Enforcement of European Union Environmental Law: An Investigation into Developments and Challenges concerning the Union's Legal Framework for addressing Non-Compliance

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Abstract

This thesis brings together a selected sample of my sole-authored legal research publications completed between 2008-2016 and published during the period whilst I held the position of Senior Lecturer in Law at Kent Law School, in the University of Kent (UK). The published works focus on a common subject area: the evolving provisions, principles and institutional structures underpinning the legal framework of the European Union (EU) relevant to the enforcement of EU environmental law. Much of the original inspiration and motivation to undertake research in this legal area may be traced back to my experience working as an official (legal administrator) within the European Commission's Environment Directorate-General of the EU between 2001-2003, during which time I engaged in a range of duties connected directly or indirectly with law and policy concerning the enforcement of EU environmental legislation.

The principal aim of this thesis is to provide an overview of the legal analysis and appraisal undertaken by my selected published works on EU law concerning the enforcement of EU environmental protection legislation, drawing out their key findings and ideas and identifying how they complement one another as a collective body of research. The selection of published works chosen for this thesis includes a total of seven pieces, specifically six journal articles and one monograph. This research aims to contribute to a better and more complete understanding of the scope, contents and impact of the EU's legal framework relevant to the enforcement of EU environmental law, whilst also providing critical appraisal and insights into possibilities for enhancing its effectiveness.

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List of Abbreviations

CFP	Common Fisheries Policy
CITES	1973 Washington Convention on International Trade in Endangered Species of Wild Flora and Fauna
CP	contracting party
CJEU	Court of Justice of the European Union
EAP7	Seventh Environment Action Programme of the EU (2013-2020)
EAEC	European Atomic Energy Community Treaty (Euratom)
EEA	European Environment Agency
EIR	Environmental Implementation Review
EU	European Union
IEA	international environmental agreement
IEL	International Environmental Law
IMPEL	EU Network for the Implementation of Environmental Law.
NGEO	non-governmental environmental organisation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNEP	United Nations Environment Programme

Supporting Statement

A. Introduction

A.1 Overview

This thesis brings together a selected sample of my sole-authored legal research publications completed between 2008-2016 and published during the period whilst I held the position of Senior Lecturer in Law at Kent Law School, in the University of Kent (UK). The published works focus on a common subject area: the evolving provisions, principles and institutional structures underpinning the legal framework of the European Union (EU) relevant to the enforcement of EU environmental law. Much of the original inspiration and motivation to undertake research in this legal area may be traced back to my experience working as an official (legal administrator) within the European Commission's Environment Directorate-General of the EU between 2001-2003, during which time I engaged in a range of duties connected directly or indirectly with law and policy concerning the enforcement of EU environmental legislation.

The EU's first tentative steps towards establishing a political interest in the environment began in the early 1970s with the adoption of its first programme of political action on the environment[1] and initial pieces of environmental protection legislation.[2]Subsequently, environmental protection matters developed to become one of the most important areas of Union policy activity. By virtue of a number of amendments made to the foundational treaty framework of the EU dating back to the Single European Act 1986,[3] the Union's constitutional fabric has been adjusted so as to ensure that environmental protection is officially included as one of its common

[1] In 1973 the EU adopted its First Environment Action Programme (OJ 1973 C112/1).
[2] The first genuine environmental legislative instruments adopted by the EU were in 1975 in the form of the former Directive 75/439 on waste oils (OJ 1975 L194/23) and Directive 75/442 on waste (OJ 1975 L194/26).
[3]OJ 1987 L169.

policy fields.[4] EU treaty provisions now stipulate that environmental protection requirements must be integrated into the definition and implementation of all Union policies and activities,[5]and that the Union 'shall work for the sustainable development of Europe' as well as a 'high level of protection and improvement of the quality of the environment'.[6] These commitments have also been entrenched within the fabric of the EU's Charter of Fundamental Rights, adopted in 2000 and made legally binding since December 2009 by virtue of the 2007 Lisbon Treaty.[7]Since the inception of the EU's environmental policy, the Union has adopted several hundred pieces of legislation concerned with environmental protection covering several sectors of policy including *inter alia* water, waste management, nature protection, chemicals and air quality.[8] Both the material range and depth of this legislative intervention has had a profound impact on the Union's development as a regional international organisation, including that of its constituent member states. It is estimated, for example, by the European Commission that some 80% of environmental legislation adopted by EU member states derives from Union level obligations.[9]

Notwithstanding the elevation of importance attached to environmental protection by the EU, the Union continues to face considerable challenges to ensure that its binding environmental policy decisions are duly implemented by the EU member states within their respective national territories. For instance, in 2011 an environmental consultancy report assessed the annual cost to member states of non-implementation of the Union's environmental legislative *acquis* at €50bn.[10]Moreover, the environmental sector has for several years consistently been

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[4] See Arts.191-193 of the Treaty on the Functioning of the EU (TFEU). (For a consolidated version of the TFEU see the EU's Official Journal: (OJ 2016 C202).
[5] See Art. 11TFEU.
[6] See Art. 3(3) of the Treaty on European Union (TEU) as amended. (Consolidated version of TEU: OJ 2016 C202).
[7] Art.37 of the EU Charter of Fundamental Rights (OJ 2016 C202).
[8] The European Environment Agency has recently estimated that in total some 500 pieces of EU secondary environmental legislative and other regulatory instruments have been adopted by the Union: see *The European Environment – State and Outlook 2015: Synthesis Report* (EEA, Copenhagen 2015) at p 21 available at: http://www.eea.europa.eu/soer
[9]See *Management Plan 2013*, Environmental Directorate-General (DG ENV) of the European Commission (14.1.2013) at p17 (ARES(2013)416906) available at: http://ec.europa.eu/dgs/environment/pdf/management_plan_2013.pdf
[10] 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

ranked as a common policy area featuring a sizeable number of complaints from the public as well as infringement cases pursued by the European Commission against EU member states for breaches of EU environmental law.[11] In order to meet that challenge, the EU has established and developed over time a substantial body of rules and supranational institutional supervisory procedures intended to assist with the task of ensuring that its EU environmental rules are adhered to at national level.

The centrepiece of the published work supporting this thesis is the second edition of my monograph *Enforcement of EU Environmental Law: Legal Issues and Challenges* published by Routledge in 2015 (the first edition having been published in 2006). The book, comprising 350,000 words across 16 chapters, contains a detailed and comprehensive analysis of the various legal and institutional mechanisms developed at EU level concerned with EU environmental law enforcement. In analysing the key legal principles and mechanisms that together constitute the body of EU law concerned with enforcement of EU environmental legislation, it contains three principal parts:

- the infringement procedures contained in Articles 258 and 260 of the Treaty on the Functioning of the EU (TFEU) enabling the European Commission to take legal action against EU member states over infractions of EU environmental law;
- the body of EU rules assisting private persons in taking an active role to enforce EU environmental law; and
- the corpus of Union law either stipulating requirements for national authorities of the EU member states or assisting them in connection with fulfilment of their responsibilities of ensuring proper implementation and application of EU environmental statutory obligations.

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[11] In its latest annual monitoring report on the state of implementation of EU Law covering the year 2015 the European Commission records that 20% of all open infringement cases (276) involved the environment sector, the largest number of any EU common policy area. In addition, 17% of all new infringement cases opened in 2015 (126) concerned the environment, representing the third largest number amongst EU policy sectors behind financial services and transport, and 10.5% of 3,450 complaints from the public filed with the Commission concerned alleged breaches of EU environmental law (363) representing the fifth largest number amongst EU policy sectors behind employment and social affairs (612), internal market (552), justice and consumers (524) as well as taxation and customs union (423). See (COM(2016)463) *European Commission Report Monitoring the application of European Union law 2015 Annual Report*, 15.7.2016 (available at: http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_33/com_2016_463_en.pdf)

The comprehensive nature of the monograph's analysis, in exploring and appraising what it terms the 'tripartite structure' of EU law's involvement with law enforcement in relation to its environmental policy area, constitutes a unique approach to the investigation of this legal subject area. The principal contributions to the development of legal academic research made by the book and journal articles included in the list of published works supporting this thesis are summarised in section B.4 below.

The publications other than the monograph supporting the application concern enforcement of EU environmental law and complement the research work undertaken in the book by either focusing on particular legal issues or developments in more depth or considering niche topics not directly addressed in the monograph. The distinct but complementary contribution of each publication will be made apparent in Section B below, which provides a summary of the research works and how they enhance our understanding of the various legal principles and mechanisms developed under the aegis of EU law for the purpose of enhancing the state of due and proper implementation and application of Union environmental protection statutory obligations.

This thesis is structured so as to be divided into three main sections, namely: Section A (Introduction), Section B (Commentary on Research) and Section C (Theoretical Context of Published Works). The remainder of this introductory section includes a list of the published works selected for this thesis. Section B, which constitutes the main body of the thesis, provides an overview and summary of the principal contents and findings of as well as contributions to research made by the selected published works. The publications are explored within a coherent thematic context, in order to underpin direct and indirect connections and complementarities between them and assist in outlining their appraisal of the developments made to and challenges confronting the Union's legal framework concerning the enforcement of EU environmental law. The final part of Section B draws together and reflects on the published works' principal findings. Section C places the published works within an overall theoretical context and framework, notably analysing how they relate to contemporary legal theoretical discourse on understanding the drivers underpinning statal compliance and non-compliance with international obligations.

A.2 Research and Publications List

Book

- Hedemann-Robinson M, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd edn, Routledge, 2015). ISBN 978-0-415-659959-8. Hardback 722pp.In total ca.350,000 words.
  http://www.routledge.com/books/details/9780415659598/
  For the purposes of this doctoral submission Chapter 5 is provided as a selected extract (Chapter 5 'Enforcement action brought by the European Commission (3): some critical reflections' – pp196-260). (Approx.20,300 words)

Selected Journal Articles(in chronological order)

- Hedemann-Robinson M, 'The Emergence of European Union Environmental Criminal Law: A Quest for Solid Foundations – Part I' (2008) 16(3) *Environmental Liability* 71-91 and 'The Emergence of European Union Environmental Criminal Law: A Quest for Solid Foundations – Part II' (2008) 16(4) *Environmental Liability* 111-136. ISSN 0966 2030. (Approx.30,000 words)

- Hedemann-Robinson M, 'Enforcement of EU Environmental Law and the Role of Interim Relief Measures' (2010) 19(5) *European Energy and Environmental Law* 102-114. ISSN 0966-1646. (Approx. 20,000 words)

- Hedemann-Robinson M, 'EU Enforcement of International Environmental Agreements: The Role of the European Commission' (2012) 21 *European Energy and Environmental Law* 2-30. ISSN 0966-1646.(Approx. 19,300 words). Also printed as part of an edited collection in Ch23 of Krämer L (ed), *Enforcement of Environmental Law* (E Elgar, 2016).

- Hedemann-Robinson M, 'EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 1' (2014) 23 *European Energy and Environmental Law* 102-114. ISSN 0966-1646 and 'EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? –Part 2' (2014) 23 *European Energy and Environmental Law* 151-170. ISSN 0966-1646.(Approx.26,000 words)

- Hedemann-Robinson M, 'Enforcement of EU Environmental Law: Taking Stock of the Evolving Legal Framework' (2015) 24(5) *European Energy and Environmental Law*115-129. ISSN 0966-1646.(Approx. 12,100 words)

- Hedemann-Robinson M, 'Environmental Inspections and the EU: Securing an Effective Role for a Supranational Union Legal Framework' (2016) *Transnational Environmental Law.* First View DOI http://dx.doi.org/10.1017/S2047102515000291 Published online: 04 March 2016, pp. 1-28. ISSN: 2047-1033 (Online).(Approx. 13,600 words)

B. Commentary on the Selected Published Works

This section provides a summary of the principal objectives, ideas and findings to be drawn from the published works selected for this thesis submission. Whilst all of the publications share a common objective of investigating and appraising the EU's legal framework concerning enforcement of Union environmental law, they differ in terms of range of coverage and depth of legal analysis. As mentioned earlier in Section A, the monograph on *Enforcement of EU Environmental Law: Legal Issues and Challenges* (hereafter referred to as the '*Enforcement* monograph') provides the principal basis and site of my research work in this field. It provides in a single volume a uniquely broad-ranging and substantial legal analysis into the principal elements of the Union's involvement in shaping and assisting with public and private law enforcement activity concerned with upholding norms adopted under the aegis of the EU's common environmental policy framework enshrined in Articles 191-193 TFEU. The other six selected published works focus on specific aspects or areas of EU environmental law enforcement that either receive only relatively brief or (for reasons of space) no appraisal within the *Enforcement* monograph. Collectively, the selected published works complement one another in providing a detailed and wide-ranging investigation into the ways in which EU law has evolved to establish a framework of rules and institutional procedures for the purpose of assisting with the task of ensuring that Union environmental rules are adhered to within member states as well as by EU institutions. The principal focus of my research concerns the former aspect, namely the Union's development of legal and institutional machinery to assist in ensuring that member state governments and authorities fulfil their responsibilities to see that the writ of EU environmental law is respected within their respective national territories. Addressing non-compliance by and within the EU member states constitutes the Union's main challenge in practice in terms of overseeing due application of its environmental protection rules.

In order to provide a coherent overview of the contributions made by the selected published works to the field of research investigated, in particular with a view to showing how they complement and relate to one another, this section is divided up into three parts. The structuring of this section broadly follows the tripartite analysis

I use in the *Enforcement* monograph as a means of exploring and appraising the legal terrain of this subject area. Accordingly, each part of this section focuses on a particular legal dimension to the EU's engagement with enforcement of its environmental rules. The first part (B.1) focuses on the role of the European Commission in monitoring and supervising compliance with EU environmental law by the Union's member states. The Commission's supervisory functions, which also include powers to bring legal proceedings against member states over failures to adhere to EU obligations, constitute traditionally the bedrock of EU involvement in law enforcement activity. The second part (B.2) analyses the more recent development of EU legal principles and statutory provisions endowing individuals with certain rights to be able to participate in law enforcement activity. This particular subsection is divided into two components, specifically focusing on private persons' rights to enforce EU environmental law within the national legal orders of the member states as well as against EU institutions and other bodies. The third part (B.3) considers the extent to which the EU has used legislative instrumentation in order to shape and steer the policing of EU environmental law by national (environmental) authorities. This particular dimension to EU level engagement with law enforcement work concerning environmental protection constitutes the most recent source of Union activity in the field. The section is completed with a final part (B.4) that seeks to draw out the principal findings and reflections underpinning the selected published works.

B.1 Role of the European Commission in Enforcing EU Environmental Law (Infringement Proceedings)

Part One of the *Enforcement* monograph (Chapters 2-5) focuses on the role of the European Commission in ensuring that EU environmental law is upheld by the Union's member states. Specifically, this part of the book explores the law and practice underpinning the operation of Articles 258-260 TFEU that empower the Commission (and EU member states) to take legal proceedings against member states suspected of breaching Union law, including its environmental protection norms. For several years during the early phase of the EU's development, these infringement proceedings constituted the bedrock of rules of Union law relevant to

the enforcement of EU environmental law. Until 1993, the EU treaty system provided for a single infringement procedure enabling the Commission to bring a defaulting member state before the Court of Justice of the EU whose rulings only had declaratory effect (now contained in Art.258 TFEU). Subsequently, certain treaty amendments made it possible for the Commission in certain circumstances to request the CJEU to impose financial penalties against infracting member states. Specifically, the 1992 Maastricht Treaty introduced the possibility for the Commission to bring infringement proceedings against member states failing to adhere to CJEU judgments and request the Court to impose a financial penalty in the form of a daily penalty payment and/or lump sum fine (so-called 'second round' proceedings as now set out in Art.260 TFEU). Furthermore, by virtue of the 2007 Lisbon Treaty the Commission became empowered to seek financial penalties from the CJEU in respect of a member state failing to notify measures transposing an EU legislative directive into national law (now set out in Art.260(3) TFEU). Whilst infringement proceedings remain a fundamental component of the legal matrix concerning EU environmental law enforcement, since the 1990s the Union has also begun to develop other forms of legal machinery to assist with ensuring that EU environmental obligations are adhered to at national level. These latter innovations are also explored in my research, as outlined in sections B.1.2-B.1.3 below.

Chapters 2-4A of the *Enforcement* monograph provide an in-depth legal analysis of the infringement procedures, including considering the evolution of their structure, legal procedural elements (including assessing of rights of defence and sanctions) in light of CJEU case law as well as their practical application (including examining European Commission case management systems and recent innovations such as EU Pilot[12]).In addition, as part of that analysis I also undertook some empirical research using the CJEU's case law database[13] to establish the average duration of the various procedural steps involved in bringing infringement litigation concerned with alleged non-compliance of EU environmental law. My findings confirm that, notwithstanding certain efforts on the part of the Commission and CJEU to

[12]For an overview of the current operation of the EU Pilot scheme see e.g. section IV.2 of (COM(2016)463) *European Commission Report Monitoring the application of European Union law 2015 Annual Report*, 15.7.2016.

[13] Specifically, this research was based on information gleaned from CJEU judgments delivered between 2010-2012 accessible from the CJEU's Info Curia case law database, accessible at: http://curia.europa.eu/jcms/jcms/j_6/en/

accelerate the administrative and judicial phases of infringement proceedings, overall the procedures remain lengthy affairs averaging 49 months for 'first round' infringement actions(i.e. those brought under Article 258 TFEU)[14] and 57 months for 'second round' infringement cases (i.e. those brought under Article 260 TFEU).This specific part of my research updated earlier work on the temporal dimension to infringement proceedings undertaken by myself and others.[15] Tables 1.1-1.3 located in the Appendix to this Supporting Statement provide an extract of the data used for the *Enforcement* monograph on the duration of prosecuting recent environmental infringement cases.[16]

Chapter 5 of the *Enforcement* monograph entitled 'Enforcement action brought by the European Commission (3): Some Critical Reflections' (and which is one of the selected published works included in this thesis) provides a critical appraisal of the infringement procedural system under Articles 258-260 TFEU. The chapter explores various structural and practical weaknesses and shortcomings of the proceedings, with a view to highlighting opportunities for their reform. Key structural aspects explored include notably: the lack of investigative powers available to the European Commission; undue length and rigidity of the infringement procedures; lack of their suitability to address urgent cases; potential conflicts of interest within the Commission; relatively modest level and restricted availability of financial sanctions (in contrast with the system and practice for imposing fines for breaches of EU competition law) as well as the restricted degree of accountability of the Commission in relation to its prosecutorial decision-making. Notable other problems and challenges analysed, including those of a more practical nature, include the relative lack of administrative and financial resources made available to the Commission for law enforcement case work (e.g. in terms of legal staff), its relatively recent decision

[14] My research found that the completion of first round proceedings differed according the type of infringement: 22 for non-communication cases (failure to notify transposition measures for an EU environmental directive), 63 months for non-conformity cases (instances where national legislation fails to be in accordance with the terms of EU environmental legislation) and 44 months for bad application cases (cases involving misapplication of EU environmental law within a member state). (See pages 67-69 of my *Enforcement* monograph).

[15] See e.g. Krämer, L, *EU Casebook on Environmental Law* (OUP 2002) at p464; Krämer, L, 'Statistics on environmental judgments by the EU Court of Justice' (2006) *JEL* 407 and Hedemann-Robinson, M, 'Article 228(2) EC and the Enforcement of EC Environmental Law: A Case of Environmental Justice Delayed and Denied? An analysis of recent developments' (2006) 15(11) *Eur. Energy and Env Law Rev* 312.

[16] The data is contained in tables contained in Chapter 3 'Enforcement action by the European Commission (1)' of the monograph.

in a 2008 Communication to prioritise infringement casework effectively limiting the range of cases that may be taken up. The chapter also contains statistical data on environmental infringement casework undertaken by the Commission over the period 2002-2013 that I compiled from examining the Commission's annual monitoring reports on the application of Union law. This data includes statistics on complaints from the public about EU environmental law infringements, the Commission's own information-sourcing on suspected breaches, numbers and types of environmental infringement actions and analysis of individual member state non-compliance. Several of the above points are also investigated and, where appropriate, updated in the first section of the article 'Enforcement of EU Environmental Law: Taking Stock of the Evolving Union Framework'.

Two of the other selected publications also concern the enforcement role of the European Commission, specifically focusing on particular aspects either only relatively briefly or not taken up in the *Enforcement* monograph. In 'Enforcement of EU Environmental Law and the Role of Interim Relief Measures' an analysis is provided of the extent to which the European Commission has been able to make use of infringement proceedings as a means of addressing violations of EU environmental law requiring particularly urgent intervention in order to prevent prospective potentially irreversible environmental damage. The article is divided into two principal parts. The first part provides an appraisal of the general EU legal framework concerning the availability of injunctive measures in conjunction with infringement proceedings. In particular, it draws out some of the key structural weaknesses underpinning Articles 258/260 TFEU that serve to make it challenging for the Commission to seek from the CJEU the imposition of interim measures requiring a defendant member state to order the cessation of actual or prospective conduct contrary to EU law actually or very likely leading to imminent serious environmental harm. These weaknesses include: the fact that EU law vests the CJEU and not the Commission with power to impose injunction orders; the requirement for the Commission to wait until completion of the administrative phase of the infringement procedure before it may apply to the CJEU for interim relief measures under Article 279 TFEU; the relatively narrow range of coverage of such measures and the unpredictable nature of the 'balance of interests' test used by the CJEU for assessing requests for interim measures. The second part analyses the extent to

which interim relief has emerged as a legal tool for the benefit of the Commission when challenging EU member states over alleged infringements of EU environmental law. It explores how, after a considerable number of years in which the Commission appeared to have abandoned attempts to apply for interim relief in the wake of its unsuccessful application in the *Leybucht* litigation[17] against Germany in the late 1980s, the Commission appears more recently to have revived its interest in this area, as evidenced by three successful interim relief applications it made to the CJEU in 2006, 2007 and 2008.[18]

In 'EU Enforcement of International Environmental Agreements: The Role of the European Commission' I appraise a particular aspect to the Commission's law enforcement role not addressed in the *Enforcement* monograph. Specifically the article explores to what extent, in law and practice, the Commission's powers under the aegis of the infringement procedures are relevant to the enforcement of international environmental agreements (IEAs) concluded by the Union against EU member states. Legal analysis of this area is complex and subject to a number of uncertainties, notably given a range of outstanding questions concerning the legal status and impact that IEAs have within the Union's legal order. On the one hand, the TFEU makes clear that as a matter of EU law international agreements concluded by the EU are binding both on the Union as well as member states.[19] This would suggest that agreements concluded by the Union falling within the scope of the common policy areas set out in the TFEU are to be treated as binding sources of EU law for the purposes of infringement action. This is a relatively straightforward proposition to accept in relation to those international agreements concluded in policy fields in respect of which the Union has been vested with exclusive competence to make decisions by the member states.[20]On the other hand, a number of questions arise over the jurisdictional reach of infringement proceedings in

[17] The *Leybucht* case: Case C-57/89R *Commission v Germany* [1989] ECR 2849

[18] Namely, the interim relief orders secured in the *Ligurian Bird Hunting* case (Case C-503/06R *Commission v Italy* [2006] ECR I-141 and [2007] ECR I-19), the *Rospuda River Valley* case (Case C-193/07R *Commission v Poland*, notably Court of Justice Presidential Orders of 18.4.2007 (ECLI:EU:C:2007:218) and 18.7.07 (ECLI:EU:C:2007:464)) and the *Maltese Bird Hunting* case (Case C-76/08R *Commission v Malta* [2008] ECR I-64). The case proceedings are available for inspection on the CJEU's website: www.curia.eu.int

[19] Art.216(2) TFEU.

[20] See e.g. Case 181/73 *Haegemann v Belgium* [1974] ECR 449 in which the CJEU confirmed that international agreements concluded by the Union under the auspices of its exclusive powers constitute integral parts of EU law.

relation to the enforcement of international agreements concluded in areas of policy competence shared between the Union and member states, including the environmental protection policy sector,[21] and where in these policy areas of 'mixity'[22] treaty practice invariably involves both the Union and its member states signing and ratifying the international agreements. For instance, is it legally possible for the European Commission to take legal action in order to ensure that certain obligations contained within an IEA it has concluded are adhered to by a member state, even though such obligations concern an environmental policy area not yet subject to internal EU legislative requirements? What are the effects of a declaration of competence appended by the Union to an IEA purporting to inform other contracting parties (CPs) that responsibility for fulfilment of the IEA's obligations by the EU is split between Union and its member states depending on the extent to which the Union has or has not adopted internal EU legislation addressing the same subject matter covered by the international accord's provisions? Is an IEA concluded by the Union enforceable against member states that have not yet ratified ('partial mixity' scenario)? May infringement procedures be invoked to ensure that an IEA is upheld, in respect of which the EU has already adopted internal legislative instrumentation and a common position on its membership of the international accord but where the IEA does not foresee international organisations as CPs so that the Union is represented externally only by its member states (so-called 'reverse mixity' scenario)? There is relatively little case law from the CJEU and a lack of academic research in this area, reflecting the European Commission's relatively recent interest in and infrequent use of infringement proceedings as a tool to enforce international agreements against EU member states.

These and other legal questions and issues are explored in the article, which is divided essentially into three main parts. The first part examines a range of key general legal principles and issues concerning the legal status of mixed agreements

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[21] See Art.4(2) (e) TFEU. See also Art.191(3) TFEU which stipulates that:
'Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.'

[22] The general term given for instances of policy competence shared between the EU and its member states. See e.g. O'Keeffe D/ Schermers H (eds), *Mixed Agreements* (Kluwer 1983); Koutrakos P/ Hillion C (eds) *Mixed Agreements Revisited – The EU and its member states in the world* (Hart 2010).

concluded by the EU (specifically IEAs) within the Union's legal order and the extent to which the Commission, in light existing case law of the CJEU,[23] may be able to use infringement proceedings as a means to enforce them against defaulting member states. The second part focuses on a particular IEA concluded by the EU, namely the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[24] (the 'Århus Convention'), as a potential candidate for enforcement via the infringement procedures. Since the Union's ratification of the Århus Convention in 2005, several EU member states have struggled to ensure their full adherence to the IEA's obligations concerning the establishment of certain procedural rights for individuals to secure a minimum level of involvement and influence in environmental decision-making (namely, rights of access to environmental information, participation in the decision-making process affecting the environment and access to justice for the purpose of upholding environmental law). The article considers, in particular, the implications of the CJEU's relatively recent judgment in *Slovakian Bear*[25] concerning the legal status of the Århus Convention within the EU legal order as a means to assess the European Commission's possible utilisation of infringement proceedings to uphold Article 9(3) of the Convention concerning access to environmental justice. Finally, the journal article concludes with a number of recommendations that the European Commission may wish to consider with a view to enhancing the prospects of the Union as a whole of being able to fulfil environmental obligations under IEAs it has entered into.[26]

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[23] Notably including Case C-239/03 *Commission v France (Etang de Berre)* [2004] ECR I-9325, Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635 and Case C-308/06 *The Queen on the application of: International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057.

[24] UNTS Vol.2161, p447. The text of the Convention is accessible on the UNECE website at: www.unece.org

[25] Case C-240/09 *Lesoochranárske zoskupiene VLK (WOLF Forest Protection Movement) v Slovakian Environment Ministry* [2011] ECR I-1255.

