capacity at EU level. Specifically, the material provision regarding the development of existing EU policy regarding inspections and surveillance is paragraph 65(iii) of the Annex to the Decision adopting the EAP7, which stipulates that the Union's environment policy programme requires:

‘extending binding criteria for effective Member State inspections and surveillance to the wider body of Union environmental law, and further developing inspection support capacity at Union level, drawing on existing structures, backed up by support for networks of professionals such as IMPEL, and by the reinforcement of peer reviews and best practice sharing, with a view to increasing the efficiency and effectiveness of inspections’.

This provision within EAP7 has accordingly signalled the Union's commitment to the development of two principal dimensions of future EU engagement in the area of environmental inspections. Specifically, it has promised not only intervention to enhance the inspection systems of national competent authorities but also complementary development of EU supranational institutional inspection capability. To date, though, the Commission has only begun to focus on the first of the two dimensions, namely at the level of national inspectorates. Following on from a 2011 impact assessment study considering options for revision to the RMCEI<sup>111</sup> as well as a stakeholder consultation which delivered strong support for strengthening the existing EU legal framework,<sup>112</sup> the Commission's Environment Directorate-General (DG ENV) has signalled its view in favour of recommending a horizontal framework directive be proposed to promote coherence to the existing state of EU legislation on environmental inspections.<sup>113</sup> The initiative would accordingly be intended to be legally binding, in contrast to the RMCEI and would cover the

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<sup>108</sup> Decision 1386/2013 on a General Union Environment Action Programme to 2020 - *Living well, within the limits of our planet* (OJ 2013 L354/171).

<sup>109</sup> This assurance followed up an earlier 2012 Commission Communication concerning enhancing implementation of Union environmental measures (COM(2012)95), in which the Commission signalled its intention to push for a broadening out and upgrading of the existing EU legislative framework on inspections and surveillance.

<sup>110</sup> Priority Objective 4 (*To maximise the benefits of Union environmental legislation by improving implementation*) within Dec. 1386/2013, *op cit.* FN116.

<sup>111</sup> COWI/ECORYS/CE *Impact assessment study into possible options for revising Recommendation 2001/331 providing for minimum criteria for environmental inspections - Final Report for the European Commission* (2011) (ENV.G.1/FRA/2006/0073). Available for inspection on the Commission's DG ENV website at: <http://ec.europa.eu/environment/legal/law/inspections.htm>

<sup>112</sup> The details of the stakeholder consultation process and findings are available for inspection on the Commission's DG ENV website at: <http://ec.europa.eu/environment/legal/law/inspections.htm>

<sup>113</sup> These observations are based upon an Outline Paper and Explanatory Paper presented by the European Commission's DG ENV at a joint workshop between the Commission and IMPEL in Rome in December 2014. The papers presented to the workshop area available for inspection at: <http://ec.europa.eu/environment/legal/law/inspections.htm>

broad span of EU existing environmental legislation. The draft legislative initiative would be based on a compliance assurance approach, which would entail member states utilising the tool of risk assessment for the purposes of identifying strategically principal non-compliance problems, before applying various risk mitigation techniques (compliance promotion, monitoring and enforcement) in order to enhance levels of adherence to EU environmental legislation. However, it may be some time yet before the Commission feels ready to approve the launch of a formal draft initiative. Notably, it is not clear when (or indeed if) the current Commission college will be receptive to the adoption of a formal legislative proposal for a directive. The issue of enhancing of implementation of EU environmental law, including the prescient issues environmental inspections and access to environmental justice identified in EAP7, does not feature amongst list of priorities identified in the European Commission President's mission letter<sup>114</sup> of November 2014 to Karmenu Vella, Commissioner for Environment, Maritime Affairs and Fisheries, for the current Commission's five year tenure to 2020. The new administrative structuring within the Commission organised by the President means that, in order for any new initiative to be (potentially) included within the Commission's work programme,<sup>115</sup> this has to be first recommended by one of the Commission Vice Presidents on the basis that it is deemed to fit within the Political Guidelines document, presented by the Commission President to the European Parliament in July 2014.<sup>116</sup> Given that environmental policy, other than in respect to climate change, barely features in the Political Guidelines,<sup>117</sup> it may well prove in practice a tough task for the Environment Directorate-General to persuade the Commission hierarchy to adopt a legislative proposal on environmental inspections imminently.

### III Concluding remarks

Without doubt, in certain respects the European Union has travelled some distance in terms of developing its framework for overseeing the due application of its rules on environmental protection. It is no longer accurate to depict the Union relying solely upon the infringement procedure as a legal enforcement tool. For the EU's accession to the Århus Convention as well as its support for national authority networking initiatives such as IMPEL have led to the development of additional Union-level mechanisms intended to underpin EU environmental law enforcement, specifically in relation to the promotion of enhanced access to environmental justice for individuals as well in relation to improved standards and controls concerning environmental inspections. Moreover, the infringement procedure itself has been subject to some relatively recent improvements by virtue of the 2007 Lisbon Treaty which have, to some extent at least, sharpened up its deterrent edge. Notably, this includes the

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<sup>114</sup> See FN7.

<sup>115</sup> The Commission's Work Programme for 2015 is set out in COM(2014)910 Commission Communication *Commission Work Programme 2015 – A New Start*, 16.12.2014. Available for inspection at: [http://ec.europa.eu/atwork/key-documents/index\\_en.htm](http://ec.europa.eu/atwork/key-documents/index_en.htm).

<sup>116</sup> Juncker J-C, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change: Political Guidelines for the next European Commission* (July 2014). Available for inspection at: [http://ec.europa.eu/priorities/docs/pg\\_en.pdf](http://ec.europa.eu/priorities/docs/pg_en.pdf)

<sup>117</sup> The Political Guidelines identify 10 priority policy areas for the Commission college appointed for the period 2015-2020, which in broad terms may be highlighted as: jobs, growth and investment; digitalisation of the single market; energy union in conjunction with climate change policy; strengthening of internal market; deepening of economic and monetary union; attainment of a free trade agreement with the US; deepening the area of justice in conjunction with fundamental rights; development of a new migration policy; strengthening of Union external relations and strengthening of democratic structures of EU decision-making.

introduction of the possibility of fines being imposed in first round proceedings concerning non-transposition cases.

Nevertheless, the Union has a considerable way to go yet before it may be in a position to claim seriously that it has established a legal framework suitable to ensure effective supervision of the proper implementation and enforcement of EU environmental protection rules. Notably, significant gaps exist in terms of securing access to environmental justice and the Union's intervention in the area of inspections is still at a relatively early stage with relatively weak and/or patchy legal support structures. Moreover, in recent years the Commission has reigned in considerably its role in intervening in suspected cases of misapplication of EU environmental legislation through infringement proceedings. Until there are significant improvements made to the existing EU legal framework on environmental law enforcement, it is most likely to remain, in contrast to the current Commission President's assessment, underdeveloped, incomplete as well as immature. And that is important in terms of having a bearing on the state of implementation of EU environmental legislation across the member states.