[26] These include the Commission doing the following: reviewing whether it is necessary for both Union and member states to sign and ratify for all IEAs (restricting use of mixity); ensuring no delays to Union ratification; ensuring that Union decisions ratifying IEAs stipulate, where appropriate, a maximum time limit for member state ratification; restricting the use of declarations of competence in IEAs; and ensuring that IEAs to which the Union is a contracting party are actively policed vis-à-vis EU member states.

B.2 Role of Private Persons in Enforcing EU Environmental Law

Part Two of the *Enforcement* monograph focuses on a second EU legal dimension regarding the subject area of enforcement of Union environmental law, namely the extent to which Union rules endow private persons with rights to participate in law enforcement activity.

This research considers private persons' rights to assert the upholding of EU environmental protection requirements at national level (Chapters 6-8A) as well as at EU institutional level (Chapters 9-10). Section B.2.1 below considers the published works appraisal of private enforcement at national level, whilst section B.2.2 surveys those of the selected publications that consider legal accountability of EU institutional conduct to civil society.

B.2.1 *Enforcement of EU Environmental Law at National Level*

Chapters 6-8Aof the book consider the extent to which the EU has developed a body of rules that serve to assist private persons to take legal steps to ensure that the Union's environmental protection legislation is properly implemented and adhered to within the EU member states. They include firstly an analysis of important general legal principles that have emerged from CJEU case law establishing a body of rights for private persons wishing to rely upon certain EU norms (including EU environmental legislative norms) before national courts. Specifically, Chapter 6 appraises key principles developed by the CJEU endowing individuals with certain rights to rely upon and invoke sources of EU law before national courts (principles of direct and indirect effect) and Chapter 7 appraises the role of the CJEU in developing EU rules in order to facilitate and enhance private individuals' rights of access to justice and effective remedies in the context of litigation conducted before national courts involving conflicts over the correct application of EU law. Whilst these general principles developed by the CJEU have been of some benefit to private persons seeking to uphold EU environmental law at national level, the *Enforcement* monograph elucidates on their significant limitations in this regard. Notably, these rules neither guarantee the right for individuals to invoke all EU environmental protection obligations before national courts nor do they provide a satisfactory

minimum range of procedural rights in order to secure effective access to or obtain judicial remedies from those courts.

Chapters 8 and 8A of the monograph consider to what extent the EU, in fulfilment of its status as a CP to the 1998 Århus Convention, has adopted legislative measures in order to address these shortcomings. As was briefly mentioned above in section B.1.1, the Århus Convention requires its CPs to ensure that private persons enjoy a minimum set of procedural rights to be able to participate in and monitor environmental decision-making in three ways: namely, minimum rights of access to environmental information,[27]rights of participation in decisions affecting the environment[28] and rights of access to environmental justice.[29] Chapter 8 considers the extent to which the Union has adopted legislative instrumentation, as required by the provisions contained in Article 9 of the Århus Convention, to ensure that private persons have adequate recourse to national courts or national administrative review procedures to uphold their Convention rights of access to environmental information, participation in certain environmental decision-making processes and access to environmental justice concerning breaches of national[30]environmental law. The Union has only been partially successful in ensuring, through the adoption of EU legislative measures, that access to environmental justice obligations stipulated under the Convention are required to be adhered to by EU member states. The limited state of EU legislative work carried out to date to implement Article 9 of the Århus Convention receives critical appraisal in the chapter and is taken up in more depth in the journal article 'EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? 'That journal article tracks through in detail the long-standing and ongoing difficulties which the Union has faced and continues to face in seeking to introduce legislation to secure for individuals a right of access to an EU member state court or appropriate administrative review procedure for the purpose of ensuring that EU environmental

[27]See Arts.4-5 Århus Convention.
[28] See Arts.6-8 Århus Convention.
[29] See Art.9 Århus Convention.
[30] For the purposes of the Convention, 'national' environmental law includes EU environmental law for contracting parties who are member states of the EU, given that Union rules form part of the corpus of environmental rules of law contained within EU member states' national legal systems. This interpretation has been confirmed by the Århus Compliance Committee in its Communication ACCC/C/2006/18 (Denmark).

law is upheld at national level. In particular, the article considers how the Commission has appeared to revitalise its interest immediately prior to and under the aegis of the Union's 7th Environment Action Programme (EAP7) to promote effective legal protection for citizens regarding access to environmental justice,[31] after having failed for many years to secure Council approval for a Commission proposal for EU legislation on this issue dating back to 2003.[32] The article was completed and published before the decision by the European Commission in 2014 formally to withdraw its 2003 legislative initiative, as noted in the article 'Enforcement of EU Environmental Law: Taking Stock of the Evolving Legal Framework'.

By way of complement to Chapter 8 of the *Enforcement* monograph, Chapter 8A[33] to the book provides a detailed appraisal of the EU's efforts to implement its obligations under the Århus Convention to secure a right of access to environmental information for private persons at national level. In contrast to the situation regarding access to environmental justice, the EU has undertaken a range of steps to ensure that the Convention's 'first pillar' right of information access has been implemented effectively at Union level through the adoption of a wide-ranging directive that essentially mirrors Convention requirements. It was considered useful to include a specific chapter on EU rights of access to environmental information, given that in practice information access rights often constitute an essential pre-requisite or foundation for the prosecution of environmental protection law suits.

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[31] See paragraph 65(e) and (v) of Priority Objective 4: *To maximise the benefits of Union environment legislation by improving implementation* of Annex to Decision 1386/2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' (OJ 2013 L354/171).

[32] COM(2003)624final, Commission proposal for a Directive on access to justice in environmental matters, 24.10.2003.

[33] For editorial (printing) reasons, certain chapters of the monograph are only made available online via the publisher's website to accompany the printed version and have a special nomenclature: Chapters 4A, 8A and 9A.See: https://www.routledge.com/Enforcement-of-European-Union-Environmental-Law-Legal-Issues-and-Challenges/Hedemann-Robinson/p/book/9780415659598.

B.2.2*Enforcement of EU Environmental Law at Supranational Institutional Level*

The second section of Part Two (Chapters 9-10) of the *Enforcement* monograph turns to consider a distinct but complementary law enforcement role for private persons, specifically the extent to which individuals are vested with rights under Union law to hold EU institutions and other Union bodies to account in respect of decisions contravening EU environmental law. The law in this field constitutes an important safeguard to ensure that EU environmental obligations may be upheld at all levels within the regulatory chain.

Firstly, Chapters 9-9Aof the book consider in detail the various formal rights that private persons have under Union law to hold EU institutions and other bodies to account in respect of their decision-making. Chapter 9 undertakes a critical appraisal of the availability and effectiveness of various legal proceedings enshrined in the EU treaty framework to individuals.[34] It also assesses the impact of relatively recent EU legislation intended to enhance the possibility for individuals to seek internal administrative review of EU institutional decision-making, notably the so-called Árhus Regulation (Regulation 1367/06[35]). The chapter takes a sceptical view as to whether these formal appeal and review mechanisms comply with the requirements of the 1998 Árhus Convention, taking into account in particular the restrictive approach adopted by the CJEU on legal standing requirements for individuals wishing to seek judicial review of EU decisions before the General Court of the EU under Art.263 TFEU. By way of complement to Chapter 9, Chapter 9A provides a detailed appraisal of the EU's efforts to implement its obligations under the Árhus Convention to secure individuals a right of access to environmental information held by EU institutions and other bodies. As is the case for private legal enforcement at national level, right of access to environmental information is frequently an important legal tool used in order to assist individual plaintiffs with the prosecution of environmental protection litigation. In contrast with its problematic approach

[34]Chapter 9 considers the law and practice underpinning annulment proceedings (Art.263 TFEU), the preliminary ruling procedure (Art.267 TFEU), and proceedings in respect of a failure to act (Art.265 TFEU and non-contractual liability proceedings (Art.268 and 340(2) TFEU).

[35] Regulation 1376/2006 on the application of the provisions of the Árhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (OJ 2006 L264/13).

towards implementing the Århus Convention's stipulations concerning access to environmental justice, the EU has adopted a body of measures on access to environmental information that is in far closer alignment with the Convention's requirements.

Secondly, subsequent to the examination of judicially enforceable mechanisms available to private persons, Chapter 10 provides an analysis of the nature and impact of various non-judicial complaints procedures open to civil society actors to use to seek review of controversial EU level decisions affecting the environment. These include, in particular the maladministration complaints process before the European Ombudsman as well as petitioning procedures handled by the European Parliament over contested decisions of the European Commission to refrain from taking infringement action against member states. Given their relatively speedier, less costly and more informal nature, these alternative dispute resolution processes have established themselves increasingly as credible alternative routes for challenging EU institutional conduct.

B.3 Role of EU Member State Authorities in Enforcing EU Environmental Law

Part Three of the *Enforcement* monograph (Chapters 11-13) considers a third strand to the EU legal fabric relevant to enforcement of EU environmental law, namely the role and responsibilities of the EU member states and their public authorities involved in overseeing implementation of EU environmental protection controls. 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) of the Treaty on European Union (TEU), which places a general legal duty on member states to take active steps to ensure they adhere to EU obligations as well as engage in sincere co-operation with the Union for this purpose. 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 the same degree of vigilance in detecting breaches of EU law as with national law;[36] the duty to ensure that EU infringements are penalised with effective, proportionate and dissuasive sanctions;[37] and the duty of due diligence to review decision-making so as to ensure conformity with EU law.[38]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[39] 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[40] and the 2008 EU Environmental Crimes Directive.[41]Both of these EU legislative instruments represent particular crystallizations of the 'polluter pays' principle, one of the foundational principles underpinning the EU treaty framework on environmental protection.[42]As far as the area of environmental inspections is concerned the EU has also adopted a limited range of both general and specific measures stipulating minimum requirements for competent authorities.[43] Its involvement and increasing interest in this area, as reflected in EAP7,[44]is relatively recent and still emerging.

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[36]See e.g. Case C-68/88 *Commission v Greece* [1989] ECR 2965(esp. paras.23-24 of judgment).
[37] See e.g. Case C-354/99 *Commission v Ireland* [2001] ECR I-7657 (at para. of 46 judgment).
[38]See e.g. Case C-72/95 *Aannemersbedriff P K Kraaijeveld BV* [1996] ECR I-5403.
[39] Currently enshrined in Art.5(3) TEU.
[40] Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L143/56).
[41] Directive 2008/99on the protection of the environment through criminal law (OJ 2008 L328/28).
[42] See Art.191(2) TFEU, second sentence.
[43] See notably the general Recommendation 2001/331 providing for minimum criteria of environmental inspections in the Member States (OJ 2001 L118/41).
[44] See para.65(iii) of the Annex to Decision 1386/2013 on a General Union Environment Action Programme to 2020 '*Living well, within the limits of our planet'* (OJ 2013 L354/171).

Chapter 11 of the monograph examines the role of national authorities in EU environmental law enforcement from a general perspective, assessing the impact of broad EU legal obligations on member states in relation to enforcement of EU environmental legislation including Article 4(3) TEU and the subsidiarity principle. In addition, it looks at the evolution of measures taken at Union level since the early 2000s to develop benchmarks and minimum standards for environmental inspections of installations and activities that represent significant risks or threats to the quality of the environment.

By way of complement to Chapter 11 of the monograph, the article 'Environmental Inspections and the EU: Securing an Effective Role for a Supranational Union Legal Framework' provides a more in-depth analysis and appraisal of the EU's legal and policy initiatives concerned with setting minimum standards and/or benchmarks with respect to member states' environmental inspection regimes. Inspection systems constitute a vital part of regulatory frameworks constructed for the purpose of overseeing compliance with minimum standards of conduct laid down by public law, whether these are prescribed at national or international level. As noted by Baldwin, Cave and Lodge, 'uncovering undesirable behaviour through detection is a first step in regulatory enforcement'.[45] Environmental regulation is no different in this respect. For several years, though, the quality and effectiveness of national environmental inspectorate systems amongst the EU member states has varied considerably, undermining foundational Union environmental and economic objectives of ensuring that a high level of environmental protection is assured and that EU law is upheld uniformly across the geographical span of the single market area. Until relatively recently, the EU has been on the whole reluctant to intervene in areas concerned with national administration of EU environmental policy, largely as a result of political resistance by several member states to supranational engagement in the area of national administrative management regarding implementation of EU environmental obligations. Since the early 2000s, though, to some extent member states' concerns over loss of national sovereignty have eased so as to enable the Union to adopt a limited range of EU measures establishing some general soft law guidance on minimum inspection criteria in the form of a recommendation (Recommendation

[45] Baldwin R/Cave M/Lodge M, *Understanding Regulation: Theory Strategy and Practice* 2nd ed. (OUP, 2012) at 228.

2001/331[46]) as well as certain minimum binding standards in particular environmental sectors via legislative instrumentation. Specifically, EU legislation on minimum standards of environmental inspections carried out by national authorities has been adopted in sectors concerning industrial emissions,[47] major accident hazards involving dangerous substances,[48] waste management,[49] ozone depleting substance management,[50]geological storage of carbon,[51] scientific experimentation on animals,[52] the civil nuclear industry,[53] as well as the common fisheries policy (CFP).[54] Recently, under the aegis of the EAP7 the EU has signalled its interest in developing its engagement in this policy field, having recognised the need for 'extending binding criteria for effective Member State inspections and surveillance' as well as 'further developing inspection support capacity at Union level'.[55]

In tracking through the policy developments at EU level, the journal article casts a critical eye over the state of EU legislative intervention in this area, which remains fragmented and lacking legal coherence (see Table 3 below in the Appendix). It argues that the EU remains politically and legally conflicted over the extent of its role in overseeing the functioning of national environmental inspectorates. On the one hand, the Union has a legitimate interest to ensure that inspection systems work effectively to maximise compliance with EU environmental legislation at national level, a mandate underpinned in various ways in its constitutional framework. Notably, member states are obliged under Art.4(3) TEU to ensure that they take

[46] Recommendation 2001/331 on Minimum Criteria for Environmental Inspections in the Member States (OJ 2001 L18/41).
[47] Directive 2010/75 on industrial emissions (integrated pollution prevention and control) (recast) OJ 2010 L334/17).
[48]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').
[49]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).
[50] Regulation 1005/2009 on substances that deplete the ozone layer (recast) (OJ 2009 L286/1).
[51] Directive 2009/31 on the geological storage of carbon dioxide and amending various Directives (OJ 2009 L140/114).
[52]Directive 2010/63 on the protection of animals used for scientific purposes (OJ 2010 L276/33).
[53]See Art.35 EAEC (European Atomic Energy Community Treaty (Euratom) and Directive 2009/71/Euratom establishing a Community framework for the nuclear safety of nuclear installations (OJ 2009 L172/18) as amended by Directive 2014/87/Euratom (OJ 2014 L219/42).
[54] 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).
[55] See para. 65(iii) of the Annex to the (EAP7) Decision 1386/2013 (OJ 2013 L354/171).

measures to secure compliance with their EU obligations; both the Commission and the CJEU are vested with responsibilities to ensure that EU law is correctly applied[56] and Art.197(1) TFEU specifically recognises that effective implementation of Union law to be 'essential for the proper functioning of the Union' and 'shall be regarded as a matter of common interest'. On the other hand, the EU remains constrained in terms of the extent to which it may use the tool of legislative harmonisation in this area. Notably, Art.197(2) TFEU specifically excludes the possibility of the Union introducing harmonising measures for the purpose of improving national administrative capacity. Moreover, the current European Commission College (2014-19) has made a political decision to shelve recent preparatory work undertaken by its Environment Directorate-General subsequent to the launch of the EAP7 on a possible legally binding horizontal measure concerning national environmental inspection systems. Whilst its official reasons for so doing have not been clear, it appears fairly evident that a major factor is likely to have been concerns on the part of member states with supranational involvement in an area foreseen to be primarily subject to national sovereign control. Given these conflicting forces in play, the article concludes that it is unsurprising to find that development of EU policy on environmental inspections management has made relatively little headway. In the absence of a clearer resolution over the definition of EU institutional and member state roles, it is likely that the Union will be unable to achieve a genuinely integrated and effective form of shared administration within the European administrative space as far as environmental inspection management is concerned.

Chapters 12 and 13 of the *Enforcement* monograph consider the impact of two important EU legislative initiatives intended to enhance the performance of member states in fulfilling their EU environmental obligations. Specifically Chapter 12 examines the legislation addressing the area of environmental civil liability at national level, in particular the provisions of the EU's Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage.[57]The chapter explores the novel approach taken by this instrument with respect to the issue of civil liability, contrasting the emphasis it

[56] See Arts.17 and 19 TEU.
[57] OJ 2004 L143/56.

places on the responsibility of national authorities to hold operators accountable for environmental damage and for securing environmental remedial action with the traditional approach to civil liability that focuses on legal relations between private persons and monetary compensation, for example followed in substantial part by the Council of Europe's 1993 Lugano Convention.[58] It also assesses the impact of the EU legislation, still unfolding on account in particular of belated transposition into national law by the member states, relative paucity of CJEU case law, a number of outstanding legal interpretative issues (e.g. evaluation of environmental damage) and divergences between member states on application of various aspects (e.g. defences, insurability). Chapter 13 of the book considers the nature and impact of the EU's legislation on environmental criminal liability, notably Directive 2008/99 on the protection of the environment through criminal law.[59]It explores the policy and legal background to the directive's adoption, its statutory contents as well as brief comment on state of implementation by member states. The earlier journal article 'The Emergence of European Union Environmental Criminal Law: A Quest for Solid Foundations' tracks through in significantly more detail than the monograph the political and legal struggles at EU level to resolve disagreement between the European Commission and several member states over the appropriate legal basis for Union engagement in the policy area of environmental criminal justice. Whereas the Commission considered that the EU's treaty provisions on the Union's common environmental policy constituted an appropriate legal basis for EU legislation on environmental crime,[60] several member states considered that the basis should be the former 'third pillar' framework of the TEU concerning co-operation in criminal matters.[61]The legal dispute was ultimately resolved through recourse to the CJEU for definitive legal confirmation of the appropriate legal basis for EU legislative

[58] 1993 Council of Europe Convention on civil liability for damage resulting from activities dangerous to the environment (ETS 150).
[59] OJ 2008 L328/28.
[60] Specifically, Art.175 of the former European Community Treaty (now superseded by Art.192 TFEU).
[61] Former Title VI to the TEU (Provisions on Police and Judicial Co-operation in Criminal Matters) – Arts.29-42. Subsequent to the entry into force of the 2007 Lisbon Treaty the third pillar ceased to exist. EU treaty provisions on cooperation in the criminal justice policy are now specifically provided for in Title V (Area of Freedom, Security and Justice) to the TFEU. In particular Art.83 TFEU expressly provides for decision-making procedures concerned with harmonisation of national criminal laws.

intervention in this area.[62]These developments took place prior to the 2007 Lisbon Treaty's amendments to the Union's constitutional legal framework which have established new treaty provisions on cooperation in the area of criminal justice within the TFEU,[63] superseding those contained within the EU's former 'third pillar' (i.e. Title VI of the TEU prior to the Lisbon Treaty).

B.4 Principal Findings of and Contributions Made by the Selected Published Works

Principal research findings

The principal general findings of the research publications submitted for this thesis may be gleaned in part from the final concluding chapter (Chapter 14) to the *Enforcement* monograph as well as from the conclusions to the article 'Enforcement of EU Environmental Law: Taking Stock of the Evolving Legal Framework'.

Firstly, as Chapter 14 notes, over time the EU has made considerable beneficial changes to the way in which it approaches the task of overseeing the implementation of Union environmental protection rules. Whereas in the early years of the Union's development of a common environmental policy the European Commission played a predominant role in supervising due application of EU environmental legislation, more recently the Union has placed considerably more effort in promoting the capacity of civil society (principally through non-governmental environmental organisations) as well as responsibilities of national authorities to also engage in law enforcement work. These developments have encouraged and enabled a far wider range of stakeholders to become involved more effectively in law enforcement work. as the limited supervisory resources of the European Commission have steadily

[62] Two CJEU judgments were key in this respect, namely: Case C-176/03 *Commission v Council (Environmental Crimes)* [2005] ECR I-7879 and Case C-440/05 *Commission v Council (Ship-Source Pollution)* [2007] ECR I-9097. For commentaries on these judgments see e.g. Hedemann-Robinson M, 'The EU and Environmental Criminal Liability: A Legal Analysis in the Light of the Ruling of the ECJ on EC Competence (Case C-176/03)' (2005) 6 *Environmental Liability* 149 and Hedemann-Robinson M, 'The EU and Environmental Crime: The Impact of the ECJ's Judgment on Framework Decision 2005/667 on Ship-Source Pollution' (2008) *Journal of Environmental Law* 1.
[63] See esp. Art.83 of Title V (Area of Freedom Security and Justice) of the TFEU.

become more apparent within the context of an expanding EU membership. The book maintains that the gradual development and entrenchment of a multi-dimensional (tripartite) framework to EU environmental law enforcement has led to a more effective system of supervision of environmental protection rules, with each component (European Commission, civil society and national authorities) able to bring something distinct as well as mutually supportive to the collective goal of enhancing the state of implementation of EU environmental law. Moreover, the extent and reach of EU legal machinery on environmental law enforcement compares very favourably with the state of affairs at international level, where there are very few mechanisms contained within IEAs that are capable of holding CPs to account effectively for deficient implementation of treaty obligations.

Secondly, Chapter 14 also notes that to a significant extent the drivers underpinning these changes have been ideological (and not simply resource-related). A major influence has been the impact of the principle of subsidiarity, in placing greater emphasis on the role and autonomy of national authorities to supervise implementation of EU environmental requirements within the member states. In addition, the accession of the Union to the 1998 Århus Convention has spurred on initiatives at EU level to develop participatory rights for individuals in relation to environmental law enforcement.

Thirdly, as is borne out in the monograph generally but also in the concluding remarks to 'Enforcement of EU Environmental Law: Taking Stock of the Evolving Legal Framework' my research has revealed some significant limitations to the existing legal framework of the Union concerning the enforcement of its environmental *acquis*. Notably, in recent years the European Commission has reined in its law enforcement role in intervening in suspected cases of misapplication of EU environmental legislation through infringement proceedings. Whilst this change might be understandable for resource-related reasons, the effect of this places considerable onus on civil society (notably NGEOs) as well as national authorities, for formal law enforcement action may usually entail considerable legal costs for private plaintiffs. In addition, heavy reliance upon national authorities to supervise the implementation of EU environmental law may well be unrealistic or even counter-productive (e.g. in the face of insufficient financial and administrative

resources invested in authorities, ineffective inspection regime structures and/or dangers of regulatory 'capture' from industry).In addition, significant gaps exist in terms of securing individual rights to access environmental justice at both national and EU institutional levels and the Union's intervention in the area of inspections is still at a relatively early stage, with weak and patchy legal support structures. As my research notes in some detail, the relatively high number of environmental infringement complaints and cases dealt with annually by the European Commission indicate that non-compliance with EU environmental law remains a significant problem and challenge for the Union. In sum, the EU has a considerable way to go yet before it may be in a position to claim seriously that it has established a legal framework that is adequate to ensure effective supervision of the proper implementation and enforcement of EU environmental protection rules.

Principal Contributions made by the Published Works

The comprehensive nature of the *Enforcement* monograph's analysis, in exploring and appraising what it terms the 'tripartite structure' of EU law's involvement with law enforcement in relation to its environmental policy area, constitutes a unique approach to the investigation of this legal subject area. The existing literature on the subject of EU environmental law enforcement has tended to be less comprehensive in outlook, focusing only on certain key aspects, including notably the role of infringement proceedings and access to justice provision for individuals.[64] For instance, relatively little research has been undertaken regarding the role, as foreseen by EU environmental law and policy, of national authorities in securing implementation of Union environmental legislation. Not only has the monograph provided a far more comprehensive investigation and assessment of the research field, it has also provided the basis for a more in-depth appraisal into the inter-connectedness between the different branches of Union engagement in environmental law enforcement as well as how they relate to trends and developments in the EU's overall strategy on enhancing member state performance

[64] See e.g. Borzsák L, *The Impact of Environmental Concerns on the Public Enforcement Mechanism under EU law: Environmental Protection in the 25th Hour* (Kluwer 2011); Lee M, *EU Environmental Law: Challenges, Change and Decision-Making* (Hart 2005) (and 2nd edition 2014); Lenaerts K/Gutiérrez-Fons, 'The General System of EU Environmental Law Enforcement' 30(1) *Yearbook of European Law* 3 and Wennerås P, *The Enforcement of EC Environmental Law* (OUP 2007).

regarding implementation of Union environmental legislation. This latter aspect is taken up, in particular, in my 2015 journal article 'Enforcement of EU Environmental Law: Taking Stock of the Evolving Legal Framework'.

In addition, the book also enabled me to bring some unique insights into the analysis as a result of my tenure as a legal administrative official within the European Commission between 2001-2003. Notably, this was useful in contributing to my analysis in Chapter 5 of the monograph concerning the issue of actual and potential conflicts of interests arising as a result of the European Commission being invested with prosecutorial powers under Articles 258/260 TFEU.[65] Conflicts of interest may arise given that the Commission has both a policy development as well as prosecutorial role. My analysis here builds on and updates rare and much earlier research analysis carried out in this area.[66]

The monograph also contains some empirical research work providing contemporary information on various operational aspects concerning EU law on environmental law enforcement. Specifically, the book contains data on the duration of recent environmental infringement litigation under Articles 258/260 TFEU[67] (see Tables 1.1.1-3 in the Appendix) based on CJEU judgments delivered between 2010-2012, which builds upon and updates earlier research work carried out in this area.[68] Furthermore, the monograph also contains some data gleaned by the author that offer insights into the range and type of casework (citizen complaints and own-initiative inquiries) carried out by the European Ombudsman between 1995-2012 in appraising allegations of member state non-compliance with EU environmental legislation.[69]

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[65] Specifically, see pp223-227 of Chapter of the *Enforcement* monograph

[66] See e.g. Williams R, 'The European Commission and the Enforcement of Environmental Law: An Invidious Position' (1994) 14 *Yearbook of European Law* 351

[67] Data on duration of first round (Art.258 TFEU) and second round (Art.260 TFEU) infringement proceedings is provided in pp67-69 and pp151-152 respectively.

[68] See e.g. Krämer L, 'Statistics on Environmental Judgments by the EC Court of Justice' (2006) 18(3) *Journal of Environmental Law* 407 and Hedemann-Robinson M, 'Article 228(2) EC and Enforcement of EC Environmental Law: A Case of Environmental Justice Delayed and Denied? An Analysis of Recent Developments' (2006) 15(11) *European Energy and Environmental Law Review* 312.

[69] Specifically pp523-524 of the *Enforcement* monograph (in Ch10: 'Private enforcement of EU environmental law at EU institutional level (2) – Administrative complaints procedures and other possibilities').

C. Theoretical Context of Published Works

This final section of the thesis seeks to place the published works within a broader theoretical context, specifically reflecting on how my research relates to ongoing debates engaged in seeking to understand the motivations and drivers influencing the degree to which states may comply with international environmental legal commitments. In particular, it is useful to consider to what extent these debates enable insights to be drawn regarding which particular ideas concerning statal compliance have influenced the EU's approach in developing its legal framework on enforcement of its environmental norms. This section will commence with a brief overview of theoretical discussion on state compliance with international rules of law, before considering how it relates to and has a bearing on the EU's legal framework concerning enforcement of its environmental norms.

Compliance theory

Broadly speaking, two main rival schools of thought on international relations have predominated in discussion over compliance theory (logic of consequences versus logical of appropriateness) and likewise two camps offer distinct approaches on how international law should be crafted in order to maximise compliance based on acceptance of a particular compliance theory (enforcement versus managerialist approaches).[70] Whilst these rival analyses retain relevance and influence to varying degrees in the development of international environmental law (IEL), it is fair to say that since the early 1990s the logic of appropriateness school and related managerialist approach have gained considerable traction in legal scholarship and in international practice in terms of IEA regime building. Each will be outlined briefly in turn.

[70] For some overviews and reflections on compliance theory see e.g. Mitchell R, 'Compliance Theory: Compliance, Effectiveness and Behaviour Change in International Environmental Law' in Bodansky D/ Brunnée J/ Hey E (eds), *Oxford Handbook on International Environmental Law* (OUP 2007); Zaelke D/Higdon T, 'The Role of Compliance in the Rule of Law, Good Governance and Sustainable Development' (2006) 5 *Journal of Eur Env'l Planning Law* 383; Brunnée J, 'Enforcement Mechanisms in International Law and International Environmental Law' (2005) 1 *ELNI Review* 1; and Bodansky D, *The Art and Craft of IEL* (Harvard UP, 2010).

The logic of consequences school of thought, closely related to a rationalist interpretation of actor behaviour, assumes that states are motivated by weighing up the consequences of alternative course of action in light of self-interest. A variety of factors may influence statal behaviour, including relative global power, resources and internal political preferences. According to this school, as far as compliance with international law is concerned, a material consideration will be the factor of deterrence. Specifically, the extent to which there are systems in place to ensure a high likelihood of detection of non-compliance coupled with sufficiently swift and costly sanctions as response measures will materially influence state decisions over whether or not to comply. This perspective on the dynamics influencing the degree to which states are likely to comply with international obligations resonates strongly with deterrence theoretical models on individuals' compliance with state regulation.[71] Based closely on the theoretical underpinnings of the logic of consequences school, the enforcement approach[72] envisages that the most appropriate strategy to maximise statal compliance with international law is to ensure international accords contain deep structures of co-operation and supervision, notably including sanction mechanisms capable of tipping the cost-benefit calculation of CPs concerning whether to take steps to achieve compliance.[73] Whilst the logic of consequences school has traditionally predominated in international relations discourse, in practice the enforcement approach has received a weak reception in terms of international regime-building, not least in the environmental protection sector. With some exceptions,[74] relatively few IEAs contain or have contained procedures equipped for the deployment of coercive-type sanctions against non-compliant parties.[75] Whilst, for instance, some do contain non-compliance mechanisms which envisage the possibility of imposing response measures on defaulting CPs, the most coercive tool options (such as suspension of treaty rights or

[71] See notably Becker G, 'Crime and Punishment: An Economic Approach' (1968) 76 *Jl of Political EconomyEc* 1969. For a view that applies a deterrent-based approach in appraising the enforcement of national environmental regulation, see e.g. Abbott C, *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence* (Hart, 2009).

[72] See for a view in favour of this approach: see e.g. Downs G /Rocke D M/Barsoom P N, 'Is the good news about compliance good news about co-operation?' (1996) 50 *International Organisation* 379.

[73] Mitchell (n 70) 912.

[74] In particular, the 1973 Washington Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) ((1973) 983 UNTS 243), the 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change((1998) 37 ILM 22) as well as the EU.

[75] For an overview of IEA non-compliance mechanisms see e.g. the United Nations Environment Programme's *Compliance Mechanisms Under Selected MEAs* (UNEP, 2007)

privileges or financial penalties) are only very infrequently deployed in international practice as a means of last resort.

In contrast, the logic of appropriateness school of thought views the motivational forces underlying state decisions over compliance with international law in a radically different way. Its principal assumption is that states operate as good faith actors, generally wishing to comply with their international obligations and viewing their fulfilment as socially legitimate. It considers that states are motivated also by a consideration that the greater degree to which they comply with freely assumed obligations, the more positive an image will be given to other states regarding their international standing. At the same time, this theory acknowledges that sometimes states may not always be able to fulfil their international duties, but this will be largely as a result of capacity issues rather than any deliberate strategy to be deviant. In the 1990s, notably through the work of Chayes and Chayes,[76] a managerial model emerged from this theoretical foundation for the purposes of developing a strategic response to the challenge of enhancing the state of implementation with international rules of law, including IEL. Contrary to the enforcement approach, a managerialist perspective envisions IEL regimes as instruments to manage an environmental protection field over time rather than be underpinned by sets of prohibitory rules. The overall approach advocated is to install a system so as to keep non-compliance to acceptable levels primarily through a continual process of transparent discourse and exchange amongst CPs (typically through education, advice and/or assistance). Managerialism's general assumption is that states intend to comply with their IEA obligations and that instances of non-compliance will be largely due to capacity issues or inadvertence (lack of national legislative, administrative and/or financial resources) rather than any deliberate intent to breach. Accordingly, the managerialist approach favours prioritising facilitative responses in order to address issues of non-compliance with IEAs, whilst not discounting the possibility of using more coercive response measures as a last resort in the face of persistent offending. It has received considerable endorsement within international legal scholarship[77] and has exerted a

[76] Chayes A/Chayes A H, 'On Compliance' (1993)47(2) *International Organization* 175-205.
[77] See for instance, Brown Weiss E/Jacobson H (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000); Bodansky (n 70) esp Chs 10-11; O'Connell M E, 'Enforcement and the Success of International Environmental Law' (1995-6) 3

significant degree of influence on the way in which several IEA regimes have developed systems to enhance statal compliance.

Both enforcement and managerial approaches, as well as compliance theories underpinning them, are widely accepted as bringing useful insights to bear on the way in which prescriptive MEA regimes should be crafted.[78] Whilst starting from contrasting assumptions and promoting different techniques, the two approaches on strategy are not mutually incompatible.[79] For instance, the managerial camp would not completely rule out the use of sanctions as a last resort tool, whilst a broad understanding of the meaning and tiering of non-compliance response measures would not necessarily be ruled out under an enforcement approach. There are close resonances here with the evolution of an increasingly influential seam of scholarship positing a synergistic combination of both facilitative as well as deterrent-based tools as a means of enhancing effective enforcement of state regulation within national legal orders.[80]

Theoretical underpinnings of EU environmental law enforcement

Considered from a compliance theoretical perspective, the EU's legal framework for assisting in the enforcement of its environmental rules may be viewed as reflecting an approach highly resonant of the logic of consequences school of thought. As explored in my research outlined in Section B above, the EU has established and developed various 'hard'(i.e. legally binding) principles, procedures and remedies geared towards deterring member states, their authorities as well as private persons from engaging in non-compliant behaviour with respect to the EU environmental *acquis*. Notably, the infringement proceedings enshrined in the TFEU have been given a sharper edge through a range of treaty amendments over the last two decades, including the introduction of financial penalties, as a means of enhancing

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Indiana Jl of Global Legal Studies 47; and Goetyn N/Maes F, 'Compliance mechanisms in MEAs: An Effective Way to Compliance?'(2011) 10 *Chinese Jl Intl L*at 800.

[78] See e.g. Zaelke D/Higdon T (n 70) at 383; Goteyn N/Maes F (n77) at 801.

[79] See e.g. Bodansky (n 70) at 238.

[80] An overview of recent strategies promoting such an approach for the purposes of enhancing the effectiveness of enforcement of state regulation (such as responsive regulation, smart regulation and really responsive regulation) are outlined and discussed in Chs 11-13 of Baldwin R/Cave M/Lodge M (n 45).

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member state compliance rates. In addition, the Union has established a range of EU rights for private persons to participate in EU environmental law enforcement activity and has adopted a range of legislative instruments intended to steer and enhance formal types of law enforcement work of national authorities (such as regarding the application of criminal law and civil liability mechanisms).

However, upon closer inspection, and as is evident from my research, the EU has also increasingly drawn upon 'softer' regulatory techniques and tools for the purposes of enhancing compliance with its environmental *acquis*, revealing a more nuanced and managerialist dimension to its approach on law enforcement. The Union has some well-established systems in place designed to encourage member state compliance with EU (environmental) obligations, including financial assistance for less wealthy members.[81] The initial administrative phase in infringement proceedings under Art.258 TFEU reflects a conciliatory approach in being intended to allow space for the European Commission and defendant member state to settle non-compliance issues out of court where possible. In recent years, the European Commission has sought to underline a more managerialist approach to the issue of non-compliance through a less prominent reliance on infringement proceedings in general as a means of improving member state compliance. Since the early 2000s the European Commission has been keen to use a wider range of facilitative-type tools or inducements as a means of first resort to encourage member states to implement EU (environmental) obligations. These include issuance of implementation guidance, publicised performance scoreboards and intensification of structured dialogues with national authorities (e.g. bilateral 'package' meetings, supporting export network meetings and workshops on enforcement issues such as via IMPEL[82]) amongst other initiatives as promoted notably in the Commission's 2008 Communication *Implementing EC Environmental Law*.[83] The Commission's 2008 Communication also signalled its aim to rein in the use of environmental infringement casework in order to focus on certain priority areas: non-communication cases, failures to respect CJEU judgments and cases that either raise issues of principle or having a far-

[81] Notably under the aegis of the EU's Cohesion Fund: see Regulation (EU) No 1316/2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010 (OJ 2013 L348/129).
[82] EU Network for the Implementation of Environmental Law.
[83] COM(2008)773 final, 18.11.2008.

reaching negative impact for citizens.[84]It appears that these reforms may take some time to bed down, as 'bad application' cases have continued after 2008 to feature prominently in the environmental infringement casework of the Commission (see Table 2 in the Appendix extracted from Chapter 5 of the *Enforcement* monograph).

Most recently, the European Commission has continued to develop its approach of furthering a more targeted, facilitative and preventive-oriented strategy of enhancing member state implementation of EU environmental legislation under the aegis of its new review scheme known as the Environmental Implementation Review (EIR), recently adopted in May 2016.[85] The EIR is intended to provide for the first time a strategic and comprehensive overview of the state of play on how key EU environmental policies have been implemented in practice across the EU member states, setting out areas of excellence as well as challenges. The EIR will have two main aspects namely, the production of biennial country-specific reports by member states as from the end of 2016 onwards to assess their implementation performance as well as implementation delivery systems (including regarding administrative capacity, compliance assurance, access to justice and environmental information, environmental fiscal and procurement policies)as well as the holding of high level discussions about significant implementation gaps common to several member states. A synthesis report focusing on horizontal implementation problems will accompany the individual 28 country-specific reports. The Commission will liaise and exchange views with other EU institutions and bodies over horizontal issues meriting special attention. The main purposes of the EIR, as identified in the Commission's Communication, will be to: create the opportunity for a structured dialogue with member states on achievements and challenges in tackling the implementation gaps and about the actions needed; provide tailored assistance to member states to improve on implementation; strengthen the EU's compliance

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[84] As spearheaded by the Commission's 2007 Communication COM(2007)502 *A Europe of Results – Applying Community Law*, 5.9.2007 and then amplified in the Commission's 2008 Communication COM(2008)773 *Implementing EC Environmental Law*. See also COM(2012)95 final, Commission Communication *Improving the Delivery of Benefits from EU Environmental Measures: Building Confidence through better Knowledge and Responsiveness*, 7.3.12.

[85] COM(2016)316 final, Commission Communication – *Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review*, 27.5.2016. The EIR is intended to underpin the EU's Better Regulation agenda COM(2015)215 final, Commission Communication: *Better regulation for better results – An EU agenda*, 19.5.2015.Further information on EIR may be obtained from the European Commission's Environment Directorate-General (DG ENV) website at: http://ec.europa.eu/environment/eir/index_en.htm.

culture in the area of environmental policies; provide an informed basis for discussion between EU institutions about the general challenges, opportunities and possible solutions for reducing implementation deficits; identify and share best practices and common problems and make best use of the experience accumulated across the EU; and engage more broadly with the whole range of stakeholders on activities to address implementation gaps. Whilst the EIR is explicitly intended to act as a complement to the more formal tool of infringement proceedings, it is likely that this scheme will have a significant influence on the shaping of the prioritisation agenda concerning future infringement casework.

Taking into account the above 'hard' and 'softer' features of the EU's strategy for enhancing member state compliance with EU environmental law, it appears that the Union has developed an approach which draws upon a combination of deterrence-based as well as managerialist-type tools. In particular, the Union (through the European Commission) has increasingly laid emphasis on the use of infringement proceedings only as a last resort enforcement mechanism in all but the most egregious instances of non-compliance, investing more effort into exploiting the use of incentive and facilitative-oriented mechanisms which may prove to have certain advantages over recourse to infringement action, e.g.in terms of being more preventive as opposed to reactive in nature, less cumbersome and costly, as well as being more realistic regarding the limits to EU level resources in tackling non-compliance.

Notwithstanding the hybridised nature of EU level engagement with member states in seeking to enhance levels of compliance with EU environmental law, it is likely that the Union will consider that the more deterrence-oriented elements of its law enforcement framework, as contained within the tripartite legal structure explored in my research, should continue to constitute the bedrock of its environmental compliance strategy. That this should be so is underpinned by the fact that the level of statal compliance with IEAs other than the EU has been consistently of a mediocre or low level,[86] where most of the international accords have either weak or no systems in place to monitor implementation performance of CPs and/or sanction breaches of treaty commitments. By way of illustration, in 2013 only 50% of CPs to

[86] See e.g. Bodansky (n 70) at 226.

the CITES Convention were considered by the conference of the parties (COP) to have adopted satisfactory implementation legislation,[87]only about 50% of CPs have submitted the three national implementation reports required so far under the aegis of the 2001 Stockholm Convention on Persistent Organic Pollutants [88] according to information provided by the Convention's Secretariat as at June 2016[89]and only some 30% of CPs to the 2000 Cartagena Protocol on Biosafety[90] to the 1992 Biodiversity Convention[91] are considered to have put in place satisfactory implementation measures.[92] In stark contrast, the EU has been able to record significantly higher levels of member state compliance. According to analysis compiled by the European Commission, as at the end of 2015 99.3% of all EU directives concerning the operation of the single market[93] had been transposed correctly into national law on average across all EU member states.[94]Undoubtedly a major (arguably principal) factor underlying the sharp differences in levels of statal compliance between the EU and other IEAs is the much stronger law enforcement framework present within the Union's legal structure. This would suggest that the presence of a notable deterrence dimension to the EU's legal framework concerning supervision of implementation of its environmental legislation at national level(in the form of infringement proceedings) is a crucial element in the Union's aim to maintain effective pressure on member states to achieve improvements in compliance performance, and accordingly assist the EU ultimately in realising its objective to secure a high level of protection and improvement of the quality of the environment.[95]At the same time, the EU's development of and increasing emphasis on using first, where possible and appropriate, a range of facilitative-type measures

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[87] See COP-16 (CITES) document *CITES Interpretation and implementation of the Convention: Compliance and Enforcement* (COP-16 Doc.28, 14.3.2013).
[88](2001) 40 ILM 532.
[89] For information on the submission rate for the three national reports due by end 2006, end October 2010 and end August 2014 respectively provided by the POPs Convention's Secretariat at: http://chm.pops.int/Countries/Reporting/NationalReports/tabid/3668/Default.aspx
[90] (2000) 39 ILM 1027.
[91] (1992) 31 ILM 822.
[92]See Report of the Cartagena Biosafety Protocol Compliance Committee *Evaluation of the Status of Implementation of the Protocol in Meeting its Objectives* (UNEP/CBD/BS/CC/13/3, 3.2.2016).
[93]Single market directives include those concerning the environmental policy sector for the purpose of the Commission's data analysis.
[94] European Commission, *Single Market Scoreboard –Transposition (Reporting period: 05/2015 - 12/2015)*: http://ec.europa.eu/single-market-scoreboard. The Commission reports that as at the end of October 2015 there were 1,099 EU directives in force to ensure the functioning of the Union's Single Market.
[95] As mandated in Art.3(3) TEU and Art.191(1) TFEU.

to assist member states in carrying out their implementation responsibilities serves as a complementary strategy of focusing more on preventative (*ex ante*) intervention at EU level and ensuring that infringement proceedings are targeted at addressing the most serious and persistent breaches of EU environmental law. This hybrid approach towards addressing actual and potential non-compliance is highly resonant with certain enforcement strategies that have emerged relatively recently in academic analysis(and to some extent administrative practice in some countries such as the UK) as models for enhancing compliance with national regulatory regimes.[96]

[96] See e.g. discussion of the concepts of responsive regulation, smart regulation and really responsive regulation in Baldwin R/Cave M/Lodge M (op cit. n 45).

APPENDIX

Tables 1.1-1.3: **Article 258 TFEU (first round) infringement proceedings in environmental cases decided between 2010-2012**
(*Extract from Chapter 3 'Enforcement action by the European Commission (1)' of the* Enforcement *monograph*)

Table 1.1

Article 258 TFEU (First Round) Infringement Proceedings

Environmental cases 2010-2012

Pre-litigation phase

Average duration in months

Year of CJEU environmental judgments	Non-Communication Cases	Non-conformity cases	Non-implementation/ bad application cases	Average duration of pre-litigation phase for all types of cases
2010	17.9	30.9	30.5	28.4
2011	12.3	51.3	29.8	33.3
2012	-	63.7	26.6	41.5

Table 1.2

Article 258 TFEU (First Round) Infringement Proceedings

Environmental cases 2010-2012

Litigation phase

Average duration in months

Year of CJEU environmental judgments	Cases without an Advocate General Opinion	Cases with an Advocate General Opinion	Non-communication cases	Average duration of litigation phase for all types of cases
2010	12.4	24.3	7.4	14.9
2011	13.7	25	7	15.8
2012	12.9	28	-	14

Table 1.3

Article 258 TFEU (First Round) Infringement Proceedings

Environmental cases 2010-2012

Average total duration of proceedings

Average duration in months

Year of CJEU environmental judgments	Average duration of pre-litigation phase for all types of cases	Average duration of litigation phase for all types of cases	Average total duration of Art.258 TFEU proceedings (from LFN to judgment)	Number of Art.258 TFEU environmental judgments
2010	28.4	14.9	43.3	29
2011	33.3	15.8	49.1	22
2012	41.5	14	55.5	14

Table 2: Types of Environmental Infringement Cases 2004-2013

(Extract from Chapter 5 'Enforcement action by the European Commission (3)' of the Enforcement *monograph)*

As at end of year	Types of environmental infringement cases (Article 258 TFEU)					
	Non-communication cases		*Non-conformity cases*		*Bad application cases*	
	%	Quantity	%	Quantity	%	Quantity
2004	30.35	173	18.07	103	51.58	294
2005	25.36	124	17.59	86	57.06	279
2006*	-	-	-	-	-	-
2007*	-	-	-	-	-	-
2008	18.30	88	31.80	153	49.90	240
2009	49.65	212	17.56	75	32.79	140
2010	26.08	115	20.63	91	53.29	235
2011	12.24	41	22.99	77	64.78	217
2012	4.53	13	26.83	77	68.64	197
2013	26.51	92	18.16	63	55.33	192

*No data published by the European Commission.

Table 3: EU environmental legislation on inspections by national authorities

(*Extract from the journal article 'Environmental Inspections and the EU: Securing an Effective Role for a Supranational Union Legal Framework'*)

EU legislation→ *Key inspection provisions↓*	IED (Dir.2010/75)	Seveso III (Dir.2012/18)	WFD (Dir.2008/98)	Landfill Dir.1999/31	Mining Waste (Dir.2006/21)	WEEE (Dir.2012/19)	WSR (Reg.1013/06)	ODSR (Reg.1005/09)	CO2 Storage (Dir.2009/31)	Animal Experiment-n (Dir 2010/63)	Civil nuclear (Dir 2009/71)
General inspection Duty	x	X	X	x	X	X	X	x	x	x	x
Inspection plan	x	X					X				x
Inspection programmes	x	X					X				
Non-routine inspections	x	X					X		x	x	
Follow-up inspections	x	X					X		x		
Records of inspections					X					x	x
Inspection cost charges						X					
Resourcing of inspectorate(s)	(x)	(x)					X				X
Internal Co-operation	x	X					X				X
Interstatal co-operation		X					X	x			X
EU Commission inspection/ supervisory powers								x		x	X

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Preface

Without their proper enforcement, governmental commitments to improving the state of the environment are prone to remain but 'greenspeak'. Over the last 40 years and more, the European Union has developed a raft of legislation intended to enhance standards to protect the environment. The main purpose of this book is to provide an overview of the current principles and provisions of the European Union (EU) legal order concerning the enforcement of Union environmental law. It aims to examine the subject of EU environmental law enforcement by providing a detailed account of the various legal arrangements that may be used for the purpose of upholding EU environmental norms as well as a critical appraisal of the practical impact of those arrangements, considering in particular issues of efficacy and accountability. Spanning three parts, the book focuses on the principal modes of EU environmental law enforcement: namely, the role of the European Commission, possibilities for private law enforcement and the role of national authorities.

In Part I, in addition to detailing the key legal considerations that affect the European Commission's prosecution of infringement proceedings against member states acting in violation of EU environmental law, the author also draws from his own professional experience within the Commission's Environment Directorate-General of the practical and systemic limitations faced by this EU institution. In Part II, the author seeks to appraise the possibilities available under EU law for private individuals to enforce EU environmental law, in particular taking account of legal principles developed by the Court of Justice of the Union, EU legislative instrumentation (such as that on environmental damage and access to environmental information) as well as EU institutional systems of support. In Part III, the book examines the requirements and structures in place at EU level which may serve to assist national authorities involved in environmental protection to utilise EU environmental law.

It is hoped that this monograph, now in its second edition, will continue to provide a useful reference point of key information as well as a platform for ongoing legal and political discourse at academic and legal professional levels concerning the state of EU mechanisms intended to assist with enforcement of EU environmental law.

Since the first edition of this book, it is fair to say that there are heartening signs regarding the long-term prospects of the legal arrangements relating to EU environmental law enforcement. These include notably the recent opening up of possibilities for civil society to play a more active and serious legal role in supervision of EU environmental law, in large part due to the Union's commitment to implementing the 1998 UNECE Århus Convention. In addition, recent EU legislative initiatives have sought to crystallise EU member state authorities' enforcement role and responsibilities more precisely, including with respect to the key area of environmental inspections. One could also point to the recent reforms within the European Commission to try to focus its existing limited resources for law enforcement more effectively, in particular by concentrating more on ensuring that member states transpose their obligations in EU environmental directives, the main legislative tool used in EU environmental policy, into national law correctly and on time.

Nevertheless, challenges still remain. For instance, there is a strong case for enhancing the limited current enforcement role of the European Commission, particularly in the areas of inspection and investigations. National authorities are crucially important actors in relation to EU environmental law enforcement. Yet it is apparent that the quality of law enforcement work carried out at national authority level across the Union varies considerably. This is an area that warrants attention at EU level, in order to ensure that a floor of minimum standards applies with respect to essential aspects of law enforcement agency work concerning resourcing, inter-agency co-ordination and planning of environmental investigations and inspections.

The EU has made great strides in recent years towards developing a more coherent and effective strategy for overseeing the implementation of Union environmental law. Efforts have been made and are continuing to be made to enhance the roles of civil society and national authorities in relation to law enforcement work, so as to complement the important but ultimately limited capabilities of the European Commission in this area. However, the journey is far from complete and will require sustained effort at EU level and, in particular, by member state governments to ensure that resources are effectively utilised to craft a suitably comprehensive framework that meets the challenges of EU environmental law enforcement.

I have intended the book to be up to date as at the end of September 2014.

Martin Hedemann-Robinson

Canterbury, October 2014

5 Enforcement action brought by the European Commission (3)
Some critical reflections

Following on from the discussion in the previous two chapters of the legal framework underpinning Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU), this chapter seeks to reflect on the broader context and effect of these particular tools of environmental law enforcement at EU level. At a basic level, their importance for EU environmental policy should not be underestimated. As has been noted with good reason elsewhere, the credibility of policy is undermined unless there is due and effective supervision and enforcement of transposition of legally binding commitments entered into by the constituent member states.[1] Whilst member states have a clear unambiguous duty under the EU treaty framework to secure the proper implementation of EU environmental law and legislation,[2] in practice this obligation has proven insufficient to ensure that the writ of EU environmental norms are respected at national level. The threat of legal action from the Commission in the form of infringement proceedings provides an important tool to use where necessary in order to provide sufficiently strong incentives for member states to comply with their Union-level legal obligations. The introduction and development of financial sanctions within the infringement proceedings system by virtue of the 1992 Maastricht Treaty and 2007 Lisbon Treaty have significantly enhanced the potency of the threat of law enforcement litigation under Articles 258 and 260 TFEU.

In many respects these particular enforcement proceedings remain the most important legal weapons that the Commission holds in order to assist it in its role as the EU institution charged with responsibility for ensuring that EU environmental law is applied correctly by and within the member states under Article 17(1) of the Treaty on European Union (TEU).[3] The Commission itself is effectively charged with the duty of upholding the environmental obligations undertaken by member states at EU level. That role becomes all the more important, when one considers in practice how relatively isolated the Commission stands in shouldering this responsibility.[4] As Krämer aptly points out, the environment has no 'vested interest defender'.[5]

Member states' record on compliance with EU environmental law over the years indicates that it is unsafe to rely on their promises to fulfil their environmental obligations. It is evident that the state of political and financial resources invested into EU environmental law enforcement at national level in some member states leaves

a lot to be desired. Budgeting for delivery on environmental protection has not traditionally been a political priority for several member state governments, as compared with the efforts placed to secure economic benefits to be gleaned from the single market. Very few member states ensure that EU environmental directives are transposed into national law on time. The environmental inspections regimes within member states remain patchy and often under-resourced. The Union has only relatively recently begun to address the shortcomings in this area in earnest under the aegis of the Seventh EU Environmental Action Programme (EAP7).[6] At the same time, member states' records on facilitating the possibilities of the public, notably non-governmental environmental organisations (NGEOs), becoming involved and assisting in EU environmental law enforcement, as endorsed by the Union's membership of the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Århus Convention), is very mixed.

Moreover, it is also evident that there are relatively few powerful actors outside of government interests in civil society which are prepared and/or able to shoulder the responsibility of EU environmental law enforcement. The mainstream within the business sector has little if any vested economic interest in ensuring that environmental norms are upheld, unless it is apparent that non-compliance with specific environmental norms by competitors offers the latter a distinct unfair economic advantage. In contrast, large elements within this sector have been and are established crucial players in terms of assisting in the enforcement of the laws pertaining to the single market, through such methods as taking civil action before national courts as well as reporting of instances of violations of EU law to the Commission or to national governmental support contacts such as those under the SOLVIT[7] system. This is not surprising, of course, when one considers that the enforcement of single market law is a means of enhancing market and therefore profit opportunity for several businesses, particularly those with international presence. This leaves ordinary citizens and NGEOs, the latter in practice constituting important actors in environmental law enforcement. However, there are several well-known significant legal, financial and technical challenges facing citizens and NGEOs interested in pursuing (EU) environmental law enforcement. These range from being able to secure the legal right to act on behalf of the environment to take action against polluters in any given case (legal standing issue), being able or entitled to secure evidence of a principal cause of illicit pollution (causation issue), to having the financial resources to be able to be in a position to take legal action (legal costs issue). The ability of the private individuals and associations to undertake EU environmental law enforcement work will be considered later in more detail in Part II of the book.

Accordingly, there is little doubt that Articles 258 and 260 TFEU will continue to retain an important role in terms of assisting in EU environmental law enforcement across the Union. Taking into account the lack of priority member state governments attach to environmental protection as compared with economic policies and limited scope for civil society to be involved in upholding environmental policy (e.g. frequent, significant practical hurdles involved in mounting

legal action to enforce environmental protection standards) it is evident that the Commission's supranational supervisory controls under the EU treaty framework will remain key tools in its task to ensure due application of Union environmental law at national level.

At the same time it is also widely understood and recognised from Commission and commentators alike that Article 258 and 260 legal proceedings suffer from a number of significant problems and limitations, many of which are not easily soluble. There are several issues concerning the current structure of infringement proceedings which constitute serious checks on the capability of the Commission to carry out its task to ensure that EU environmental law is upheld within the Union. The problems range from the technical inadequacies and shortcomings of the legal machinery itself to more profound issues concerning the inherent limitations posed for a centralised model of law enforcement. In particular, it is important ultimately to recognise the resource limits that constrain the ability of the EU infringement system to serve as an environmental law enforcement system and, as a consequence, to acknowledge the importance of the need to ensure that Articles 258 and 260 TFEU are appropriately supported by complementary law enforcement mechanisms at national level.

This chapter seeks to identify and reflect on these aspects, with a view to discussing possible ways and means of improving the current position and, in particular, how the Commission itself has sought to address some of the problems and challenges involved. Tables are provided at the end of the chapter containing some statistical data on the case management of environmental infringements by the Commission services.

5.1 Investigation and detection of infringements

A significant area of weakness associated with infringement proceedings brought under Article 258 TFEU is the pre-judicial process, namely the initial period of investigation carried out by the Commission.[8] In a number of important respects the Commission is hampered from the outset in certain types of cases when trying to ascertain whether or not a violation of law has occurred, in not having suitable powers or resources to verify complaints or launch own-initiative enquiries.[9] These are the so-called 'bad-application' cases, where the Commission suspects that EU environmental law has failed to be applied properly in a particular member state. For cases which involved scrutinising whether a member state has transposed its environmental obligations into national law as required by an EU environmental legislative instruments (non-communication and non-conformity casework) this particular problem does not arise, as legal analysis of these cases is entirely document based.

5.1.1 Investigatory and inspection tools

Article 258 TFEU does not provide the Commission with any powers to investigate cases where a member state is alleged or suspected of failing to ensure that

EU environmental law is applied in practice (the so-called bad-application cases). The allegation could embrace a situation where a member state authority is suspected of infringing an environmental norm itself or of tolerating an infringement on its territory by a third party. In either case, the Commission is not vested with any legal powers under Article 258 to be able to require relevant sites to be subject to mandatory inspection by its officials or those of the relevant environmental authorities within the member state concerned. As a result, the Commission has in practice been virtually dependent upon outsiders for the delivery of information and evidence for each bad-application case, whether from the member state authorities or from a complainant. In the vast majority of cases, EU environmental legislation does not incorporate provisions that specifically address the subject of EU level inspection.[10] Article 4(3) TEU, the treaty provision imposing a general duty of co-operation by member states in connection with the activities of the Union, is too vague and general in nature to constitute any clear or firm legal basis on its own for requiring member states to subject themselves to supranational investigations of suspected violations of law or to carry out systematic inspections of installations and sites. For this to occur, specific EU legislation would need to be adopted in order to crystallise the definitive obligations of member states and powers of the Commission for the purposes of conducting EU-led investigations. Historically, though, the majority of member states have been steadfastly reluctant to be amenable to the idea of facilitating or constructing a system enabling the Commission to spearhead infringement investigations. Currently, there is no clear, effective legal or administrative structure at EU level to enable the Commission to be in a position to make systematic checks on member states through the mechanism of investigations.[11]

In the past, the Commission has occasionally dispatched officials and/or contracted scientific investigation teams to carry out site inspections in the context of Article 258 casework. However, it should be noted that this is only possible where the defendant member state has agreed in advance or is in a position to be able to accept Commission site scrutiny. If the member state and/or site owner refuses to submit to an inspection, the Commission may not carry out on-site investigation. In practice, such investigations are rare and in any event lack the element of surprise. On each occasion a suspected defendant is forewarned of an investigation request. Even where the Commission decides in the highly unusual event to send out an environmental inspection team, it is not that straightforward internally within the Commission to find the necessary funds for the investigation.[12] For instance, in the aftermath of the *Kouroupitos (2)* litigation,[13] I recall during my period as an administrator dealing with legal issues in the Commission's Environment Directorate-General (DG ENV) technical unit responsible for waste management[14] there being a situation of uncertainty and financial wrangle in mid 2001 as to which Directorate within DG ENV would actually be responsible for funding the investigation of the waste sites suspected of breaches of EU waste management legislation in Chania, Crete. An inspection was considered necessary by the technical unit dealing with waste management issues to verify whether or not the Greek authorities had taken sufficient measures to implement the

second-round judgment of the Court of Justice of the European Union (CJEU). Given the lack of a clear framework for the organisation of Commission environmental inspections, it was in any event difficult to access EU funding for such an inspection as there was no specific EU budgetary line for such work. Accordingly, whilst it may be the case that member state refusals to accede to an EU-level environmental inspection are rare,[15] this matters little, given the relative paucity of genuine powers and resources at the disposal of the Commission to launch such investigations in appropriate cases.

The lack of investigatory powers afforded to the Commission reflects a long-standing scepticism and resistance by the majority of member states into contemplating any independent EU environmental inspectorate for the purposes of assisting in EU environmental law enforcement. The matter of environmental inspection in general has been considered predominantly by member states to be a domain exclusively reserved to the national as opposed to supranational level, any attempts to introduce EU-level initiatives resisted as unwarranted incursions into matters perceived to be sovereign internal issues. Accordingly, the majority have resisted attempts by the Commission, for instance, to develop a supranational and independent dimension to inspections of installations.[16] This has been rightly criticised[17] as the emotionalising of sovereignty and subsidiarity principles, not least given that several other sectors of EU policy envisage EU-level inspectors, including notably in the areas of competition,[18] veterinary health,[19] fisheries[20] and customs policy.[21]

The absence of investigatory powers afforded to the Commission in enforcement work raises the prospect of the Commission having in practice to be substantially if indeed not overly reliant on the co-operation of member state administrations for supplying information on suspected violations and state of environmental legislative implementation.[22] This raises a clear potential conflict of interest, which may materialise where national or sub-national public authorities are reluctant or insufficiently resourced to carry out inspections or enforcement activities on account of non-environmental reasons or pressures.[23] For instance, the *Kouroupitos* litigation[24] was protracted and made particularly difficult not least because of the unreliability of information supplied by the local administration on the subject of compliance with EU waste management legislation. The lack of supranational oversight capabilities into bad-application cases also raises questions as to whether there are adequate systems in place to ensure that the implementation of EU environmental law is applied consistently across the Union. It is a core EU treaty mandate that the Union should aim for a high level of environmental protection.[25] This fundamental (constitutional) obligation applies across the geographical space of the combined territories of the Union's member states and an inability to ensure a comparable level of national implementation of EU environmental protection legislation serves only to undermine this essential legally binding commitment. Furthermore, a failure to ensure that member states are providing comparable levels of effort and effectiveness regarding implementation of Union law opens up the prospects of damaging competitive distortions arising within the single market, with enterprise in certain member states being subject in practice to less rigorous law enforcement regimes than others.

The incorporation of effective investigatory powers for the Commission has in the past attracted some degree of support from a number of quarters.[26] It has also been mooted in the not so distant past that the European Environment Agency (EEA), founded in 1990,[27] might expand its remit to be able to engage as an independent environmental inspectorate.[28] Currently, its core function is to provide information concerning the state of the environment, and this is based heavily on the supply of environmental data it receives from national authorities. Its original legal framework provided for a review to be conducted within two years of its inception as to whether it should be granted a role in the monitoring of EU environmental law.

Notwithstanding initial support from the European Parliament (EP) in favour of developing a monitoring role in the early 1990s, both the Commission and Council of the EU were not persuaded that a change in the EEA's functions was warranted. The Commission and Council decided to opt for a more informal process of encouraging better inspection standards at national level, rejecting the idea of a supranational role of the Commission in being directly involved in supervisory or operational aspects of environmental inspections. Both institutions considered that inspections should be considered essentially a national responsibility, whether these were routine checks or related to investigations of suspected breaches of Union environmental law. The Commission was at that stage initially reluctant to promote the idea for an EU-level environmental auditing body.[29] Rejecting the EP's call for a binding supranational legislative instrument setting common minimum standards on inspections, the Council of the EU adopted in 2001 instead a recommendation[30] establishing some non-binding minimum criteria regarding the organisational aspects of inspections at national level. No operational role is envisaged for the Commission (or other EU-level supranational entity such as the EEA) under the soft law instrument, which currently remains in place. The 2001 Recommendation's remit is confined to a limited area addressed by EU environmental legislation, specifically industrial installations covered by the EU's regime on integrated pollution prevention and control. In 2007 the Commission completed a first a review[31] of the recommendation's implementation, which expressed criticism about its narrow coverage and limited impact. Nevertheless, at that time the Commission concluded that the non-binding status of the instrument should not be hardened into an EU legislative measure.

However, most recently the Commission appears to be changing its views and assumed a renewed level of interest in the area of environmental inspections. The Seventh EU Environment Action Programme (EAP7) (2013–20)[32] specifies, in the context of one of its priority objectives,[33] that the EU is to extend binding requirements on inspections and surveillance to the wider body of EU environmental law, complementing these with an EU-level capacity that can address situations where there is due reason for concern.[34] The Commission is currently in the process of proposing a revision to the current EU legislative framework, with a view to establishing a minimum set of legally binding requirements. The subject of environmental inspections at national level is considered in more detail in Chapter 11 of this book.

Member states are also in practice vested with exclusive responsibility for reporting on the state of implementation of EU environmental legislation within their respective territories. It is a standard requirement[35] placed in EU environmental legislation that member state authorities are obliged to provide the Commission with basic information via questionnaires on the implementation of EU environmental legislation within their respective territories. It is apparent that this system of reporting has had a number of drawbacks. One obvious disadvantage is the in-built conflict of interest set up by this type of scheme, where member states are clearly going to be reluctant to spell out implementation shortcomings in full knowledge that this will attract potential litigation.[36] Implementation reports have also taken in practice a considerable time to be completed by a number of member states, which has hampered the Commission in being able to draw up sectoral reports on an EU-wide basis.[37] The questionnaires are also limited in the sense that they do not necessarily elicit all information pertinent to implementation problems. For instance, in respect of EU waste management legislation, questionnaires are designed principally to derive only relatively basic information from the member states on how they have put in place requisite infrastructure in order to implement the legislation (such as registration systems and waste plans). Important though that is, they do not require member states to report in detail on their experience in implementing environmental protection standards vis-à-vis the wider community (e.g. steps taken to tackle illicit waste dumping scenarios). It is rare, if at all, that EU environmental legislation requires member states to report on the degree of effectiveness of the implementing measures they have taken.[38]

The Commission's own periodic reporting on the state of implementation of specific EU legislative instruments, foreseen in practice as a standard requirement in EU environmental legislation, often takes a considerable period of time to be drawn up and published, being predicated and reliant upon information submitted to it from the member states. For example, the Commission reports on implementation of the EU waste framework legislation for 2007–9 and the 1991 Urban Waste Water Directive for 2009–10 were only published in 2013.[39] Delayed publication may render the information contained in the Commission implementation reports vulnerable to challenges of being out of date.

One judicial development to emerge from the CJEU's case law that is likely to be of some degree of assistance in the investigation and particularly prosecution of systemic breaches of EU environmental law by the Commission is the establishment of the category of 'general and persistent' (GAP) infringement by virtue of the *Irish Waste* case,[40] as discussed in Chapter 3. In that case the CJEU held that the Commission had proven that Ireland was guilty of a GAP infringement of EU waste management legislation in having failed to address a number of instances of fly-tipping. The GAP status of the breach meant that the defendant state was obliged to address the systemic underlying problem identified by the case of failing to ensure that its implementation policy of EU waste legislation was sufficiently effective in practice, without any opportunity to shut down EU legal scrutiny by only addressing the symptoms of failure through closure of particular illicit dumping sites.[41] At the same time, the evidential burden on the Commission

is eased once it is able to provide sufficient proof of widespread failure to honour EU obligations; the GAP status of proceedings will not be affected by measures taken by a defendant state to address one or a few instances of non-compliance and the CJEU confirmed that additional evidence of similar breaches could be referred to by the Commission after the pre-litigation phase has been completed. Moreover, the development of a category of GAP breaches has potentially beneficial implications for the prosecution of second-round proceedings. First, from an evidential perspective, the Commission will not be faced with the potential collapse of a second-round case if a member state demonstrates that compliance has been achieved in only one or a few instances. Secondly, given the seriousness of a member state being found guilty of a GAP breach of EU environmental law, the CJEU has the opportunity to impose a far higher level of financial sanction than for instances of single or isolated breaches, although at the time of writing the CJEU had yet to confirm this to be the case and how this would be factored into its calculation framework for financial sanctions.[42]

5.1.2 Resources issues

A long-standing problem facing the Commission has been the question of a lack of resources internally to deal with the number of environmental cases under Articles 258 and 260 TFEU.[43] In terms of personnel charged with the principal responsibility of following up complaints, own-initiative enquiries into suspected violations and preparing case dossiers (including letters of formal notice and reasoned opinions), the relevant legal units[44] dealing with infringements within the DG ENV of the Commission has been staffed with relatively few personnel for much of the DG's history.

Until fairly recently, the number of legal officers barely exceeded one per member state.[45] For the years 2002 and 2004, for example, there were reportedly 18 and 16 full-time desk officers respectively to cover the then 15 EU member states.[46] In more recent times, matters do not have appeared to have improved. As at October 2013, the information available from the Commission's Staff Directory indicated that 25 case handlers and infringement support staff were in post to service infringement casework for the 28 member states, though some of these appear to be on part-time contractual arrangements.[47] In the past, the law enforcement teams within DG ENV have been hampered by not infrequent staff turnover, often compounded by the fact that a number of personnel have been supplied by member states on temporary secondments. Borzsák notes that in recent years the situation has stabilised somewhat with Commission staff postings lasting usually for a minimum of two years.[48] Nevertheless, the current position pans out to fall considerably short of two full-time desk-officers per member state, an informal benchmark that the Commission services aimed to achieve for a considerable number of years, and serves to underline the point that the Commission remains stretched in terms of personnel to take on the number of environmental infringement cases involved.

Figures from the Commission's annual reports on monitoring the implementation of EU environmental law show that the environmental sector accounts for,

on average, the largest proportion of Article 258 TFEU casework. Specifically, between 2002–12 the proportion of infringement actions concerning EU environmental legislation opened annually by the Commission has averaged just under a quarter (23 per cent) of the total number of first-round case pursued by the institution (see Table 5.3 at the end of this chapter). Over the same period, the Commission reported in its annual surveys monitoring the application of EU law that the environmental sector has accounted for the largest number of case investigations of alleged EU law infringements in any given sector. As at the end of 2012, there were 296 live environmental infringement cases, representing some 20 per cent of all Article 258 TFEU casework[49] (see Table 5.3).

The reader is referred to the statistical tables at the end of the chapter for further information on infringement case numbers. Against this backdrop, it is not difficult to see that the question of allowing on-site investigations becomes particularly challenging from a Commission perspective.

5.1.3 Complainants as sources of information on environmental law enforcement

It has been evident for a number of years now that complaints to the Commission have proven to be an important source of information on EU law implementation matters. It has been noted generally that complainants are of significant value to the Commission in assisting it in carrying out its supervisory functions under Articles 258 and 260 TFEU, particularly in fields such as environmental policy where the Commission has not been vested with any specific monitoring powers.[50] For the environment sector, the complaints system presents itself as an opportunity for ordinary citizens and particularly environmental and other non-governmental organisations (NGOs) to seek to trigger legal action without having to incur legal costs that they would normally have to shoulder if they decided to take civil action before the national courts

Annual monitoring reports of the Commission on the application of EU law have for several years disclosed a consistently high number of complaints filed by the public with Commission services concerning alleged instances of member state non-compliance with EU environmental law. The number of environmental complaints rose quite rapidly in the 1980s, reflecting with increase in environmental legislation adopted at EU level. Whilst in the early part of the 1980s environmental complaints numbered around 10 a year, by the end of that decade this had increased to around 500.[51] Since then, the Commission (DG ENV) has continued to address a considerable amount of environmental complaints. Between 2002–13, for instance, the average number of complaints filed annually from the general public with the Commission about alleged instances of infringements of EU environmental law was 380, representing approximately one-fifth (20.7 per cent) of the total amount of complaints filed across all EU policy sectors (see Table 5.1 below). For the overwhelming majority of that period the environmental sector accounted for the largest proportion of complaints. Whilst the number of environmental complaints has varied over the previous decade

and appeared to have decreased in the mid 2000s, it is evident that the quantity of complaints has been substantial in most recent years. There were 666, 604, 588 and 520 complaints registered with the Commission annually between 2010 and 2013[52] (see Table 5.1). With the recent accession of a number of Central and Eastern European countries to the EU, many of which face considerable challenges in meeting and maintaining EU environmental protection standards, notwithstanding the provision of transitional relief and structural funding assistance, it is unlikely that use of the complaint system will diminish significantly in the near future.

Analysis of recent Commission reports and data on monitoring the application of EU environmental law suggest that information from complainants has been useful and has led to the triggering of a substantial proportion of environmental infringement actions. However, it appears that the relative significance of complaints as sources for the launch of infringement action has decreased in recent times.[53] Whereas DG ENV has reported some 50 per cent of environmental infringement proceedings could be traced back to a complaint, by 2011 this proportion had decreased to around 28 per cent (see Table 5.2 below). These figures may well underestimate their significance in the prosecution of bad-application cases, taking into account that the Commission has no supranational powers to undertake on-site investigations in such cases.

Notwithstanding the continuing importance of complainants as a source of information for the Commission services, a note of caution also needs to be sounded. It is perhaps too easy to run away with a complacent view that complainants may serve effectively as watchdogs on member state implementation of EU environmental law. Their involvement depends on a number of factors. In particular, the degree of legal, technical and/or financial capability of the potential complainant may often be crucially significant for it to be able to garner information and evidence. In addition, the parameters of environmental interest of a complainant will serve to determine the range of legislation covered. For instance, Grohs notes that few complaints are filed affecting the chemicals, noise and air quality sectors. She suggests that this may be down to the fact that the legislation concerning the first two sectors is focused on delivering product norms and less at involving the wider public, whilst EU air quality legislation has provided few enforceable standards.[54] She also notes that far more complaints are filed affecting nature conservation issues (Habitats, Wild Birds and EIA Directives), which relate to standards the public can readily understand. This may also have something to do with a number of well-known NGEOs tending to specialise in wildlife protection and conservation issues.

5.2 Limitations of legal structures underpinning Articles 258 and 260 TFEU

The procedures envisaged for the prosecution of infringement actions, and especially those concerning EU environmental law, suffer from a number of serious shortcomings. The central core legal framework relating to infringements, namely

Article 258 TFEU, has remained essentially unchanged since its inception in the 1950s under the aegis of the original Union Treaty framework (former Treaty of Rome 1957 or E(E)C Treaty). True, the 1992 Maastricht Treaty did introduce the possibility for the first time of financial penalties being imposed via second-round infringement proceedings (now Article 260(2) TFEU) and the 2007 Lisbon Treaty enabled the Commission to request penalties from the CJEU in first-round proceedings in respect of non-communication cases.[55] However, these changes have had a relatively limited impact in terms of making the prosecutorial tools more effective for the Commission. For a good deal of the infringement caseload, the infringement procedures remain cumbersome and essentially wedded to the traditional approach that leans towards reaching resolutions out of court as far as possible, through negotiations between Commission and defendant member states.[56] It may be questioned whether this structure is suited to providing the Commission with an effective legal mechanism in order to assist in its mandate to 'ensure the application of the Treaties'.[57]

Whilst the Commission has sought in recent years to introduce some practical changes to the handling of its environmental casework, there is relatively little that can be done until the legal structures of the infringement process, and particularly those relating to Article 258, are amended. This would require unanimous approval from the member states which, although a difficult task, has not proved impossible in the past when they agreed to the TEU in 1992 introducing changes to the infringement structures by incorporating the second-round penalty procedure in the form of Article 260(2) TFEU. The following sections explore some of the key problem areas.

5.2.1 Temporal aspects

A major drawback of both first- and second-round infringement actions governed by Articles 258 and 260 TFEU is the considerable length of time it takes on average for the Commission to be able to arrive at a legally binding resolution to a particular case.[58] This is a factor that offers a distinct advantage to defendant member states whose authorities may be able effectively to play for extra time without penalty in sorting out implementation difficulties. This raises questions about the (adequacy of) deterrence value attached to the current infringement action frameworks.

5.2.1.1 Length of infringement proceedings

With the exception of non-communication cases, whenever a member state is determined to resist the Commission's view that it has failed to implement EU environmental law correctly, the scene is often set for a lengthy litigious battle. Whilst treaty amendments introduced by virtue of the 2007 Lisbon Treaty as well as changes in case management practice by both the Commission and CJEU have made some improvements, the position overall remains challenging with many cases taking a long time to be concluded.

The introduction of the element of financial penalties at first-round stage in relation to non-communication cases by virtue of the Lisbon Treaty (Article 260(3) TFEU) without doubt has had a positive impact in terms of speeding up the resolution of casework for this type of infringement case. As Table 3.1 in Chapter 3 indicates, the anticipated timescale for completion of infringement proceedings in respect of non-communication cases (from letter of formal notice (LFN) to CJEU judgment) can be expected to be around 22 months, and even shorter if the Advocate General decides it unnecessary to provide the CJEU with an advisory opinion in the case at hand. The author's own research into the average time taken for non-communication cases to be completed during 2010–11 found this to be 22.3 months (see Tables 3.4 and 3.5 of Chapter 3). In addition, it should be pointed out that the Commission's approach in the administrative phase has become stricter in recent years, shortening the time period from six to two months for defendant member state responses. The Commission also has no qualms about launching a formal infringement procedure straight away in such cases, thus bypassing the practice employed in other types of infringement case of engaging with the member state behind the scenes informally prior to issuing an LFN.

However, the position continues to be significantly different for other types of infringement cases, namely those dealing with non-conformity and bad-application situations. Both types of infringement action comprise the bulk of environmental infringement casework, some 85 per cent of cases between 2010 and 2012 (see Table 3.5 of Chapter 3). The author's research into the handling of environmental infringement actions completed between 2010 and 2012 indicates that the average length of time of the infringement action (from LFN to CJEU judgment) for non-conformity and bad-application cases took just over five years (63 months) and just under four years (44 months) respectively (see Tables 3.4 and 3.5 in Chapter 3). The average length of time for the completion of environmental infringement actions in total (across all types of cases) was just over four years (49 months). It is important to remember that these time lengths covered only first-round proceedings under Article 258 TFEU, where the outcome would only lead to a judicial declaration from the CJEU (with no possibility of a financial penalty being imposed at that stage). The deployment of second-round infringement proceedings under Article 260(2) TFEU for the purpose of obtaining a financial sanction via the CJEU serve to extend the overall litigation time by several months. The author's own research, gleaned from information obtainable from CJEU case reports, reveal that the average combined length of first- and second-round infringement proceedings of environmental cases resulting in second-round judgments between 2010 and 2013 averaged 126.5 months (10.5 years) (see Table 4.2 of Chapter 4). The substantial lengths of time involved have been a long-standing problematic feature of environmental infringement proceedings and for infringement actions in general under Article 258 TFEU. The picture is not dissimilar to the position recorded over the past two decades or so. For instance, Krämer has assessed the average number of months taken as follows in the following time periods: 2004–5 (47 months); 2002–3 (45 months); 2000–1 (59 months); 1998–9 (68 months); 1995–7 (47 months); and 1992–4 (57 months).[59]

The current amount of time taken by Article 258 TFEU proceedings is considerable by any standards, but especially drawn out when considered in the context of environmental litigation.[60] Without the possibility of the Commission being able to secure effective and relative speedy legally binding measures to ensure correction of an implementation failure on the part of member states, the utility of environmental litigation may be severely compromised or even defunct in certain cases where time may be of the essence. As Grohs aptly points out, 'much polluted water may have flowed under the bridge' before the Commission obtains a court ruling.[61] One should be careful when making generalisations about length of proceedings, in the sense that environmental cases differ considerably in terms of the level of difficulty and temporal nature of complying with EU obligations.[62] In some instances, it might be argued a slower pace of prosecuting a defendant member state may be warranted to achieve compliance within a realistically attainable time-frame according to particular circumstances facing member states. For instance, obligations on member states to improve environmental infrastructure (e.g. installation and upgrading of sewage treatment works) require considerably more time and investment than the adoption of transposition legislation. However, recognition of such gradations in difficulty should be recognised and woven into the fabric of the relevant EU environmental legislative instrument as a result of political negotiation, rather than being accommodated in the law enforcement phase. It is standard practice for very considerable implementation periods to be foreseen in legislation involving long-term structural reforms and innovations.[63]

In many respects, the core problem of drawn-out proceedings derives from the fact that the legal framework contained in Articles 258 and 260 TFEU, notwithstanding recent reforms, is ill-suited to dealing with the challenges thrown up by environmental litigation. Their design has not been changed fundamentally since their inception, which is to encourage informal and discreet resolution of disputes between the Commission and member states out of court and out of the public's gaze if at all possible. This reflected a perception widely held in the early years of the EU that it would be considered a considerable political and diplomatic embarrassment for a member state to be hauled up before the CJEU. Over time, the infringement procedure has no longer been seen as a means of last resort and is now a commonplace enforcement tool mechanism.[64] Yet no specially tailored infringement procedure for the environment sector has been established to substitute Article 258. The result has been to deny the Commission the possibility of taking swift legal action in order to ensure due implementation of EU environmental legislation.

Under the Article 258 procedure, it is the CJEU and not the Commission which has the power to determine the issue of compliance. The Commission has no powers to issue a defendant state with any binding instruction or penalty in the form of correcting an implementation failure. The CJEU has interpreted its powers as enabling it to issue a declaration as to whether a member state has failed to comply with EU law. In contrast, under the auspices of the former European Coal and Steel (ECSC) Treaty 1951, the Commission was vested with powers to take binding decisions against a member state it considered to have violated ECSC law

and initiate a process to suspend the payment of ECSC funds as a means of applying pressure on a defendant to effect compliance with the law (Article 88 ECSC). A member state retained the right to appeal through annulment proceedings in the usual way if it were ever minded to object to such a Commission decision. This particular legal procedure was never in fact used by the Commission. Such a procedure would have significant advantages if employed in an environmental infringement context, in terms of having the potential to effect a swift, binding resolution to a dispute and carrying a strong element of pressure and deterrence.[65] The power to issue a decision would enable the Commission to tailor binding instructions to the defendant on corrective action, as warranted by the particular case at hand. It would also be more suited than Article 258 to addressing implementation failures of a more short-term nature as well as cases requiring urgent action.

Some commentators, though, have expressed concern that such a procedure would not be welcome in placing the Commission in the invidious position of being accuser, judge and executioner.[66] Such concerns are unfounded, as the defendant member state would have the standard automatic right of appeal by way of judicial review under Article 263 TFEU to the CJEU which would have the power to annul a decision it considered on any of the grounds listed in the provision. In any event, such a procedure has been applied for many years in other law enforcement contexts at EU level, such as in the field of competition law,[67] without such concerns being raised by member states. However, the member states have so far shown no willingness to alter the current structuring of Article 258 by way of treaty amendment. The changes introduced by virtue of the TEU to the infringement provisions in 1992 with the introduction of the second-round infringement procedure (Article 260(2) TFEU) confirmed the deep-rooted view held by member states that the proceedings should retain in essence their status as a tool for negotiating as opposed to imposing resolutions in respect of compliance disputes. Likewise the subsequent Lisbon Treaty changes effectively reaffirmed this paradigm. The penalty envisaged in the second-round procedure in Article 260 TFEU may only be imposed by the CJEU after there has been an attempt to reach a friendly settlement through a pre-litigation process.

As matters currently stand, then, even in a clear-cut case of non-communication of an environmental directive, the relatively cumbersome pre-litigation and litigation phases in Article 258 have to be complied with before a binding decision may be made on the issue of alleged non-compliance. Specifically, this will involve initially two written warnings from the Commission (namely an LFN and reasoned opinion (RO)) with opportunities for the defendant to be able respond on each occasion, as well as completion of the judicial phase when the case is then referred to the CJEU. The internal workings of the Commission ensure that in practice it is rare for such a case to be fast-tracked. The hierarchical nature of the decision-making process requires that the College of Commissioners has responsibility to decide each formal step taken in each proceedings. Moreover, the parties in infringement cases are not subject to any legally binding deadlines for completing the pre-judicial phase under either Article 258 or 260 TFEU proceedings.

Thus, there is the possibility for a member state to be able to drag out proceedings by, for instance, refusing to disclose information on a suspected infringement in a timely manner, without being subject to any penalty in so doing.[68] Accordingly, there have been calls for revision to the current EU treaty provisions such as through clear procedural rules to be adopted under the auspices of Article 337 TFEU (ex Article 284 of the European Community (EC) Treaty) as a means of eliminating this tactic.[69] In particular, some have argued for mandatory short time limits to be imposed on member states when responding to formal Commission written warnings in the pre-litigation phase.[70] However, no such rules have been proposed, notwithstanding that they have been enacted in other Commission law enforcement contexts, such as competition law.

The current position applicable to the environmental sector effectively tolerates a member state being able to build in a substantial amount of extra time for attaining compliance, over and beyond that foreseen and prescribed by EU environmental legislation. For instance, if the Commission decides to take an infringement action against a member state on account of its failure to implement an EU environmental directive into national law, and that member state then gets round to notifying the Commission of transposition legislation before the expiry of the deadline for responding to the reasoned opinion, then the proceedings terminate without any penalty falling on the defendant for disrespecting the original implementation deadline prescribed by the legislation. Similarly, in second-round infringement proceedings a member state will be able to avoid incurring a penalty if it secures compliance before the deadline set by the final written warning, although it should be pointed out that possibilities for abuse of this kind have been significantly reduced with the elimination of the need for an RO under Article 260(2) TFEU by virtue of Lisbon as well as the practice introduced by the Commission in the mid 2000s of requesting from the CJEU a lump sum penalty if a member state fails to honour the deadline set by the final written warning (LFN) but secures belated compliance prior to the time when the CJEU gives its second-round judgment.[71] Nevertheless, the treaty system effectively still builds in a very substantial time period before judgment is handed down, which has led to calls, for instance, for the second-round procedure to be curtailed.[72]

It should be pointed out, though, as outlined earlier in Chapter 3, the Commission has in recent years taken steps in order to streamline and speed up its handling of casework during the pre-litigation phase of first-round infringement proceedings. These changes, introduced in the wake of the Commission's 2007 review of EU law implementation,[73] have brought some benefits. Specifically, the establishment of the EU Pilot system[74] has meant that national authorities are now given early warning of and opportunity to resolve complaints that are sent to the Commission, prior to any decision being made by the Commission whether or not to launch formal infringement proceedings. Where complaints are unable to be resolved via the EU Pilot within 20 weeks, the Commission then may move to open proceedings formally if it considers the complaint meritorious and a priority case. The Commission has reported that under the EU Pilot generally the vast majority of complaints may be expected to be resolved at an informal stage.[75]

For 2012 and 2013, the Commission reported resolution rates of 68.34 per cent and 70.22 per cent respectively.[76] In addition, in recent years the Commission has also taken steps with a view to shortening the formal pre-litigation phase of the Article 258 first-round infringement procedure. Whilst up to the early 2000s it was not uncommon for the Commission to provide the defendant member state with six months or more to respond to individual formal written warnings, current standard practice of the Commission has reduced this now to two months. Other techniques have also been employed to streamline the process, such as the practice of joining similar breaches together into a single action against a particular member state.

The relative informality of the pre-litigation phase of the Article 258 procedure does appear to be beneficial in some respects. For a considerable number of years, several commentators have noted that the vast majority of infringement disputes are resolved without going to court.[77] Estimates have fluctuated over the years, but it appears that around only10 per cent of Article 258 disputes culminate in being referred to the CJEU for judicial resolution.[78] Commission annual reports on monitoring EU law indicate that a substantial number of cases are resolved at pre-judicial stage and settled out of court. The annual rate of referrals to the CJEU has been consistently and markedly lower than the number of infringement proceedings in motion (open infringement cases). Over the period 2000–10, for instance, the average annual rate of total court referrals was 18.6 per cent of the number of open cases. For environment cases the position has been broadly similar, although the out-of-court settlement rate appears not to have been as impressive as the overall position across the entire spectrum of EU sectors. During 2000–10 the average annual rate of court referrals in environmental cases was 25.4 per cent of the number of proceedings opened annually.

Some commentators may feel ready to assume from these statistics that the high number of pre-trial case closures indicates a significant degree of efficiency and that member states view the procedure as a deterrent.[79] However, the picture is more complex. There is little in the way of hard evidence to suggest that member states consider the infringement procedures as such to be a major deterrent, not least in the environment sector. Were that the case, one would expect to see relatively few infringement actions being launched by the Commission.

However, the Commission's annual monitoring reports on the application of EU law have revealed that the number of environmental infringement cases has remained relatively high over a period of several years now. As Table 5.6 at the end of this chapter indicates, in all but two years over the period 2002–10 the environment sector accounted for the largest proportion of infringement cases to reach the final warning stage under Article 258 TFEU across all EU policy sectors (averaging 27 per cent of the caseload). Similarly, the environment sector accounted for the most referrals to the CJEU in infringement actions during the same period except for one year (averaging 32 per cent of the caseload to have reached CJEU referral stage). Reports from the DG ENV on EU environmental law implementation at national level reveal that as at the end of 2012 and 2013 there were respectively 296 and 353 live infringement proceedings in the environmental

sector. Out of these, bad-application cases constituted the vast majority of cases: 197 (66 per cent) and 192 (54 per cent) by the end of 2012 and 2013 respectively. Non-conformity cases amounted to 77 (26 per cent) and 63 (18 per cent) of the live environmental infringement cases by the end of 2012 and 2013 respectively. Non-communication cases in the environmental sector have recently increased in number. By the end of 2012 and 2013 environmental non-communication cases amounted to 13 (4.3 per cent) and 92 (26 per cent) of the total number of live environmental infringement proceedings.[80] Over the period 2002–12, the environment sector also accounted on average for 44 per cent of the total number second-round infringement cases being pursued by the Commission, by far the largest number amongst EU sectors as a whole (see Table 5.8 at the end of this chapter).

A key reason why there remains considerable room for improvement with regard to the state of member state implementation of EU environmental legislation lies with the legal structures underpinning the infringement action framework as contained in Articles 258 and 260 TFEU. Notwithstanding some modifications made to them by virtue of the Lisbon Treaty 2007, the EU treaty infringement provisions remain deficient in providing member states with effective incentives to ensure timely compliance with Union environmental protection obligations. Given the length of time it takes to complete first-round proceedings, there is little in the way of pressure upon them to ensure that national law is in conformity with Union environmental legislative requirements by the time the relevant implementation deadline expires. Member state governments are fully aware that they have in practice a considerable amount of time thereafter to achieve compliance before a CJEU ruling or financial sanction imposed (which except for non-communication cases may only be made in second-round proceedings). Unsurprisingly it is indeed rare to see member states achieving compliance within the time period envisaged by EU environmental legislation.

That being said, there appears to be evidence that indicates that compliance rates are significantly enhanced if the threat of financial sanctions is brought forward to an earlier stage in the infringement process. Specifically, it is evident that since the Lisbon Treaty changes introduced the possibility of financial penalties for non-communication cases at first-round stage,[81] the number of non-communication cases has dropped significantly. DG ENV reports on annual implementation of EU environmental law[82] indicate that for the period 2001–9 non-communication cases represented on average of one-third of all environment infringement cases, whereas for the period 2010–12 this figure had fallen to an average of 14 per cent of the infringement caseload. For 2012, only 4.53 per cent of environment infringement cases concerned non-communication breaches. In terms of absolute numbers, this meant a reduction from an average of 120 open infringements each year during 2001–9 to 56 such cases annually during 2010–12 (with just 13 as at the end of 2012).

Leaving aside the factor of out-of-court settlements, it is clear that the Commission is currently not vested with adequate tools to effect a satisfactory legal outcome to an infringement of EU environmental law in the face of intransigence

on the part of a member state. The legal structure underpinning Articles 258 and 260 TFEU is such that the enforcement system is effectively still heavily reliant upon member states' preparedness to adhere to the principle of the rule of law. Were the member states to agree to establish a single infringement procedure leading to the possibility for the CJEU to impose financial penalties in all types of breaches of EU environmental law, not simply non-communication cases as is the current position, this would be likely to have a major beneficial impact in reducing the length of infringement proceedings and enhancing the deterrent effect of the infringement provisions. As has been pointed out elsewhere, any significant change to the structure of the infringement system would need to be supported with appropriate levels of staff resourcing within the Commission (and where appropriate the CJEU) for the purposes of ensuring that a swifter case management could be delivered.[83]

5.2.1.2 Interim measures

The possibility of securing interim measures in the context of Article 258 proceedings was discussed in Chapter 3. The subject is of considerable importance when dealing with bad-application scenarios that require particularly urgent action. The case law of the CJEU has confirmed that it is legally possible for the Commission to be able to secure interim measures under Article 279 TFEU (ex Article 243 EC) in the context of Article 258 proceedings, subject to it being able to demonstrate to the Court that it has a *prima facie* case, that the matter is urgent and that a failure to grant relief would effect serious and irreparable damage to the legal interest sought to be protected by the Commission if the parties waited until the date of judgment.[84] Significantly the CJEU has rejected the need for the Commission to submit a financial security when filing a request for emergency measures before the Court,[85] something that would otherwise be expected in a civil action where a party pleads for injunctive relief pending judgment.[86] The CJEU has instead waived such a requirement on the grounds that the Commission does not present it with a risk of non-payment due to insolvency.

In practice, though, the Commission has rarely sought to apply for such relief measures in the context of environmental litigation. It was not until 2006 when the Commission was able to deploy the interim measures procedure successfully in an environmental infringement case, namely in *Ligurian Bird Hunting*.[87] Prior to that case the Commission had shown little interest or confidence in the possibilities of applying to the CJEU for interim measures. One of the key reasons for the Commission's lack of appetite stems from the setback it sustained in the *Leybucht* infringement case,[88] discussed in Chapter 3. In *Leybucht*, the Commission had failed to meet the test of urgency according to the CJEU. A substantial amount of works had already been carried out on the particular coastal site host to wild birds in respect of which the Commission sought emergency measures from the Court. The Commission was adjudged to have left it too late to apply for injunctive relief against Germany for the purposes of requiring a cessation of

building activity. The case highlights the need for the Commission to have access to a good source of information and evidence at a relatively early stage in any bad-application dispute which might require interim measures (such as the need to order a cessation of unlawful development with actual or potential adverse impacts on a protected nature site or on EU environmental quality standards). As has already been pointed out earlier, taking into account in particular its lack of investigatory powers and other resources, the Commission is not really in a ready or suitably independent position to be able to present a plea to the Court for such types of measure.

Matters are made more difficult given the fact that it is the CJEU and not the Commission that has the power to issue interim relief measures. A plea for interim measures may only be made to the CJEU in relation to an action pending before the Court. Accordingly, the pre-litigation requirements of Article 258 TFEU have to be completed before the Commission may approach the CJEU for interim relief, a process that may take some time.[89] However, as was noted in Chapter 3, the CJEU has accepted the imposition of tight deadlines in Article 258 actions for responding to formal written warnings from the Commission (LFNs and ROs) so the legal hurdles do not seem insuperable in an appropriate case. Indeed, the Commission was able to apply successfully to the CJEU for interim measures in a few environmental cases since 2006, without having to accelerate the pre-litigation phase unduly.[90] In addition, there do not appear to be any internal structural problems that may bar the convening of emergency inter-service meetings between the Commission's DG ENV and its Legal Service to arrange for an expedited processing of a case warranting interim relief, even though there may appear to be a lack of clarity on specific internal procedures.[91] The key appears to be the Commission being in timely receipt of information and evidence of a bad-application breach. For the interim relief procedure is only suited to addressing those types of bad-application infringement cases which are able to be processed speedily within the pre-litigation phase of Article 258 TFEU.

5.2.2 Legal sanctions

Another major problem concerning the Article 258 and 260 TFEU infringement procedures is their lack of provision for the imposition of effective sanctions. This traces back to the origins of the infringement procedure, which was designed at the outset to secure if possible a friendly settlement outcome and minimise unnecessary tension between member states with regard to the evolving European Union integration process. The position also reflects the degree of political and diplomatic sensitivity involved with the establishment of an international court, in terms of the degree of its 'reach' into what may be perceived in orthodox international law terms to be within the sovereign internal domain of a nation state. In international relations, it is rare for nation states to agree to submit to the jurisdiction of an international court on a mandatory basis, as is the case with the EU member states and the CJEU under Articles 258 and 260 TFEU. It is rarer still for an international court to be issued with powers to impose sanctions as a

means of enforcing its rulings. Accordingly, from a broader public international legal context, EU infringement proceedings may be viewed in a relatively positive light as being a relatively effective set of law enforcement tools.[92] However, this does not detract from the reality that without genuinely effective sanctions, EU infringement procedures remain overly reliant on the goodwill and co-operation of member states to adhere to their environmental obligations.

5.2.2.1 Sanctions and Article 258 TFEU

With the possible exception of the special procedure applicable for dealing with non-communication cases which foresees the imposition of financial penalties,[93] the first-round infringement procedure under Article 258 TFEU is a rather weak form of litigation tool in terms providing inducements for member states to comply with their EU obligations. An effective outcome depends to a great extent upon the co-operation of the defendant, particularly in bad-application cases. As has already been mentioned, the Commission has no power of its own motion to take decisions in the area of environmental policy to issue binding instructions to member states, as it does in other fields of law such as competition. Neither does it have powers to impose pecuniary-type penalties, as was the case with respect to the coal and steel sector until the lapse of the former ECSC Treaty in July 2002.[94] Moreover, it has no power of its own motion to order interim measures, unlike in other areas of EU administrative law such as competition law.[95]

The CJEU may only issue a judicial declaration under Article 258 TFEU, save for the special exception of non-communication cases for which it may decide to impose financial penalties. The Court's position is that member states are obliged as a matter of EU law to give effect within their domestic legal systems to its rulings on whether EU law has been infringed, and it has refused to grant interim relief against member states which default on implementing its judgments. In its view, an interim relief measure would simply duplicate what has been already required to be carried out by its Article 258 judgment.[96] However, it is clear that the system of declaratory judgments by the end of the 1980s was having little deterrent effect, with many member states being on the receiving end of supplementary infringement actions on account of failing to implement CJEU judgments. The Court has taken the approach of avoiding issuing defendant member states with definitive instructions as to what they should do to achieve a state of compliance ('*arrêt educatif*') and instead simply affirm whether or not the defendant has perpetrated a violation of EU law. It has been mooted that the issuing of instructions would be within its current jurisdiction.[97] As has been pointed out elsewhere, the issuing of instructions or guidance from the Court might be particularly useful in those environmental cases where it is not self-evident what the appropriate remedial action is from a legal perspective. Winter takes the example of the *Santona Marshes* cases,[98] where it was not clear whether the effect of the ruling of the Court was that building works carried out on an area that should have been designated as a special protection area (SPA) contrary to the EU Wild Birds Directive[99] should be removed or allowed to stay.[100]

5.2.2.2 Sanctions and Article 260(2) TFEU

As has already been discussed in the Chapter 4, the second-round penalty infringement procedure Article 260(2) TFEU was incorporated into the EU legal order by virtue of the TEU with a view to enhancing the record of member state implementation of EU law and in particular the levels of compliance with CJEU judgments. Prior to that amendment, the only legal means available to the Commission to try and seek to induce a member state which had failed to implement an Article 258 ruling was to launch a fresh infringement action. Krämer notes that whereas in 1984 there was but one reported instance involving the environment where the Commission had decided to take such action, by 1991 this had risen to 21 repeat infringement actions.[101] However, even though the second-round penalty infringement procedure (now under Article 260(2) TFEU) has introduced a marked change, in that the CJEU is now vested with power to impose pecuniary sanctions on a member state that defaults over implementing a first-round judgment, it appears that the new second-round infraction procedure has not brought significant improvements in terms of speeding up member state compliance rates, and this also applies to the environmental sector. It should be noted, of course, that the 2007 Lisbon Treaty assisted in reducing the length of the pre-litigation phase of Article 260(2) proceedings by eliminating the need for an RO.

Since its inauguration by virtue of the 1992 Maastricht Treaty, the second-round procedure (Article 260(2) TFEU) has not appeared in practice to have deterred member states significantly from continuing to fall short when it comes to implementing EU law, including EU environmental legislation. Even with the recent Lisbon Treaty amendments, the second-round infringement procedure does not appear to have induced member states to ensure that they meet transposition or implementation deadlines stipulated in EU environmental legislation notably any quicker. Specifically, the Commission remains frequently confronted by situations in which several member states fail to comply with EU environmental legislative obligations on time, notwithstanding the fact that substantial transitional periods are built into EU environmental directives to allow member states to adopt national transposition and/or implementation legislation. For instance, in respect of the Water Framework Directive 2000/60[102] none of the member states had complied with the directive's 22 December 2003 transposition deadline, and by the beginning of 2005 infringement actions had been launched against six member states. Other more recent examples of widespread non-compliance abound. For instance, in 2010 Commission press releases[103] reported that the Commission had decided to launch infringement action against nine member states over failures to transpose the Ambient Air Quality Directive 2008/50.[104] In 2011 the Commission issued 8, 14 and 13 member states with final written warnings (ROs) on account of failure to transpose correctly the Marine Strategy Framework Directive 2008/56,[105] Waste Framework Directive 2008/98[106] and Environmental Crime Directive 2008/99[107] respectively. In the same year, infringement proceedings were commenced against eight member states in respect of transposition failings regarding a 2009 amendment to the Ship Source Pollution Directive

2005/35.[108] In 2013 infringement action was started against four member states over failures to transpose the Energy Efficiency in Buildings Directive 2010/31.[109] Other examples of recent 'horizontal' infringement action in relation to non-compliance with EU environmental legislation includes the launch of proceedings in 2010 against 17 member states over failure to implement environmental quality obligations contained in the Air Quality Directive 2008/50.[110] In the same year, 12 member states received final written warnings under Article 258 TFEU on account of their failure to comply with management plan requirements contained in the Water Framework Directive 2000/60.[111]

The environmental sector has accounted for the largest proportion of ongoing Article 258 infringement cases for several years. As at the end of 2013, some 25.6 per cent (334) of all live first-round infringement proceedings concerned EU environmental law (see Table 5.3 at the end of this chapter). Moreover, it appears from Commission annual reports on the monitoring of EU law that several member states are still failing to implement CJEU judgments within a reasonable time period (as required under Article 260(1) TFEU) and as a result face the prospect of second-round infringement action. Specifically, as at the end of 2013 the Commission was prosecuting 40 second-round environmental infringement cases, representing some 35 per cent of all live Article 260(2) TFEU proceedings (see Table 5.9 at the end of this chapter). Table 5.9 shows that the position has remained fairly consistent for a number of years now, with the environment sector regularly having the highest proportion of second-round infringement actions across all EU policy sectors. Given that the Lisbon Treaty amendments came into effect relatively recently in December 2009, it is probably too early to make definitive conclusions about the impact of the reduction to a single warning in the pre-litigation phase. However, the early data to have emerged from Commission monitoring reports are not particularly encouraging, in that they do not appear to indicate at the time of writing any notable let-up in the number of live second-round proceedings being opened by the Commission. In the long-term, though, the introduction of penalties for first-round actions relating to non-transposition cases by virtue of the Lisbon Treaty is likely to have some effect in terms of reducing the number of second round environmental proceedings.

It is not that difficult to find reasons to explain why the effect of Article 260(2) has thus far appeared to have been relatively minimal. A prime concern is the fact that the second-round procedure does not reduce the length of the infringement procedure system itself.[112] Before a member state is faced with the prospect of receiving any penalty, the Commission is obliged to carry out a pre-judicial negotiation process akin to that applicable to first-round infringement proceedings under Article 258 TFEU, albeit this has been somewhat shortened by the Lisbon Treaty as a result of the elimination of the need for a second written warning from the Commission. This means that it may be several months after the initial judgment before a member state may face a pecuniary fine. In respect of the eight environmental cases that have, at the time of writing, culminated in a second-round judgment under Article 260(2) TFEU, the average time taken between initial Article 258 LFN and court fine imposed in a second-round judgment has been

142 months (11 years and 10 months). The lack of will on the part of the Commission to seek to secure a quick legal outcome after a member state has defaulted on a court ruling has been sharply criticised in the past.[113] It should be noted, though, more recent practice of the Commission has been more assertive in terms of curtailing pre-litigation phase case management, with the results of this change yet to feed through statistically into the court reports. It should also be noted that under the EU treaty framework the Commission has also been vested with discretion as to whether to prosecute a second-round action, for the wording relating to the pre-litigation phase in Article 260(2) TFEU is identical to that contained in Article 258 TFEU. However, this interpretation has been disputed in some quarters.[114]

The nature of the sanctions available under the second-round procedure is not really appropriately geared or tailored to securing implementation of EU environmental legislation. The pecuniary sanctions were introduced instead principally as a means of fining member states in terms of their disrespect of the CJEU, not the EU norms in question.[115] The second-round procedure is in large degree a contempt of court procedure, as opposed to a legislative enforcement mechanism.[116] However, the CJEU has considered the procedure to share the same purpose as Article 258 TFEU in ensuring the effective application of EU law.[117] As was seen in the previous chapter the Commission has sought to infuse the calculation methods applicable to second-round penalties with criteria that relate also to the nature and severity of the original legislative infringement.[118] Under the second-round procedure, a pecuniary penalty may only be applicable from when a member state has been provided with a reasonable opportunity to implement the Article 258 TFEU court ruling. The second-round procedure might have had more effect if it had employed the principle of being able to sanction a member state as from the date the Commission originally issued an LFN to it under the Article 258 procedure. Such an approach has been applied for many years in the EU competition law sector. A fine which is imposed on a company for anti-competitive behaviour for breaching Articles 101 and 102 TFEU may run from the date the defendant is put on notice by the Commission by way of a statement of objections that it considers there has been a breach of Articles 101 and 102 TFEU and not only from the later date when an official decision is issued against the defendant after the hearing stage.[119] Accordingly, the pecuniary sanction system contained in Article 260(2) TFEU is not designed to punish past illicit conduct.[120]

Several commentators have criticised the sanctioning mechanism under Article 260(2) TFEU as being ill-suited to addressing the implementation failings of a defendant member state. In an environmental context, it appears rather an unsatisfactory approach to seek to try to quantify environmental damage (wholly) in monetary terms; a more effective sanction would be to impose an obligation to remediate the damage caused.[121] Currently, the infringement procedure does not provide for the recovery or suspension of any EU environmental fund payments to the defendant member state concerned, a sanction option that might well be more tailored and effective in securing compliance from the defendant.[122] Moreover, unless the CJEU actually imposes a sufficiently high periodic penalty, there is the danger that the pecuniary sanction system may fall into the trap of becoming a *de*

facto tax on pollution.[123] It has been queried by some whether the levels of pecuniary sanctions are adequate to serve as an effective deterrent.[124] It is apparent, for instance, that the CJEU has often imposed lower lump sum fines than those recommended by the Commission and at the same time does not usually provide any indication of the criteria it uses to calculate the final amount.[125] Brian Jack makes the point that the co-efficients recommended by the Commission and used by the CJEU to calculate fines have not been appropriately applied to acknowledge the severity of adverse environmental impact.[126] He cites the example of a far higher seriousness co-efficient being recommended in a free movement of persons case against Italy as compared with the one applied by the CJEU failure by France to adhere to fishing conservation measures.[127] In addition, he questions whether the criterion of relative voting strength should feature in the calculation framework.[128]

One step taken to strengthen the impact of the second-round procedure, though, has been the CJEU's clarification[129] that it may impose more than one type of financial sanction in a given case. Whilst the text of Article 260(2) and (3) TFEU refers to the CJEU having the power to impose a lump sum 'or' a penalty payment, the wording does not exclude the possibility of cumulative fines. As Prete and Smulders point out, if the CJEU were confined to imposing only one type of financial sanction, namely a lump sum for those states complying before second-round judgment and a penalty payment for defendants still in breach at that time, this would lead to a number of unjust scenarios arising as well as a dampening of the deterrent effect underpinning the second-round procedure.[130] In particular, they note that, under a single fining system, perversely a defendant state might receive a much smaller fine if compliance were achieved very shortly after second-judgment than before it.

Finally, there is still some uncertainty as to whether and how the CJEU may enforce collection of pecuniary sanctions under Article 260(2) in the face of an intransigent member state. Thus far, there does not appear to be any indication that a member state is likely to decide to refuse to pay any or part of fines imposed on it by the CJEU. As was discussed in the previous chapter, in the follow-up to the *French Fishing Controls (2)* case, the French government did dispute the legal competence of the Commission to require collection of a deferred penalty payment. However, that issue has been resolved by the General Court[131] in the Commission's favour and not contested by France or other member states. Nevertheless, it is not out of the question that a member state might dispute the legitimacy of the level of a fine imposed and refuse to pay and, in that event, it appears unlikely the CJEU has jurisdiction to force the issue by ordering the withholding of EU funds until payment of fines are fulfilled.[132] Ultimately due payment of fines, as is the case with effecting due compliance with EU law, is a matter principally for member states and depends upon their preparedness to uphold the rule of law.[133]

Eight of the 21 second-round judgments under Article 260(2) TFEU to have been handed down by the CJEU (so far as at the time of writing in September 2014) have concerned environmental legislation.[134] These judgments undoubtedly have had some psychological impact in terms of promoting member states' awareness of the ultimate powers of the CJEU to impose pecuniary sanctions. It appears,

though, that Article 260(2) TFEU has had to date but a limited deterrent effect on member states. This is borne out by the fact noted earlier that there are a large number of unimplemented first-round judgments, including in the environmental sector. In its annual monitoring report on the application of EU law for 2012, the Commission has reported that as at the end of 2012 it had opened 35 formal second-round proceedings involving breaches of first-round environmental judgments, representing the highest number of second-round infringements across all EU sectors (27 per cent) (see Table 5.8 at the end of this chapter). The low number of second-round judgments (only 21 after over two decades of Article 260(2) TFEU being operational) indicates that member states will probably eventually wish to settle a dispute out of court with the Commission to avoid a fine.[135]

European Commission reports on the monitoring of EU law have noted that the vast majority of second-round infringement proceedings come to be settled after the point in which the Commission has referred a case to the CJEU and determined the level of penalty it wishes to request from the Court. As at the end of 2003, 76 per cent of cases for which a penalty request to the CJEU had been made had been settled before judgment (22 out of 29 cases). However, it also appears that settlement is often reached at a relatively late stage, with some evidence of defendants drawing out proceedings until the moment when liability cannot be avoided.[136] This problem was more acute in the past when the Commission pursued a practice of not requesting a financial penalty from the CJEU if a defendant managed to comply with the terms of the first-round judgment prior to the second-round judgment[137] and when the pre-litigation phase was longer than present in requiring two Commission warnings. If, as the evidence suggests, member states' minds are seriously concentrated on correcting implementation failures only during the latter part of second-round proceedings, this raises questions as to whether the first-round infringement proceeding is but perceived little more than a trivial inconvenience or banal exercise by defendants.[138] The recent introduction of the availability of penalties in first-round proceedings for non-communication cases may well have some deterrent impact for this type of breach, although more time is required to assess the evidence for this.

5.3 The European Commission and conflicts of interest

It is the Commission which is vested with the exclusive responsibility of deciding whether or not to prosecute an infringement case under Articles 258 and 260(2) TFEU. As confirmed by the CJEU on a number of occasions, the Commission has unfettered discretion in deciding whether or not to pursue an infringement case. A decision by the Commission not to prosecute a case is immune from legal challenge from a third party such as a private individual interested in seeing infringement proceedings commenced, either through annulment proceedings under Article 263 TFEU (ex Article 230 EC) or by way of an action for failure to act under Article 265 TFEU (ex Article 232 EC).[139] The Commission has a particularly important and powerful position in this regard. In the environmental policy context, the Commission's responsibility and power as principal monitor

of EU environmental law under Article 17 TEU (ex Article 211 EC) is all the more enhanced, given the range of difficulties and challenges (legal, technical and financial) that other stakeholders have in terms of being in a position to enforce environmental obligations.

At one basic level, one can understand the reasons of those that drafted the EU treaty framework in having accepted that the Commission should be vested with exclusive power to initiate enforcement proceedings under Article 258 TFEU. The Commission was seen to be in a suitable position to act as an independent and impartial arbiter as between member states, an actor that would be placed at arm's length to supervise the implementation of the process of European legal integration as promised by the constituent member states. The Commission's tasks, as set out in Article 17 TEU, underpin its supranational status. It is charged effectively with defending a collective interest ultimately expressed in the EU's founding treaties and derivative legislation, as opposed to representing any minority viewpoint such as a particular national interest on behalf of which an individual member states would normally be expected to negotiate.

However, the decision to vest the Commission with the exclusive responsibility and role of seeking to ensure that member states apply EU law has not been an unproblematic one. It is not so clear in practice whether the elements of independence and impartiality are adequately safeguarded. A major cause of concern is the fact that the Commission is charged with the responsibility of not only enforcing policy but also being responsible for its development as well. Since the EU's inception in 1957, the Commission has retained a principal role in the legislative decision-making process of the Union. For the vast majority[140] of policy matters falling within the purview of the EU, including environmental matters, the Commission is vested with a monopoly of proposing legislative initiatives. The EP still only has a relatively weak proposal function in this regard, virtually unused in practice to date, in being able only to request the Commission to present legislative proposals (Article 225 TFEU).[141] The Commission also has significant powers at later stages during the EU legislative process, including those in relation to environmental matters. Specifically, in the context of the ordinary legislative procedure (as set out in Article 294 TFEU) applicable to most EU environmental policy decisions,[142] the Commission has the power to be able to force the Council of the EU to vote on a unanimous basis in respect of any amendments tabled by the EP with which it disagrees.

The multiplicity of tasks of the Commission, which cross over into executive, quasi-judicial and legislative territories, raise questions as to whether the institution is in a suitable position to be able to shoulder its law enforcement responsibilities under Articles 258 and 260 TFEU in a sufficiently impartial manner. The lack of a clear demarcation between enforcement and policy position of the Commission has raised concerns of a lack of accountability in infringement procedure decision-making.[143] The conflation of policy innovation and law enforcement roles potentially leads the Commission into situations where decisions to launch or terminate infringement proceedings may become particularly vulnerable to the influence of political as opposed to enforcement motivations.

5.3.1 College of Commissioners

As a matter of principle, decisions over infringement matters must be channelled through and approved at the collegiate level of the European Commission. Thus, any decision to commence infringement proceedings must receive the approval of the College, as is the case for subsequent legal steps in the proceedings (LFN, RO and referrals to the CJEU). In that sense, the EU infringement procedures may be characterised as being policy-sensitive as opposed to constituting a purely technocratic process, given that formal decisions are not taken by a body exclusively charged with law enforcement responsibilities. Although on paper, decisions taken by the College are to be taken on the basis of an absolute majority of the members,[144] it is understood that in practice a consensual approach usually has been adopted. Access to information on College decisions regarding infringements is not made public, so no hard evidence has ever been gleaned as to the particular dynamics, political or otherwise, that go to underpin a decision as to whether an action should commenced or taken to the next step.[145]

However, it has been suggested in the past that the system has been vulnerable to individual Commissioners blocking proposals to launch infringements on political grounds, although proof has been difficult to come by to substantiate this.[146] Alleged problems are said to have arisen where, for instance, an infringement action would interfere with the political portfolio or remit of a particular or a number of Commissioners. Krämer has stated that the Commission decided to close an infringement case against Germany over breaches of the EU Wild Birds Directive[147] in the wake of political interference by the German Chancellor sending a letter to the Commission President.[148] Williams, for instance, cites the example of a report in *The Independent* newspaper in August 1992 alleging that the then Commissioner for the Internal Market, Martin Bangemann, had provided assurances to the UK Home Secretary that no action would be taken in respect of the UK's policy on border controls at the time carried out with respect to EEA citizens and that the then UK Secretary of State, John MacGregor, had also secured a deal for the Commission to refrain from taking legal action under the auspices of the EIA Directive in the M3 motorway development of Twyford Down although being unable to secure an agreement over Oxleas Wood.[149] She also cites another report in *The Independent* newspaper of 30 June 1992 which reported having been briefed that the former Commission President Delors was responsible for the early retirement of the Environment Commissioner at the time Mr Ripa di Meana, on account of the latter's willingness to press for a number of environmental infringement actions. The report indicated that the move was taken in order to facilitate ratification of the 1992 Maastricht Treaty (TEU). Concerns over the Commission's decision-making process at College level are set to continue for as long as it is charged with carrying out both policy development and law enforcement functions in respect of its decisions over law enforcement.

To some extent concerns could be addressed if the Commission were to apply a distinctive decision-making procedure to law enforcement matters. In particular, one notable improvement could be the introduction of a process unique to

law enforcement decisions which would guarantee that only purely legal reasons should be able to be raised for discussion at College level if a proposal for an infringement action were to be doubted by any Commissioner. Such concerns would logically have to be raised prior to a meeting of the College through the Commission Presidency, which is responsible for managing the Commission's Legal Service.

5.3.2 The level of Directorate General

It is important to realise that in substance the vast majority of administrative work relating to infringement actions is taken below collegiate level within the European Commission. In practice, the vast majority of infringement cases are effectively 'rubber stamped' at College level where there is no dispute of any substance between Commissioners over a case or its implications, and in that (frequent) scenario no oral discussion takes place. Instead, proposals over infringement decisions are channelled through a written procedure up to the College from the level of the Directorate-General. Commissioners do not usually get to see the details of cases at College meetings, but are usually provided access to a brief résumé (or 'fiche') of the dispute. As was discussed in Chapter 3, this practice has been challenged unsuccessfully before the CJEU. Specifically, in infringement proceedings brought against it the 1990s, Germany claimed that the Commission, as formally composed of the College of Commissioners, had acted *ultra vires* in having failed to take genuinely informed decisions as to the processing of the legal action.[150] Controversially, the CJEU held that the practice of making information on individual cases available to Commissioners, if they so wished to access it, was an adequate basis for the College to be able to proceed in making formal decisions over the Commission's next steps on the case(s) in question.[151]

Each particular Directorate-General which has responsibility for a particular EU policy field within the Commission is usually vested with its own legal unit and/or teams dedicated to preparing infringement dossiers. For environmental cases, the relevant unit or units dealing with infringements within the DG ENV have the task of organising the day-to-day case management of infringement proceedings.[152] It is the legal units, in liaison with the Commission's Legal Service, which in principle determine whether or not a proposal should be made to go before the College that infringement proceedings should be commenced.

It is possible that political considerations may come to influence law enforcement casework at this level. For instance, one criticism in the past has been that the legal units have not been vested with sufficient independence within DG ENV. Specifically, such units have been housed in the past in a particular environmental directorate that has also accommodated units responsible for environmental policy development. On certain occasions conflicts of interest might arise between units within the same directorate over infringement cases; some policy units may not wish to see an infringement action launched if it might result in an incursion into policy development (e.g. if an infringement action might be directed against a member state whose vote might be key in securing approval for EU legislation

at Council level, or where an infringement action might have the effect of depriving funds for environmental projects in a particular member state). Williams has rightly raised the concern that such a situation may well lend itself to a Director being in a difficult position in adjudicating over the units' rival positions.[153] A more suitable organisational position would be to ensure that the legal units are contained within a directorate devoid of policy units or under direct supervision of the Director-General of DG ENV, in order to avoid the possibility of such problems arising. Currently, the legal units are housed within Directorate D of DG ENV (Implementation, Governance and Semester), which spreads legal teams across three units which also deal, *inter alia*, with cohesion policy issues.[154]

It is also possible that on occasion political considerations interfere with the decision-making process of the legal units themselves. In practice, the office holder of Head of Unit of the relevant DG ENV unit in which law enforcement teams operate is in a pivotal position to determine which cases should be processed to the next level or withdrawn. Technically, it is possible that their opinion could be overridden either by the Director of the particular directorate in which the unit is located, Director-General or the Commission's Legal Service. However, whilst possible, this rarely happens, which means that the Head of Unit usually has a particularly strong position in relation to decisions concerning the prosecution of infringements. There is nothing inherently objectionable with this, so long as the work of the Head of Unit (or Director) is not subject to non-law enforcement considerations, namely political interference. However, the experience of DG ENV in this respect has not been without disturbing incidents. For instance, it has been alleged that a former Head of the Legal Unit in the mid 1990s was removed from his post for reasons of political expedience, on account of being perceived to be overly active in initiating environmental infringement action.[155]

In the more recent past, there have been instances where there appear to have been shortcomings within the Commission to safeguard the principle of political independence of the office holder of Head of Unit. In 2002, the European Ombudsman was very critical of the Commission and found it guilty of maladministration in the handling of an environmental infringement case where it had failed to intervene vis-à-vis a senior DG ENV official in charge of overseeing infringement matters who had maintained a senior political position within a national party of a member state which was at the time the subject of infringement proceedings.[156] The position of Head of the Legal Unit is particularly important when seen in the context of access to EU funds allocated to relatively poorer parts of the Union, notably the Cohesion Funds and Structural Funds. As a matter of principle, a member state will not be able to access such funding to support particular environmental projects in a sector in respect of which a member state is considered to be in breach of EU rules.[157] Accordingly, a decision as to whether an infringement case should be commenced or withdrawn may take on an especially significant financial dimension, in addition to its immediate environmental protection context. The safeguarding of the independence of office holder Head of Unit overseeing law enforcement staff is, therefore, of substantial importance. The EU[158] and the Commission[159] has instituted a legal framework that should address these issues. To what extent this machinery has been implemented in practice remains questionable, though.[160]

Whilst working within DG ENV between 2001 and 2003, I came across a memorable situation which demonstrated to me that, on occasion, political considerations may interfere with the work of law enforcement. I was an official working within the unit at the time responsible for waste management policy, dealing with legal issues. The matter in question arose in connection with the sinking of the *Prestige* oil tanker in November 2002. The vessel had come into difficulties in heavy weather off the Galician coast on 13 November 2002 before starting to leak fuel oil. A specialist salvage team was commissioned to seek to take control of the vessel and bring her under control. Media reports indicated that both the Spanish and Portuguese authorities had ordered the salvage team to tow the *Prestige* out into the Atlantic, contrary to the advice and request of the salvage team, which wished the tanker to be allowed to be taken into calmer waters port for repair. At one time the tanker was reported to be as close 3 miles from the Galician coast. Between 14 November and the date of its breaking up in the Atlantic on 19 November 2001, the salvage team were reportedly refused access to the nearest available Spanish and Portuguese ports. In following up those reports, I managed to gain confirmation of these events from a representative of the salvage company. His assessment was that there was a much better chance for the oil pollution to be limited if the salvage could be undertaken in the relative shelter of port as opposed to on the high seas in rough weather (at the time weather reports indicated a 30-knot SW wind and heavy rain). He reported to me that the Portuguese authorities were 'very clear in their opinion', in dispatching a navy vessel to the location of the *Prestige* and ordering the tanker to 'go in a westerly direction'. In the event, the tanker broke into two parts in the heavy seas and sank releasing its cargo of 77,000 tonnes of heavy fuel oil into the Atlantic Ocean, resulting in substantial pollution of the Atlantic coastlines of France, Spain and Portugal.

In my view this testimony pointed to there being a case for pursuing legal action against the Spanish and Portuguese authorities on grounds that there had been a failure to apply the basic duty of care enshrined in EU Waste Framework Directive,[161] which requires member states to take the necessary measures to ensure that waste (in this case the leaking fuel oil) is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. The response from senior management of the DG ENV legal unit to the request for legal action was quite revealing, not least in terms of the overt reference to political considerations that underpinned its analysis of the situation:

> Subject: 'Prestige' accident and WFD
>
> Importance: High
>
> . . .
>
> As regards the Prestige case I would like to bring your attention to the following considerations:
>
> 1) From a legal point of view it can be argued that an infringement of the Waste directive has occurred. The fact that this was accidental is not

relevant for the application of the directive, although Spain could invoke as a defence the 'force majeure' which is a general principle of EU law. The decisive argument for pursuing this case is that it has now become an 'infraction consommé' (see note in Annex of the LS on the relevant case law).

2) The Commission has always the possibility to ask member states to provide information on cases which might constitute potential infringements. In the present case this should have been done during the days following the 13th November (day of the accident). Sending such a letter now could raise expectations and in any case it would be considered as a 'post mortem' reaction.
3) Needless to say that this case has a strong political sensitivity and cannot be dealt with as a 'business as usual' case.
4) Nevertheless, I believe that, since such accidents may occur in the future, it could be useful to send all the maritime MS[162] a letter stressing the dimension of the WFD as a lesson to learn from this accident.

In the event, no infringement action was brought against the member states involved. The matter was never deliberated beyond Director-General level; the College of Commissioners therefore had no control over whether or not legal action should be brought. A number of important and interesting issues are illustrated by this particular case. Point 3 of the email revealed that political considerations were considered to be important in terms of how the DG ENV legal unit was advised to proceed, although no justification is offered for this. The correspondence highlights the issue concerning the importance of being able to secure information and evidence quickly in emergency cases, a matter that the Commission is not usually in a position to be able to do (point 2). It also raises doubts that legal action might have been allowed to proceed on the basis that it would be an 'infraction consommé'. The issue of the Commission taking action in respect of historical breaches was discussed in Chapter 3. Although not clear-cut, the available case law suggests that the CJEU will not determine that an action is inadmissible where a member state has not taken the appropriate steps to remedy a breach. In this case, an appropriate remedy on the part of the defendant might be considered only to have been achieved when appropriate systems would have been put in place to ensure that appropriate assistance to stricken vessels are offered in similar future cases. Whilst one may debate the legal issues pertaining to the particular case and the question of admissibility, what is most important here is to consider the sensitivity recognised in the correspondence to political factors which appear to have influenced in part the recommendation to desist from taking legal action, and those factors were not even addressed by the politicians themselves (i.e. Commissioners). Interestingly, a Galician High Court in November 2013, some 11 years after the event and investigation by Spanish authorities, has been reported to have found there to be insufficient evidence to convict the former head of Spain's merchant marine department, Jose Luis Lopez-Sors, of crimes against the environment in relation to the affair.[163]

The spectre of conflicts of interest arising within the Commission has caused some commentators to propose conferring responsibility for monitoring EU environmental law enforcement upon a body other than the Commission or otherwise by setting up systems to ensure that law enforcement activities are separated from policy considerations.[164] A number of possibilities could be considered. For instance, as far as a separate body is concerned, the remit of the European Environment Agency could be altered to take on more enforcement responsibilities. Alternatively, a special EU environmental law task force could be set up within the Commission services under a legal framework suitable to guarantee it immunity from outside political interference and foster a more rigorous culture of independence of decision-making on case management decisions.

5.4 Prioritisation of cases and reform of the monitoring process

A major issue which has confronted the Commission for a substantial period of time now has been the question of how best to deal with the substantial amount of cases referred to it under Article 258 TFEU. The Commission has a relatively small team of lawyers charged with responsibility to oversee the implementation of EU environmental law, which has averaged out at around two lawyers for each of the larger member states. The overseeing or monitoring duty covers three broad areas: checking that member states have notified the Commission of national legislation designed to implement EU environmental legislation (non-communication casework); checking that such obligations have been correctly transposed into national legislation (non-conformity casework); as well as responding to complaints and other evidence which indicates that EU environmental legislation has not been applied correctly on the ground (bad-application casework). As has already been mentioned, the environmental sector accounts for the largest number of infringement cases of a particular EU policy sector managed by the Commission (334 live cases as at the end of 2013 accounting for 25.6 per cent of the total Article 258 caseload – see Table 5.3 at the end of this chapter). Complaints of suspected member state infringements of EU environmental law are amongst the highest filed for any EU policy sector (520 in 2013 representing 14.83 per cent of all complaints filed with the Commission – see Table 5.1 at the end of this chapter).

The sheer quantity of environmental infringement casework alone has placed a great strain on the Commission's services employed to carry out the monitoring functions assigned to the institution.[165] In many respects, the relatively high caseload underlines the reality that the Commission is never really going to be able to be in a position to shoulder on its own the responsibility of monitoring and enforcing due implementation of EU environmental law.[166] Not only does it command a relatively small number of legal staff assigned to the subject of law enforcement, the Commission is not vested with any powers to carry out investigations of suspected cases of bad application of the law. Moreover, the core functions and work of the Commission, which tend to focus on broad picture policy

issues and agendas of inter-state relations do not lend themselves to addressing issues which are predominantly local in nature. The primary responsibility lies with the member states to ensure that norms pertaining to the European legal integration process are duly applied within their own frontiers; they are not only best placed to ensure that this occurs, they also have ultimate legal responsibility to realise compliance at national level.[167] Accordingly, the Commission services are not in a position to offer a complete quality control service as far as ensuring due implementation of EU environmental law.[168]

As a consequence, the approach originally fostered by the Commission since the 1980s to encourage complainants to come forward to the Commission has subsequently come under scrutiny and review. A number of commentators expressed the view that the Commission needed to engage in a prioritisation of cases it investigated. Some were concerned with the prospect of the Commission enforcement work otherwise drifting towards being reactive as opposed to being strategic in outlook in terms of which infringement issues need to be addressed most.[169] Various suggestions were made. Some suggested that the Commission should concentrate on the cases that it is best suited to address, namely those that essentially revolve around transposition issues (non-communication and non-conformity).[170] As we have seen, cases of non-communication and non-conformity are often the most straightforward infringement case to deal with from the Commission's perspective, given that the investigation is 100 per cent document based and need not involve on-site investigation. These cases are more suited in another sense to be addressed by the Commission, as they relate more closely to the Commission's core overall functions which are in ensuring that inter-state relations are compatible from the perspective of the EU project. Specifically, in ensuring that member states have adopted the appropriate legal frameworks at national level to implement EU environmental legislation, the Commission addresses two key supranational objectives of the Union. It assists in ensuring that all member states are in a position to contribute commensurately towards achieving a high level of environmental protection, in line with fundamental environmental policy objectives and tasks specified in Article 3(3) TEU and Article 191 TFEU. In addition, it assists in ensuring that member state legal systems are not liable to be in a position to distort competition within the single market on account of individual state failures to implement agreed environmental norms into national legislation. Accordingly, non-conformity and non-communication cases lend themselves to be addressed by the Commission, as they raise issues primarily of a federal–structural as opposed to local nature.

The argument that the Commission's environmental infringement casework should be prioritised so as to concentrate on transposition disputes would mean, as a direct consequence, a reduction in the number of bad-application cases investigated by the Commission. Demmke suggested that Commission resources in the environmental sector should be focused on addressing only the worst bad-application cases which come to its attention, namely those where there is evidence to indicate deliberate flouting of environmental norms and repeat-offender scenarios.[171] Others pointed out that, in any event, the Commission is in too

remote a position geographically and from other perspectives to be able to tap into the relevant local knowledge required to address such types of implementation dispute as a rule.[172]

However, a prioritisation strategy raises particular problems as far as environmental law enforcement work is concerned. By restricting the number of bad-application cases it is prepared to investigate, the Commission raises the prospect of narrowing the opportunities for private individuals to have access to environmental justice.[173] The avenues available for stakeholders other than the Commission to take legal action to uphold EU environmental law have been and remain limited, which means that the complaints system which currently feeds into the functioning of Articles 258 and 260 TFEU in the environmental sector takes on a particular heightened degree of importance. The aspect of access to environmental justice for civil society is discussed in greater detail in Part II of this book. Suffice it to say at this stage that private individuals and bodies concerned to uphold EU environmental obligations such as NGEOs have a number of difficult legal and other problems to overcome in seeking to rely upon EU environmental law themselves in order to seek to have it implemented and applied correctly at national level. For instance, in many instances, they will not be vested with legal capacity to rely upon EU environmental norms before national courts (the so-called direct effect doctrine). The case law of the CJEU has recognised that individuals may only be able to rely directly upon such norms where they are clear, precise and sufficiently unconditional in nature. In many instances, these criteria may not be fulfilled in the environmental sector where standards may be general or imprecise in nature – e.g. very general duties pertaining environmental stewardship, requirements to establish plans/programmes, provisions being subject to other open-ended conditions such as best available technology not entailing excessive cost (BATNEEC).[174] Even if environmental provisions are found to be directly effective, there are limits to their reach within the internal legal order of a member state depending on the legislative instrument in which they are contained. Notably, no person may be able to enforce directly effective provisions contained in EU environmental directives against a private individual, as the CJEU has barred the possibility of any horizontal or inverse direct effect of directives.[175] With some exceptions, the EU directive remains the standard form of legislative instrument that the Union legislature uses when introducing EU-wide binding environmental standards. In the absence of a directly effective norm upon which an individual may rely in a given case, it may be particularly difficult for private individuals to have legal standing (*locus standi*) to take legal proceedings in order to enforce EU environmental law, whether against other private parties, national authorities or even EU institutions. Aside from all the legal hurdles that lie in the way of legal action that might be pursued at national level by private entities, one should not forget also the often not inconsiderable technical and practical problems that may arise for private bodies considering environmental litigation as an option (e.g. the legal costs involved, difficulties connected with securing of requisite evidence of non-compliance such as causation issues). In general, access to environmental justice at local level has been a major issue confronting the EU for a considerable

period of time, a subject with which the Union has only relatively recently begun to introduce initiatives to try to address. These will be examined in Part II.

It has also been suggested that it might well also be a false economy for the Commission to try and limit the number of suspected bad-application cases which are brought to its attention. Such cases may lead to uncovering useful and more profound insights into the state of implementation of EU environmental law, which would not be gleaned simply through document-based transposition checks. The state of transposition of EU environmental law into the national laws of a member state says little if anything about the state of actual practical implementation of those norms.[176] The possibility of individuals being able to complain to the Commission about the ineffective level of response of a local environmental authority offers the opportunity for the Commission to follow up allegations of deficiencies in practical implementation at local level (information function) as well as providing the basis for a meaningful fall-back response against ineffective local environmental authority protection mechanisms (deterrence element). In addition, as pointed out by Winter, supervision by the Commission of bad-application cases may lead it to be able to canvass the guidance of the CJEU on the interpretation of key points of environmental law that may be crucial for development of policy as well as to detect more profound differences in the state of implementation of EU environmental policy and law by the member states.[177] Accordingly, any decision to restrict the number of bad-application case investigations undertaken by the Commission carries with it a number of implications that may not be that easy to reconcile with the mandate provided to the Commission as guardian of the EU founding treaties under Article 17 TEU.

5.4.1 Commission responses to the issue of casework prioritisation

The European Commission has for some time been alive to the problems and limitations posed by the Article 258/260 TFEU infringement procedures and has decided over the last decade or so to take certain steps to improve the handling and management of enforcement casework as well as to introduce alternative routes to securing better implementation records on the part of member states. It is to the examination of these steps that we now turn.

5.4.1.1 Recognition of the limits to Articles 258 and 260 TFEU and decentralisation of enforcement

The Commission's 1996 Communication, *Implementing Community Environmental Law*[178] was the first time that the Union institution took stock of the issue of implementation, taking the opportunity to reflect upon the limits of the Article 258 TFEU infringement procedure as far as the environmental sector was concerned. The Commission quite rightly drew attention to the inherent limitations of the infringement procedure as a means of ensuring that member states adhered to their EU environmental obligations. Amongst others, the following factors were

noted by the Commission as limiting the efficacy of EU-level infringement procedures as far as environmental casework was concerned: the lengthy and formal nature of the procedure and lack of its being attuned to dealing with environmental cases; the practical impossibility for all infractions to be addressed through Article 258/260 procedures; the issue that infringement procedures may only be targeted against central governments which may not be immediately or directly responsible for implementation shortcomings in questions (such as in federal states where environmental protection competence is devolved to regional/local levels); the absence of an EU-level inspection system; and wide disparity in and often poor level of delivery of national/regional/local inspection and environmental reporting mechanisms.[179]

In recognising the inherent limitations posed by the Article 258/260 infringement procedures, the Commission chose to focus on alternative routes and methods in its 1996 Communication to enhance the state of member state implementation of EU environmental law. In particular, the Commission was keen to stimulate work on developing better tools at national level to effect changes. These included developing minimum criteria across the EU on environmental inspections to be carried out by well-resourced national environmental authorities, the provision of more effective opportunities for the public to become involved in assisting law enforcement work and delivery of more effective sanctions at national level against persons perpetrating violations of EU environmental standards. With respect to the point concerning greater public involvement, the Commission indicated that it was keen to see more possibilities for the public to be able to register complaints within the member states at suitable contact points as well as to be assured of greater possibilities of securing access to local courts to enforce environmental legislation. We shall examine in Part II of the book to what extent the Commission has developed greater opportunities for more effective decentralised enforcement of EU environmental law.

What is important to note at this point is that the Commission chose, from the outset of its 1996 examination of EU environmental law implementation, not to go about seeking ways to enhance the existing infringement structures in any profound way. In many respects, that is to be regretted as the procedures could be improved in a number of ways, as the problems with the procedures highlighted in this and earlier chapters indicate. The Commission could have pressed for reform of the current infringement procedures alongside its calls for an expansion of decentralised routes to EU environmental law enforcement. One example could have been to request competence to be able to take action against sub-national authorities within federal states, to take account of constitutional devolution of responsibility for the environment.[180]

The call for achieving a greater decentralisation of responsibilities and roles associated with the enforcement of EU environmental law as advocated by the Commission's 1996 Communication raised a number of important issues. In many respects, the Commission's 'reality check' approach, in placing the infringement procedures in their practical context, was a welcome development. It reminded stakeholders that the fundamental responsibilities for

implementing Union law rests with the member states, and not with the Commission; it is after all, the member states who have undertaken to carry out EU environmental legislative commitments within their respective territories. In underlining how unrealistic it would be to expect a single supranational institution in the form of the Commission to be in a practical position to be primarily responsible for ensuring complete correct application of environmental obligations set at EU level, the Communication also brought home the importance of harnessing all other viable means to assist in this task. In particular, the pivotal importance of the capacities of local stakeholders (in particular environmental authorities and NGEOs) to affect compliance behaviour is appropriately highlighted. A shift on the Commission's part towards enhancing decentralisation of EU environmental law enforcement received widespread support, for a wide variety of reasons, including notably: the Commission's own limitations in being able to carry out enforcement work and local actors' potential or actual superior position in terms of familiarity with and access to locally relevant knowledge;[181] the factor of local accountability; and sovereignty–subsidiarity concerns with the prospect of the Commission being perceived as an outsider interfering with internal matters.[182]

However, the case for decentralisation has a number of limits as well. For instance, an overly relaxed or restricted view of Article 258/260 TFEU enforcement could risk the objective of attaining commensurate levels of environmental protection systems within member states, and undermine the aims of achieving a uniformly high level of environmental protection across member states and absence of a distortion of competitive conditions as between those states.[183] Demmke has taken the idea of decentralisation to the level of suggesting that the Commission should only look to intervene where a member state fails in practice to comply with EU environmental law, namely to bring infringement proceedings where it is found that a member state has breached substantive legal requirements. In particular, he suggests that the Commission should not take action where, for instance, a member state has elected to implement EU environmental legislative instruments in an informal manner, such as through administrative circular. Accordingly, any legal action to insist upon formal transposition of EU environmental obligations as contained in a directive into national legislation would, in his view, be an ineffective use of Commission resources if it could be shown that in practice implementation was in place.[184] However, as has been pointed out elsewhere such confidence in the national position would be misplaced. Unless a national authority as well as all other stakeholders operating within each member state are subject to clear, legally binding obligations that serve to implement minimum EU environmental protection standards, it is far from apparent how those standards may be enforced with any degree of certainty or efficacy. For instance, as stated by the CJEU on a number of occasions, it is always possible for a public authority to be able to alter its commitment to environmental protection at a whim if it is faced with only an administrative circular containing recommendations or guidance.[185] Moreover, attempts to implement legislation through more informal means such as (administrative circulars, codes of conduct or environmental agreements) serve

to undermine the rights of individuals that may be intended to be derived under the legislation conceived at EU level.[186]

5.4.1.2 Prioritising and improving handling of infringement casework

By the end of the 1990s, the Commission had decided to take certain steps to improve the case management of its infringement actions. Following on from the requests set out in the European Council's conclusions at its meetings Amsterdam[187] and Cardiff[188] in June 1997 and 1998 respectively for prompter action in monitoring of the application of EU law (particularly in the area of the single market), the Commission responded by adopting some internal measures and practices to improve its working methods in relation to infringement proceedings. These were set out in a 1998 internal Communication document[189] issued by the Commission's Secretariat General, under whose auspices the Commission's Legal Service is based. The Communication set out a number of general changes that would be effected to the Commission's procedures. These included speeding up case handling, making Commission decisions more transparent and improving relations with the complainant. The latter two aspects will be discussed more fully in the next section of this chapter. As regards the aspect of speed, the Commission decided to ensure that in principle in future it would take a maximum of only one week to implement its decisions on infringement matters, as in many instances this had been allowed to drift so as to delay processing cases to the next procedural step. In the document the Commission made clear its intention to foster the practice of developing regular bilateral 'package' meetings between the Commission services and individual member states, in order to assist in resolving disputes as far as possible out of court in an informal, potentially quicker and perhaps more meaningful manner than through the distant and formal means of communication of pre-litigation correspondence of LFN, RO and member state observations. The practice was also developed in which LFNs would from now on be processed more quickly, so that as a rule the individual Commissioner together with Commission President are responsible for arranging for this step to be carried out. In 2002 the Commission indicated its intention to apply a similar practice with respect to the RO stage.[190]

With the publication of its *White Paper on European Governance* in 2001,[191] the Commission made clear its intentions to bring forward more radical changes to the handling of infringement cases. Notably, it set out a general programme for prioritising infringement casework. The Commission envisaged that it would target its law enforcement resources as from 2002 to addressing the following types of EU law infraction scenarios: transposition failures; cases involving fundamental principles of EU law; cases seriously affecting Union interests or the interests that EU legislation had intended to protect; repeated implementation problems; as well as cases involving the payment of EU funds. The White Paper also envisaged various flanking measures at national level as a means to enhance EU law enforcement. Specifically, these included promoting better dialogue with member states on enforcement issues, encouraging the establishment of twinning arrangements

between older and new member states in order share best practice on implementation, fostering a change of perception held at national level by key players such as national authorities of the still widely held perception that EU law is 'foreign' law and the establishment by member states of networks of national bodies capable of dealing with disputes involving citizens and EU law.

Several of the ideas outlined in the White Paper were fleshed out more fully in a follow-up 2002 Commission Communication, *Better Monitoring of the Application of Community Law*.[192] It clarified a number of details concerning the Commission's future strategy on law enforcement. With respect to first-round infringement actions the Communication identified in more detail three priority areas for the Commission to concentrate on: infringements that undermine the foundations of the rule of EU law; infringements undermining the smooth functioning of the EU's legal system; and infringements consisting of transposition failures. As regards the first identified priority area, the 2002 Communication signalled that this would include Commission action against member state challenges to (1) the principles of primacy and uniformity of application of EU law, (2) breaches of fundamental rights and freedoms of individuals protected under EU law including environmental damage scenarios having implications for human health as well as (3) situations where the Union's financial interests are damaged (including violations of EU law in relation to projects receiving EU funding). As regards the second area of priority, the Commission noted that this would embrace the following infringement scenarios: violation of the EU's exclusive powers, repetition of infringements in the same member state and cross-border infringements. Infringements falling outside the three priority areas would be deemed to be 'lower priority' areas not usually warranting the commencement of infringement proceedings. Instead, the Commission would seek to introduce what it would perceive to be 'complementary' mechanisms to seek to deal with disputes. Included within these complementary mechanisms would be the potential for greater scope for negotiation with member states in order to arrive at out of court settlements: e.g. package meetings, establishment of *ad hoc* contact points and dispute resolution mechanisms at national level to deal with complaints about alleged instances of non-compliance with EU law; development of independent and specialised national authorities; and initiatives to foster greater access to national courts for complainants. The 2002 Communication also indicated that the Commission would be keen to introduce more preventative strategies in the field of law enforcement, with a view to obviating the need to rely on the traditional reactive and often cumbersome strike of an infringement action.[193]

In the environmental sector, it appeared that a number of measures identified in these early Commission general strategic documents on handling of infringement procedures were taken on board within the DG ENV of the Commission. In particular, the Fifth Annual Survey on the Implementation and Enforcement of Community Environmental Law (2003),[194] drafted by DG ENV, reported that the Commission services had invested more resources in a number of preventative-type steps including issuing implementation guidance documentation to accompany new legislation,[195] the holding of implementation seminars with national

authorities on particularly complex legislative instruments, entrenchment of bilateral package meetings with individual member states, publication of scoreboards of compliance records, a commitment to ensuring delivery of more effective reporting on implementation of environmental legislation as well as fostering information exchange between implementing national authorities. As regards the latter aspect, the Annual Survey indicated that support would be channelled through IMPEL, the network for the Implementation of Environmental Law established as an informal mechanism between the Commission and member states since 1992. The work of IMPEL is discussed in detail in a later chapter (Chapter 11). Finally, the Annual Survey also referred to the initiatives undertaken by the EU to improve access to environmental justice for the public taken in alignment with developments at international level under the auspices of the 1998 Århus Convention. These initiatives will be also discussed in detail in later chapters (chapters 8–9A).

However, it was far less clear how DG ENV's law enforcement teams would seek to introduce any changes in terms of prioritising infringement cases. Whilst the prioritisation agenda outlined in the 2001 White Paper and follow-up 2002 Commission Communication, *Better Law Monitoring*, indicated that the Commission would continue unabated its work in tackling transposition failings (non-communication and non-conformity), it was less clear what was going to happen in practice in relation to the future handling of bad-application cases in the environment sector, the majority of which stem from information issued to the Commission by complainants.[196] The issue was recognised as acutely important given the danger that application of a prioritisation agenda could leave a gap in terms of the Commission's abilities to fulfil its responsibilities of ensuring proper implementation of EU environmental law, taking account of the access to environmental justice problems noted earlier.[197]

The Commission's emerging prioritisation strategy for infringement cases appeared to indicate confining Article 258 TFEU intervention to the following environmental infraction scenarios: grave violations of fundamental environmental norms with implications for human health; systematic and repeat infringements in the same member state; deliberate breaches of EU environmental law by state authorities; breaches of EU financial rules in connection with environmental projects; and breaches of a cross-border nature (e.g. waste shipment violations, inter-state-related pollution incidents). It began to be apparent that if the prioritisation agenda would be rolled out to apply to environmental casework, bad-application cases would in future have to meet a notional level of seriousness/gravity before being allowed to proceed to the status of an infringement investigation. As was readily recognised, though, unless complainants had a realistic chance of securing recourse to legal action at national level, the application of a prioritisation agenda could lead in effect to a denial of environmental justice and an abrogation of the Commission's responsibilities under the EU treaty framework (Article 17 TEU).[198]

Until the Commission intensified its prioritisation agenda in 2007–8, it was not clear that practice in case management of environmental infringements altered significantly, though. For instance, Grohs writing in 2004 indicated that DG ENV

practice at the time did not make it apparent that the volume of case management was being decreased, and that cases falling within lower priority areas were still being handled in accordance with standard practice regarding responses to complaints.[199] However, things were about to change quite fundamentally, which would see to it that the Commission's original 'open door' approach to taking up complaints about member state non-compliance with EU environmental law would be permanently closed. Instead, cases would be selected according to perceived order of priority.

With the publication of the Commission's 2007 Communication, *A Europe of Results – Applying Community Law*,[200] the Commission provided definitive clarification about its general strategy to improve the effectiveness of its law enforcement work across EU policy sectors under the auspices of Article 258 TFEU. As with its 2002 follow-up to the 2001 White Paper, the 2007 Communication underlined the need for the Commission services to devote increased attention to preventive measures, namely those which enhanced the prospects for member state compliance with new EU legislation and assist where possible in avoiding the need to resort to formal infringement litigation. These included the promotion of the following: development of guidelines (e.g. on legislative interpretation and expected operational practice); sustaining enhanced dialogue with member states (e.g. through bilateral package meetings and holding expert group meetings on transposition issues); reviews of existing EU legislative instruments in light of implementation difficulties; use of correlation tables setting out member state transposition measures in respect of specific EU legislative obligations; and promoting EU law training for national civil servants and judiciary.[201] The major focus of the 2007 Communication, though, was on elaborating a strategy seeking to limit the focus of the Commission's infringement casework to certain 'priority' cases.[202] Specifically, the Commission outlined that priority should be attached to the following types of infringement cases, which it considered to represent the greatest risks, most widespread impact for citizens and businesses, as well as the most persistent infringements: (1) non-communication cases; (2) failures to respect CJEU judgments; and (3) cases involving breaches of EU law raising issues of principle or having a particularly far-reaching impact on citizens.

The Commission underlined that a key motivation underpinning this new prioritisation strategy was to achieve a swifter and better focused addressing of member state breaches of Union law. It has been mindful of the fact that a lack of formal prioritisation of casework has not assisted the Commission legal services in addressing the worst kind of infringements as vigorously could have been expected, bearing in mind that the average time for resolving cases had been relatively slow.[203] What was clear from the 2007 document was that infringement casework would be scaled back, notably with respect to bad-application cases. However, it was not clear how this scaling-back would be applied in detail within the environmental sector. Subsequently, the Commission published a further Communication in 2008 on detailing how this guidance is to be applied in relation to the management environmental infringement cases (2008 Communication, *Implementing EC Environmental Law*).[204]

The 2008 Communication constitutes currently the principal official document setting out the Commission's strategy on enhancing EU member states' implementation of EU environmental legislative commitments, fleshing out application of the supervisory principles identified in the general 2007 Communication. In essence, it sets out the Commission's approach towards fulfilling its mandate under the EU treaty framework[205] in ensuring the proper application of Union law by member states as regards the environmental sector. By way of complement to the 2007 Communication, key elements of the 2008 document concern the promotion and development of measures to assist in minimising or preventing member state breaches of EU environmental legislation as well as adoption of a prioritisation strategy regarding the management of infringement cases.

With respect to the issue of prevention of breaches, the Commission identifies a number of activities services are to pursue or reinforce as good practice. These include notably the following measures to be introduced and/or entrenched by Commission services (DG ENV):

- effective information-gathering to be secured on the state national transposition and implementation (e.g. assessment of national implementation reports);
- performance scoreboards to be publicised to compare relative member state compliance with Union legislation ('name and shame');
- ensuring appropriate use of EU funds (including pre-accession funding) to support national environmental protection and implementation efforts;
- Commission guidance documents to be developed to assist in avoiding interpretative disputes over Union legislation;
- Commission support of structured dialogue with member state authorities (e.g. bilateral package meetings, meetings through expert networks such as IMPEL and other stakeholder groups);
- Commission funding of judicial training in EU environmental law and liaison with judicial networks (such as European Forum of Judges for the Environment);
- establishment of permanent network points between Commission and member states in all new legislative initiatives, with a view to facilitating information exchange (advice/experience) on ways and means of attaining full and timely implementation of EU environmental legislative obligations.

At the heart of the 2008 Communication, though, lies its prioritisation strategy with respect to future handling of infringement casework. Specifically, the Communication confirms that the Commission is to focus its attention on the three types of infringements identified in its 2007 *A Europe of Results* Communication. Crucially, it provides specific information and guidance on the sorts of environmental cases that are to be considered as falling under the third infringement case type, namely those involving breaches of EU environmental legislation that are considered by the Commission services to raise either issues of principle or having a particularly far-reaching negative impact for citizens. It specifies that this priority type includes situations where, on a significant scale or repeatedly, people are

exposed or may in the future become exposed to direct harm or serious detriment to their quality of life as a result of non-compliance with EU environmental legislative requirements. Where any harm sustained might be classified as irreversible, this is to be identified as a prioritisation factor.[206] The Commission identifies four criteria to be used for the purposes of identifying the most important instances of the third priority type of infringement case.[207] Specifically, these involve assessing whether one of the following four types of infraction are present:

(1) non-conformity of key legislation presenting a significant risk for correct implementation of EU environmental rules;
(2) systemic breaches of environmental quality norms or other requirements presenting serious adverse consequences or risks for human health and well-being or for aspects of nature that have a high ecological value;
(3) breaches of core strategic obligations upon which fulfilment of other EU environmental obligations depends; or
(4) breaches concerning big infrastructure projects or interventions involving EU funding and/or significant adverse impacts.

The 2008 Communication provides some additional brief guidance on the scope of each criterion. As regards the first, the range of non-conformity cases to be caught is intended to be limited to those EU directive provisions that set out the main framework for environmental protection. This would cover defective national (transposition) legislation that either significantly limits the scope of the EU legislation's application or otherwise compromises the results to be achieved by the Union legislation. The second criterion relates to situations where there is repeated or significant contravention of substantive 'state of the environment' obligations (e.g. maximum pollutant thresholds) or of key procedural or operational-related obligations (e.g. permit or management requirements). The emphasis is to be on addressing widespread (systemic) non-compliance issues within and/or across member states. The third criterion refers to shortcomings on meeting designation, planning, programming and reporting obligations, intended to provide a fundamental framework for other legislative requirements (e.g. nature protection site networks, waste management plans). The fourth criterion covers scenarios where EU funding is involved (e.g. EU Cohesion/Structural Funds) in relation to a project in breach of EU environmental law or where very serious ecological damage resulting from a breach is deemed to have occurred. The Commission also indicates that in urgent cases falling under this criterion it may be appropriate to seek interim measures from the CJEU.

The introduction of a prioritisation strategy on environmental infringement casework has long-term and potentially profound implications on law enforcement in relation to EU environmental law. On the one hand, it is evident that the Commission has turned to focus on what it might consider to be its core area of casework and work within its resource capabilities. In the context of a seemingly ever-enlarging Union this appears to reflect a sound realism that the Commission cannot possibly be expected to monitor all types of infringements of EU

environmental law. It neither has the personnel nor legal investigative powers to be able to monitor compliance with Union obligations on the ground at national level. Moreover, it is the member states themselves who have primary responsibility in ensuring proper implementation of EU legislative requirements at national level. Accordingly, it is not surprising that the Commission has sought to rein in and streamline its supervisory role under Article 258 TFEU.

However, there is no doubt that this reorientation will potentially have some negative impacts on the degree of effectiveness and impact of environmental law enforcement if other measures are not introduced to mitigate them. It is apparent that the prioritisation strategy most likely will result in fewer cases being pursued by the Commission, particularly those in relation to bad application of Union obligations, for the Article 258 TFEU procedure will be increasingly earmarked or reserved for scenarios involving widespread and/or very serious breaches of key legislative obligations. Consequently, it is vitally important that other stakeholders interested in environmental law enforcement (notably NGEOs and national authorities) are vested with effective powers and resources, financial and legal (investigative powers as well as appropriate access to justice), to be able to ensure that all EU environmental obligations may be effectively monitored and enforced.[208] One suggestion has been that the Commission should provide more contact points at national level through its representative offices for the public to raise complaints about non-compliance with EU environmental law.[209] The complementary role of these actors in the area of law enforcement will be considered in detail in the subsequent parts of this book.

Given that the changes to prosecutorial practice under Article 258 TFEU have been only introduced (officially at least) relatively recently, it is perhaps premature to pass judgment on their impact. What is clear, though, is that these changes in law enforcement activities and policy by the Commission's services require very careful handling in order to avoid falling into the trap of creating an environmental implementation strategy that is counterproductive and lessens pressures on member states to fulfil their environmental obligations.

5.5 Accountability and infringement proceedings

One aspect of the Article 258/260 TFEU infringement procedures that has come in for considerable criticism is the extent to which they remain closed and effectively elite dispute resolution processes, with relatively limited possibilities for public scrutiny and participation. Under the EU treaty framework the Commission is invested with primary responsibility for overseeing the management of the infringement system. Specifically, the Commission has exclusive powers in determining whether proceedings are formally launched and in acting as the prosecuting agency. Effectively, it is tasked with the responsibility of upholding the Union interest with respect to infringement litigation. It remains a key feature of the infringement provisions in Articles 258 and 260 TFEU that the Commission has autonomy in deciding on whether or how to proceed in any given case. The element of autonomy reflects the evident intention of the EU treaty drafters to

underpin the infringement proceedings with the principle of impartiality, namely that the Commission should be able to discharge its prosecutorial functions free from external interference (notably from member states).

The autonomous role of Commission action in relation to infringement proceedings runs in tension with the EU's principles of transparency and open decision-making that have evolved in recent years within the constitutional fabric of the Union. The current treaty framework builds on earlier tentative political steps taken in the 1990s to move towards opening up EU decision-making processes.[210] The principal provision in the EU treaty framework is Article 15 TFEU (ex Article 255 EC), which may be traced back to its introduction in the EU legal order through the 1997 Amsterdam Treaty. Article 15 TFEU, which stipulates that the Union institutions and other organs must conduct their operations 'as openly as possible', provides for the following specific right in its third paragraph:

> 3. Any citizen of the Union, and any natural or legal person residing in or having its registered office in a Member State, shall have a right of access to the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

The basic position in paragraph 3 is qualified. Each EU institution is to elaborate its own Rule of Procedure regarding access to documents. The specific rules regarding public access to EP, Commission and Council documents have now been established under Regulation 1049/2001.[211] The Commission has published further implementing rules in its Rules of Procedure with respect to access to Commission documentation.[212] A right of access to documents is also entrenched within the EU's Charter of Fundamental Rights.[213]

The infringement system is effectively a 'closed' system in the sense that the Commission's decisions over whether to commence, suspend or terminate legal action are essentially barred from public scrutiny. The general public, including notably complainants, have no power over the determination of whether a particular case is formally prosecuted. Whilst complainants are recognised to constitute a key information source for the Commission in terms of its abilities to carry out its mandate to supervise implementation of EU law, they have been granted historically relatively few rights in terms of challenging Commission inaction or in accessing Commission documentation relating to the management of the infringement procedures themselves. These rights will be discussed in detail in later chapters (Chapters 9–9A); however, some general points on this subject may be usefully made at this point in relation to the way in which the Commission handles complaints and liaises with complainants.

A matter closely related to the general issue of transparency in the context of infringement proceedings under Articles 258 and 260 TFEU is the question of the extent of participatory rights of complainants. Whilst the issue of complainants' rights will be dealt with in more detail in Part II of the book as part of its focus on the role of private individuals in the enforcement of EU environmental

law, it is useful to set out a few key points in brief here. As already mentioned, complainants constitute an important source of information for the Commission with regard to suspected infringements. In 2012, for instance, the Commission received 588 complaints of suspected environmental infringements, 18.72 per cent of all complaints registered with the Commission and the highest number for a particular EU policy sector. Their information is particularly important in the context of bad-application cases, in respect of which the Commission has few if any effective resources to investigate suspected infringements. Notwithstanding their significance in terms of enabling the Commission to undertake a degree of supervision in this area, complainants are afforded relatively few participatory rights in the conduct of the infringement process itself. The position has improved somewhat, though, in recent years with the Commission's new system of handling complaints.

Originally, the complainant was totally marginalised in the processing of infringement actions by the Commission. Historically, this may be explained by the fact that Article 258 TFEU was conceived on the basis of an essentially intergovernmental perspective of how disputes concerning implementation failures relating to international law should be handled. The aim of the process was to secure member state compliance if possible in a discreet, relatively speedy, informal way, negotiated behind closed doors at international level. It was not designed to protect the position of complainants.[214] However, perceptions of the function of the Commission and the infringement procedure – and in particular how it should be conducted – have changed considerably over time as the principle of transparency became woven within the legal fabric of the EU treaty. With the rise and recognition of the importance of the complainant as an information source on compliance issues coupled with the development of a principle of transparency within the unfolding legal order of the EU by virtue of the Maastricht Treaty, by the 1990s the traditional workings of the infringement procedure had come under strain.

As a result, the Commission introduced changes to its operational procedures in terms of handling complaints about suspected violations of Union law by member states. Changes have been driven in part due to pressure from the European Ombudsman investigating cases of maladministration by the Commission in handling complaint files. In 2002 the Commission introduced a number of reforms,[215] which have recently been consolidated and updated in a 2012 Communication *Updating the Handling of Relations with the Complainant in Respect of the Application of Union Law*.[216] The Commission has also published a standard complaints form,[217] which it recommends, but does not require, complainants to use. More recently, DG ENV has created a special complaints form relating to nature protection cases.[218] Some basic information concerning the infringement procedure is contained in an explanatory memorandum in the form. Complaints are to be filed first with the Commission's Secretariat General, which will then process the matter internally and distribute files to be handled by the law enforcement teams in the Directorate-General responsible for the policy sector concerned by the complaint.

The Commission's current policy on complaints handling affords the complainant some basic procedural rights in relation to the management of an infringement procedure. These are listed within the 2012 Communication. They include maintaining an open approach as to who may lodge a complaint. Anyone may file a complaint free of charge, and without being required to show a specific legal or other particular interest connected with the dispute.[219] The complaint must be submitted in writing and in one of the EU's official languages to the Commission, and need not be submitted in any particular format although the Commission recommends use of its standard complaints form in order to assist in speeding up the process.[220] All complaints are now recorded on the IT central application system for the registration of complaints (CHAP database), unless they are deemed to be non-investigable.[221] Until October 2009 the Commission operated a system under which an initial evaluation was made of complaints to determine whether there was sufficient evidence or information of a potential breach of EU law to justify registration of a complaint. This generated some concerns that some valid complaints were failing to be registered by the Commission.[222] Non-investigable complaints are defined in the 2012 Communication as including those: from anonymous correspondents; which fail to specify a particular member state to which an allegation may be attributed; which denounce actions of private persons unless the complaint reveals involvement or omissions to intervene by public authorities; which fail to set out a grievance; which set out grievances in respect of which the Commission has adopted a clear, public and consistent position which is also to be disseminated to the complainant; or which refer to a grievance that falls outside the scope of EU law. [223] The complainant is to receive an acknowledgement of receipt of the complaint within 15 working days of the Commission having received the complaint, including confirmation of the registration number to be used in all correspondence.[224] The complainant is guaranteed anonymity, namely that their identity will not be revealed to a third party such as the defendant member state unless they agree to disclosure.[225] Subsequent to registration, complaints may be examined in co-operation with the member state concerned, and the Commission will inform the complaint of this in writing.[226] Complainants may request at their own expense to arrange a meeting with Commission officials to provide a supplementary oral explanation of the grounds of their case.[227] A general target time limit of one year is set by the Commission for it to come to a decision whether or not to open proceedings formally with a formal LFN.[228] In the past, the so-called one-year rule came in for criticism as being arbitrary, vulnerable to delaying tactics by member states prepared to stall co-operation on disclosing information about suspected bad-application environmental infringements as well as not allowing for sufficient time to ascertain facts in complex cases.[229] However, the 2012 update to the complaints procedure has made the system more flexible, clearly envisaging scenarios where more time may be required.

The complainant is afforded a basic minimum of information as to the development of the case file, as is confirmed by the 2012 Communication. The Commission is to inform the complainant of the reasons for deciding not to register a

complaint on grounds of non-investigability.[230] They are also to be informed after formal decisions have been taken in the infringement procedure of the steps taken in relation to their case.[231] If the Commission intends to propose no further action be taken with respect to a complaint or file, unless there are exceptional circumstances (not defined), the Commission will provide the complainant with prior notice setting out its grounds, inviting the complainant to respond within four weeks.[232] The Communication makes it very clear that at all stages the Commission retains complete discretion as to deciding matters relating to the complaint, in particular the desirability of opening or terminating proceedings.[233] In practice it is the legal teams of the individual Commission Directorate-Generals that are in substantive control of decisions to close files and not the Commission College. In the case of the environment sector this is the law enforcement teams of DG ENV dealing with infringements. The system underpins the strategic role played by the Head of the relevant unit(s) housing the law enforcement teams in relation to the handling of environmental complaints.

The 2012 Communication on complaints handling offers little in the way of helpful guidance on the question of complainants' rights to access documents in infringement cases. The Communication simply refers to the legislation (notably Regulation 1049/2001)[234] governing access to documents, without providing details as whether if any documents in Article 258/260 TFEU proceedings may or are as a rule to be disclosed.[235] Article 4(2) of Regulation 1049/2001 specifically provides that EU institutions shall refuse access to documents where disclosure would undermine the protection of the court proceedings and legal advice as well as the purpose of investigations, unless there is an overriding public interest in disclosure. Current practice of the Commission has not appeared to diverge from its traditional view of maintaining confidentiality of decisions regarding the management of alleged or suspected infringements of EU law by member states (such as internal legal advice, LFNs, ROs and court pleadings) insofar as a particular case has not yet been definitively completed or, although completed, is related to pending legal action. On the other hand, Commission administrative practice does in principle foresee the disclosure of historic infringement files, namely those which have been terminated, completed or considered devoid of ongoing issues or links with live proceedings.[236] The area of access to environmental information held at EU level, including that relating to legal proceedings, is considered in Chapter 9A (available on website).

The Commission has also changed its complaints handling procedures in other respects with a view to enhance the speed and efficiency of the initial (pre-LFN) investigation phase. Specifically, since 2008 the Commission has been rolling out a new handling system called EU Pilot, subsequent to its 2007/8 review of the infringement process. EU Pilot,[237] discussed in detail in Chapter 3, is intended to provide complainants with quicker responses and also ensure more effective communication between the Commission's law enforcement teams and its Directorate-Generals and national authorities responsible for addressing non-compliance issues. Under EU Pilot, any allegation of member state non-compliance from the public is forwarded by the Commission to the relevant member state designated

contact point with the aim of establishing the factual details and seeing whether any resolution may be achieved informally at an early stage without the need for recourse to formal infringement proceedings. A deadline of 20 weeks is set for both the member state authority and Commission to respond to the complainant. This represents a significant improvement as compared with the previous position, in which there were no structures in place to require responses from member states within a set deadline and where the Commission would often close a case on the grounds of insufficient evidence obtained if it did not hear from the member state concerned within a year of the complaint.

5.6 Statistical information on EU environmental infringement cases

The Commission publishes two reports annually which provide information on recent developments concerning the state of implementation of and its monitoring of EU environmental law. Specifically, each year the Commission provides a formal and comprehensive report on its activities in relation to Articles 258 and 260 TFEU concerning the previous calendar year. This is known as the Commission's Report on monitoring the application of Union Law and several reports have been published, all accessible on the Commission's Secretariat General's website.[238] At the time of writing, the Commission's had published its latest (31st) annual monitoring report covering the year 2013 on 1 October 2014. Each annual report contains a summary of infringement actions commenced and pursued for each EU policy sector, including the environment, as well as information on the numbers of infringement actions brought (e.g. per member state as well as per policy sector).

Since 1996, these reports have been complemented with annual surveys and then online summary information carried out by the DG ENV on the state of implementation of EU environmental law in the member states. Seven annual surveys have been published covering the years until 2005, accessible from the Commission's Environment Directorate General's website.[239] Subsequently, DG ENV has focused on providing statistical overviews and has discontinued its annual surveys. Overall, the information to be gleaned from these reports has been relatively limited, with little provided in the way of strategic analysis on key implementation problem trends.[240]

5.6.1 European Commission annual reports on monitoring the application of EU law

Each annual report of the Commission includes a sectoral analysis of infringement cases, so as to incorporate basic data and summary assessment of the state of casework affecting individual EU policy areas including EU environmental policy. The European Commission's annual reports, compiled by the Commission's Secretariat General, may be accessed from the following EU website: http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm.

The reports and their Commission document references are as follows:

16th Report (1998):	(COM(1999)301)
17th Report (1999):	(COM(2000)92)
18th Report (2000):	(COM(2001)309)
19th Report (2001):	(COM(2002)324)
20th Report (2002):	(COM(2003)669)
21st Report (2003):	(COM(2004)839)
22nd Report (2004):	(COM(2005)570)
23rd Report (2005):	(COM(2006)416)
24th Report (2006):	(COM(2007)398)
25th Report (2007):	(COM(2008)777)
26th Report (2008):	(COM(2009)675)
27th Report (2009):	(COM(2010)538)
28th Report (2010):	(COM(2011)588)
29th Report (2011):	(COM(2012)714)
30th Report (2012):	(COM(2013)726)
31st Report (2013):	(COM(2014)612)

5.6.2 European Commission annual surveys and other annual publications on the implementation and enforcement of EU environmental law

Since the mid 1990s the DG ENV of the European Commission has published information on the annual management of infringement casework concerning EU environmental law on its website in the form of annual surveys as well as statistical information. Since 2006 this source information has been compressed into a summary format providing essentially simply an outline statistical analysis of casework.

- *Annual surveys on EU environmental infringements 1996–2005*

First Annual Survey (Oct. 1996–Dec. 1997):	(SEC(1999)592)
Second Annual Survey (1998–9):	(SEC(2000)1219)
Third Annual Survey (2000–1):	(SEC(2002)1041)
Fourth Annual Survey (2002):	SEC(2003)804)
Fifth Annual Survey (2003):	SEC(2004)1025
Sixth Annual Survey (2004):	SEC(2005)1055
Seventh Annual Survey (2005):	SEC(2006)1143

The above annual surveys may be located on the following European Commission website: http://ec.europa.eu/environment/legal/law/implementation.htm.

- *Statistical information on EU environmental infringements (2006–)* Since 2006, the practice of the DG ENV of the European Commission has been to discontinue the annual surveys and replace them with annual publication of statistical overviews of environmental infringement proceedings on the Commission's Environmental Directorate-General's website: http://ec.europa.eu/environment/legal/law/statistics.htm.

Since 2010 the European Commission's data on environmental infringements has been organised on the basis that information on infringements in the area of climate change policy is reported separately from those on environmental infringements. This change has been made to reflect the fact that a separate Directorate-General within the European Commission was established in February 2010 for EU climate change policy (Directorate-General for Climate Action (DG CLIMA)). Accordingly, the following set of tables does not take into account data on infringement action relating to EU legislation on climate change from 2010 onwards.

5.6.3 Statistical tables on EU environmental complaints and infringement cases

The tables below provide statistical information on recent developments in environmental infringement actions based on information derived from the above-mentioned European Commission sources (annual monitoring reports, surveys and other online sources of information).

5.6.3.1 Complaints to the European Commission concerning non-compliance with EU environmental law

Table 5.1 below indicates the number of complaints from the public filed with the European Commission in a given year concerning allegations of non-compliance with EU environmental law. It also shows the proportion of environmental complaints relative to the total number of complaints sent to the Commission across all EU policy sectors.

5.6.3.2 EU environmental infringement cases (Articles 258 and 260(2) TFEU)

ARTICLE 258 TFEU CASES

Table 5.2 below provides a breakdown of Article 258 TFEU environmental infringement cases according to particular type of case, whether based on a complaint, relating to non-communication of a directive or otherwise initiated by the Commission. (No official data available for 2012/13.)

Table 5.3 below indicates the number of Article 258 TFEU environmental infringement cases that had been formally opened and which were live as at the end of a given year.

Table 5.4 below provides a breakdown of Article 258 TFEU infringement cases according to particular environmental sector which were live as at the end of a given year.

Tables 5.5a and 5.5b below indicate the proportion of Article 258 TFEU environmental infringement cases which were live as at the end of a given year.

Table 5.1 Complaints about suspected EU member state violations of EU environmental law

Year	*Environmental non-compliance complaints*		*Total number of complaints across all EU policy sectors*
	Quantity	*Percentage across all EU policy sectors*	
2002	555*	38.78	1,431
2003	505*	39.15	1,290
2004	336*	29.32	1,146
2005	275*	23.83	1,154
2006	167	15.92	1,049
2007	113	11.80	958
2008	87	8.38	1,038
2009	143	18.15	788
2010	666*	19.77	3,368
2011	604*	19.39	3,115
2012	588*	18.72	3,141
2013	520	14.83	3,505

Key (*): Denotes highest proportion of complaints across all EU policy sectors.

Table 5.2 Origins of Article 258 TFEU infringement cases in environment sector

As at end of year	*Origins of EU environmental infringement cases under examination (Article 258 TFEU)*					
	Complaint-based		*Own-initiative*		*Non-communication*	
	%	*Quantity*	*%*	*Quantity*	*%*	*Quantity*
2004	56.97	286	14.54	73	28.49	143
2005	57.89	462	26.94	215	15.16	121
2006	54.16	371	38.98	267	6.86	47
2007	41.30	306	52.09	386	6.61	49
2008	36.27	243	50.75	340	12.99	87
2009	30.20	164	55.99	304	13.8	75
2010	27.03	120	47.07	209	25.90	115
2011	28.09	84	58.19	174	13.71	41

Table 5.3 Article 258 TFEU environmental infringement cases opened

As at end of year	*EU environmental infringement procedures opened (Article 258 TFEU)*	
	Quantity	*Percentage across all EU sectors*
2002	505*	29.79
2003	508*	27.39
2004	568	21.19
2005	489*	23.01
2006	421*	21.01
2007	480*	22.51
2008	480*	23.54
2009	452*	24.37
2010	394*	23.59
2011	339*	17
2012	272*	20
2013	334*	25.6

Key: (*) Denotes highest proportion of Article 258 TFEU actions across all EU policy sectors.

Table 5.4 Article 258 TFEU environmental infringement cases by sector (percentage breakdown)

As at end of year	*EU environmental infringement cases by sector – percentage breakdown (Article 258 TFEU)*					
	Nature (%)	*Water (%)*	*Waste (%)*	*Air (%)*	*EIA (%)*	*Other (%)*
2001	26.3	13.9	20.6	13.3	9.4	9.6
2002	30.4	15.4	21.5	7.3	11.5	8.7
2003	15.6	19.3	21.6	24.6	7	8.3
2004	24.4	15.1	25.1	16.8	12.3	3.3
2005	23.7	14.7	22.5	13.1	15.1	10.8
2006	28	18	19	16	15	4
2007	25	16	19	17	12	11
2008	22	20	23	14	10	11
2009	20	20	19	16	11	14
2010	20	30	15	13	9	13
2011	22	24	22	10	13	9
2012	23	27	19	13	11	7
2013	18	23	32	12	8	7

Tables 5.5a and 5.5b Article 258 TFEU environmental infringement case types

Tables 5.5a

As at end of year	*Types of EU environmental infringement cases (Article 258 TFEU)*					
	Non-communication cases		*Non-conformity cases*		*Horizontal bad-application cases*	
	%	*Quantity*	*%*	*Quantity*	*%*	*Quantity*
2001	42	126	29	86	30	89
2002	38	97	35	89	27	70
2003	29	88	39	118	32	95

Note: For the year 2004 onwards the European Commission has disclosed figures on all live bad-application cases, not simply those which involve legal proceedings taken against several member states ('horizontal' cases). This makes statistical comparisons with earlier years challenging. The Commission has not published data for the years 2006–7.

Table 5.5b

As at end of year	*Types of environmental infringement cases (Article 258 TFEU)*					
	Non-communication cases		*Non-conformity cases*		*Bad-application cases*	
	%	*Quantity*	*%*	*Quantity*	*%*	*Quantity*
2004	30.35	173	18.07	103	51.58	294
2005	25.36	124	17.59	86	57.06	279
2006	–	–	–	–	–	–
2007	–	–	–	–	–	–
2008	18.30	88	31.80	153	49.90	240
2009	49.65	212	17.56	75	32.79	140
2010	26.08	115	20.63	91	53.29	235
2011	12.24	41	22.99	77	64.78	217
2012	4.53	13	26.83	77	68.64	197
2013	26.51	92	18.16	63	55.33	192

Table 5.6 indicates the number of case management decisions that had been made as at the end of a given year and which were live cases. It appears that as from 2011 the annual reports from the Commission have been changed so as to no longer provide information on the amount and distribution of pending reasoned opinions and referrals to the CJEU.

Table 5.7 indicates which EU member states were subject to the most environmental infringement cases which were live as at the end of a given year. (Prior to 2004 the European Commission only disclosed data regarding horizontal and not individual bad-application environmental cases.)

Table 5.6 Article 258 TFEU environmental infringement case management decisions

As at end of year	*Case management decisions for environmental infringement cases (Article 258 TFEU)*			
	ROs (reasoned opinions)		*Referrals to CJEU*	
	Environmental sector: Quantity (% in brackets)	*Total number for all EU policy sectors*	*Environmental sector: Quantity (% in brackets)*	*Total number for all EU policy sectors*
2002	323 (32.30)*	1,000	149 (41.27)*	361
2003	311 (31.13)*	999	146 (35.52)	411
2004	309 (31.06)*	995	142 (31.28)*	454
2005	306 (26.91)*	1,137	128 (32.65)*	392
2006	244 (22.02)*	1,108	118 (32.87)*	359
2007	230 (24.03)	957	111 (31.27)*	355
2008	236 (24.71)	955	109 (27.53)	396
2009	225 (25.71)*	875	100 (28.33)*	353
2010	219 (25.83)*	848	92 (31.62)	291

Key: (*): Denotes highest proportion of case management decisions across all EU policy sectors.

Table 5.7 EU member states subject to most Article 258 TFEU environmental infringement cases

As at end of year	*EU member state with most reported EU environmental infringement cases (Article 258 TFEU)*					
	Highest	*2nd highest*	*3rd highest*	*4th highest*	*5th highest*	*Total env'l cases*
2004	Italy (75)	Spain (66)	Ireland (51)	France (50)	Greece (41)	570
2005	Italy (77)	Spain (57)	Ireland (45)	Greece (36)	Portugal (35)	489
2006	Italy (61)	Spain (40)	Ireland (38)	UK (33)	Greece (30)	421
2007	Italy (60)	Spain (42)	Ireland (34)	UK (33)	France (32)	479
2008	Italy (45)	Spain (37)	Ireland (35)	France (34)	UK (31)	481
2009	Spain (40)	Italy (35)	Ireland (34)	France, UK & Czech Rep. (26)	Greece (24)	451
2010	Italy (46)	Spain & Greece (33)	Poland & Portugal (26)	Ireland (25)	France (19)	445
2011	Italy (40)	Spain (27)	Greece (25)	Portugal (24)	Poland & Czech Rep. (21)	339
2012	Spain (32)	Italy (25)	Greece (22)	Poland (19)	Portugal (17)	296
2013	Spain (29)	Italy/Gr. (25)	Greece (22)	Poland (19)	France (19)	353

Table 5.8 Article 260(2) TFEU environmental infringement cases

As at end of year	*Second-round environmental infringement cases (Article 260(2) TFEU)*		*Total number of Article 260(2) TFEU proceedings formally opened across all policy sectors*
	Number of active env'l cases (number of new proceedings opened)	*Percentage of env'l cases out of all second round infringement proceedings opened*	
2002	33 (33)	53.22*	62
2003	40 (40)	57.97*	69
2004	20 (37)	50.68*	73
2005	77 (36)	36.00*	100
2006	66 (37)	39.36*	94
2007	77 (33)	39.29*	84
2008	61 (41)	48.24*	85
2009	61 (40)	40.40*	99
2010	62 (37)	51.39*	72
2011	56 (36)	46.75*	77
2012	54 (35)	27.34*	128
2012	54 (35)	27.34*	128
2013	40	35.39*	113

Key: (*): Denotes highest proportion of cases across all EU policy sectors.

ARTICLE 260(2) TFEU SECOND-ROUND CASES

Table 5.8 above indicates the number of second-round environmental infringements actively pursued by the DG ENV of the Commission, as well as the number of Article 260(2) TFEU proceedings formally opened for environmental cases which were live as at the end of a given year. It also shows the proportion of live environmental cases amongst all second-round infringements formally opened across EU policy sectors as at the end of a given year.

5.7 Some brief concluding remarks

Notwithstanding its limitations and drawbacks, there is little doubt that the infringement procedures set out in Articles 258 and 260 TFEU have been the subject of some notable improvements in recent years, legal as well as operational. The Lisbon Treaty changes to the first-round procedure in relation to the prosecution of non-communication cases have been particularly important. Under Article 260(3) TFEU the Commission does not need to negotiate its way through two lengthy infraction proceedings before the possibility of a financial sanction arises in respect of this type of case. Instead fines may be requested from the CJEU in a relatively

short period of time in a single procedure. The treaty change appears already to be having a significant effect as the early evidence since the change has come into force indicates a significant decline in the number of non-communication judgments. There are compelling reasons to extend this recent treaty change so as to cover all types of EU environmental infringement, and also to lift the current cap on CJEU financial sanctions currently in place in Article 260(3) TFEU. Such an amendment would provide a significant additional element of deterrence to the current infringement framework and assist in ensuring that member states adhere to their EU environmental legislative commitments in a full and timely manner.

The Commission has through its 2007/8 internal review of infringement case management finally begun to rise to the challenge of prioritising its caseload in order to focus its limited resources on breaches of more strategic importance for the implementation of EU environmental law. However, it is also apparent that more measures and care are needed to ensure that this transition is not made at the expense of complainants or other stakeholders (such as national authorities) finding themselves otherwise unable at national level to secure access to environmental justice for legal or financial reasons. It is not apparent that the Commission has taken into account sufficiently the adverse impacts that its prioritisation strategy may have either in the short or longer term on the prospects for the public, and NGEOs in particular, in being able meaningfully to continue to assist in ensuring the upholding of legally binding Union obligations in the environmental sector.

There are other changes that also need to be made to the current infringement regime which would be highly beneficial in enhancing its effectiveness. Notably, powers of inspection should be granted to the Commission so as to enable it to investigate the veracity of claims of bad application of EU environmental law and not have to rely on often unreliable information supplied by national governments or authorities and NGEOs (which do not have investigatory powers). In addition, the Commission needs to address long-standing staffing resource problems in order be able to address its environmental infringement caseload effectively. The benchmark of two desk officers per (large) member states is wholly inadequate.

In summary, it would be overly optimistic to depict the recent evolution of the infringement procedures as having 'come of age', to coin a phrase used recently in the literature,[241] with respect to the EU environment sector. A number of profound improvements are required to be made to both the legal framework and operational practice relating to case management. However, it may be fair to say that the Union has perhaps begun now to set itself on a course potentially towards meaningful reform of the Article 258/260 TFEU procedures, a position which the author assesses to be far more positive than at the time of completing the first edition of this book but a few years ago in 2006.

Notes

1 See e.g. Demmke (2003), p. 354; Johnson and Corcelle (1995), p. 482; Krämer (2003), p. 377.
2 By virtue of Art. 4 (3) TEU.

3 Formerly Art. 211 EC.
4 See Macrory (1992), p. 348 and also more generally Rawlings (2000), p. 28.
5 Krämer (2003), p. 378.
6 Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living Well, within the Limits of our Planet' (OJ 2013 L354/171) (within Priority Objective 4: To maximise the benefits of EU environment legislation). For a recent assessment of member state environmental inspection systems sponsored by the Commission, see e.g. Bio-Intelligence, *Service Study on Possible Options for Strengthening the Commission's Capacity to Undertake Effective Investigations of Alleged Breaches in EU Environment Law*, Final Report, 4 January 2013 (accessible at: http://ec.europa.eu/environment/legal/law/inspections.htm).
7 SOLVIT is an online network of contact points in EU member states (and EFTA countries part of the 1992 European Economic Area Agreement), which was established in 2002 by the EU and is co-ordinated by the European Commission. It was set up in order to assist in resolving complaints from the public about instances of non-compliance by national authorities with single market rules. Details may be obtained from the SOLVIT website: http://ec.europa.eu/solvit/site/about/index_en.htm.
8 See comments e.g. by Somsen (2003a), p. 418.
9 See Jack (2011), p. 75.
10 One notable exception is the Ozone Regulation 1005/09 (OJ 2009 L286/1) which provides for the possibility of the Commission providing assistance to national authorities in inspections (see Art. 28). See also comment by Jans (2000), p. 160.
11 See Wägenbaur (1990–1), p. 462.
12 See Grohs (2004), p. 30.
13 Case C-387/97 *Commission v Greece (Kouroupitos (2))*. The case is discussed at length in Ch. 4.
14 At the time of writing, waste management issues were now being addressed by Unit A.2 (Waste Management and Recycling) within Directorate A (Green Economy) of DG ENV.
15 Jans (2000), p. 169.
16 See e.g. Demmke (2001), p. 29 and Grohs (2004), p. 38.
17 Krämer (2003), p. 381.
18 Regulation 1/2003 (OJ 2003 L1/1).
19 Directive 2010/63 on the protection of animals used for scientific purposes (OJ 2010 L276/33).
20 Regulation 1224/09 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (OJ 2009 L343/1).
21 Regulation 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to detect fraud and irregularities affecting the EC's financial interests (OJ 1996 L292/2).
22 See e.g. Demmke (2001), p. 5.
23 See Winter (1996), p. 711 and Krämer (1993), p. 395.
24 Case C-387/97 *Commission v Greece (Kouroupitos(2))*, discussed in Chapter 4.
25 Art. 3(3) TEU and Art. 191(2) TFEU.
26 See e.g. UK House of Lords EU Select Committee Report 1991; Macrory (1992); and Winter (1996).
27 Regulation 1210/90 (OJ 1990 L120/1), as amended.
28 See e.g. Wägenbaur (1990–1), p. 472; House of Lords EU Select Committee Reports (1991) and (1997).
29 COM(1996)500, para. 9.
30 Recommendation 2001/331 providing for minimum criteria for environmental inspections in the member states (OJ 2001 L118/41).

31 COM(2007)707 Commission Communication on the review of Recommendation 2001/331 and accompanying Annex (SEC(2007)1493 Commission Staff Working Paper), 14 November 2007.
32 Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living Well, within the Limits of our Planet' (OJ 2013 L354/171).
33 'Priority Objective 4: To maximise the benefits of EU environmental legislation' (paras. 54–63 of the 7EAP).
34 Paras. 58 and 63(c) second subpara. of COM(2012)710.
35. Reporting requirements for several pieces of EU environmental protection legislation have been crafted on the basis of Directive 91/692 standardising and rationalising reports on the implementation of certain Directives relating to the environment (OJ 1991 L377/48) as amended by Regulation 1882/03 (OJ 2003 L284/1).
36 van den Bossche (1996), p. 388.
37 See Krämer (2003), p. 380.
38 See Demmke (2003), p. 334.
39 COM(2013)6, *Commission Report on the Implementation of EU Waste Legislation (2007–9)*, 17 January 2013; COM(2013)574, *Commission 7th Report on the Implementation of Urban Waste Directive 91/271*, 7 August 2013.
40 Case C-494/01 *Commission v Ireland (Irish Waste)*.
41 See e.g. Lenaerts and Gutiérrez-Fons (2011), p. 10; Prete and Smulders (2010), p. 24; Schrauwen (2006), p. 292.
42 Schrauwen (2006), p. 294.
43 See e.g. Macrory (1992), p. 363; Jack (2011), p. 75; Borzsák (2011), pp. 128–9.
44 Currently the units are based within Directorate D Implementing Governance and Semester (ENV D.1, D.2 and D.3).
45 Borzsák (2011), p. 128.
46 See Hattan (2003), p. 285; Grohs (2004), p. 33.
47 See Commission weblink: ec.europa.eu/dgs/environment/directory.htm.
48 Borzsák (2011), p. 129.
49 See COM(2013)726, *30th Commission Annual Report on Monitoring the Application of EU Law*, 22 October 2013 in Part II (Policies), p. 55.
50 Craig and de Búrca (2011), p. 410.
51 See Krämer (2002), p. 177; Wägenbauer (1990–1), p. 462.
52 See the Commission's annual monitoring reports on the application of EU law for 2010 (COM(2011)588), 2011 (COM(2012)714), 2012 (COM(2013)726) and 2013 (COM(2014)612) respectively.
53 Kingston (2011), p. 7.
54 Grohs (2004), p. 31. See also Krämer (2003), p. 273.
55 By virtue of Art. 260(3) TFEU.
56 See also comments by Lenaerts and Gutiérrez-Fons (2011), p. 4.
57 Art. 17(1) TEU, second sentence.
58 See e.g. Krämer (2006a), p. 414; Jack (2011), p. 91; Lenaerts and Gutiérriez-Fons (2011), p. 4.
59 Krämer (2006a), p. 407 and (2003), p. 388.
60 Williams (1994), p. 368.
61 Grohs (2004), p. 26.
62 See comments by Jack (2011), p. 93.
63 For instance, consider the lengthy times granted for reducing the dumping of biodegradable waste into landfills in the Landfill Directive 99/31 (OJ 1999 L182/1) and long implementation timeline (15 years) regarding the attainment of good surface water status under the aegis of the Water Framework Directive 2000/60 (OJ 2000 L327/1).
64 Audretsch (1987), p. 842; Barav (1975), p. 369; Bonnie (1998); Weatherill and Beaumont (1999), p. 214.

65 See also Wägenbaur (1990–1), p. 473.
66 See e.g. Dashwood and White (1989), p. 413.
67 For example, Article 106(3) TFEU on state monopolies.
68 Ibáñez (1998a), para. 2.1.4.
69 See e.g. Gaffney (1998), p. 126 and Ibáñez (1998a).
70 For instance, Audretsch has suggested curtailing the maximum response time to Commission writing warnings in the pre-litigation phase to one month: Audretsch (1986), p. 380. The EP has also endorsed introducing strict time limits for responses: EP Resolution P6 TA(2006)202 (at para. 24).
71 A practice effectively endorsed by the CJEU, e.g. in Case C-121/07 *Commission v France (French GMO Controls (2))*. See comments from Lenaerts and Gutiérrez-Fons (2011), p. 8; Jack (2011), p. 82.
72 For instance, Borzsák suggests eliminating the second-round pre-litigation phase: Borzsák (2011), p. 239.
73 COM(2007)502, Commission Communication, *A Europe of Results – Applying Community Law*, 5 September 2007.
74 The EU Pilot system, discussed in Ch. 3, is explained on the Commission's Secretariat General's website at: http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm.
75 See SEC(2011)1629/2, Commission Report, *Second Evaluation Report on EU Pilot*, section 3 (Evaluation), p. 6 where the Commission reported that 80% of cases are resolved without formal infringement proceedings being opened..
76 See COM(2014)612, *31st Commission Annual Report on Monitoring the Application of EU Law* (1 October 2014), p. 10.
77 See e.g. Barav (1975), p. 383; Audretsch (1987), p. 842; and Dashwood/White (1989), p. 413.
78 See e.g. COM(2002)725, Commission Communication, *Better Monitoring of the Application of Community Law*, p. 3; Prete and Smulders (2010), p. 11.
79 See e.g. comments by Dashwood and White (1989), p. 413.
80 See DG ENV summary report at: http://ec.europa.eu/environment/legal/law/statistics.htm.
81 By virtue of Art. 260(3) TFEU.
82 See DG ENV websites: http://ec.europa.eu/environment/legal/law/statistics.htm and http://ec.europa.eu/environment/legal/law/pubs.htm.
83 Borzsák (2011), p. 239.
84 See Macrory (1992), p. 357; Gray (1979).
85 See e.g. Case C-195/90R *Commission v Germany*.
86 See Hartley (2003), p. 313.
87 Case C-503/06 *Commission v Italy*.
88 Joined Cases C-57/89R and 57/89 *Commission v Germany*.
89 See Grohs (2004), p. 26; Krämer (2003), p. 392.
90 Namely, the interim relief orders secured in the *Liguria Bird Hunting* case (Case C-503/06R *Commission v Italy*), the *Rospuda River Valley* case (Case C-193/07R *Commission v Poland*) and the *Maltese Bird Hunting* case (Case C-76/08R *Commission v Malta*). The case proceedings are available for inspection on the Court's website: www.curia.eu.int.
91 Williams (1994), p. 369.
92 See Audretsch (1987), p. 854; Dashwood and White (1989), p. 388.
93 By virtue of Art. 260(3) TFEU.
94 By virtue of former Art. 88 ECSC.
95 See Arts. 101–2 TFEU in conjunction with Art. 8 of Regulation 1/2003 (OJ 2003 L1/1).
96 See Joined Cases 24 and 97/80R *Commission v France*.
97 See e.g. Audretsch (1987), p. 842; Mertens de Wilmars (1970), p. 404.
98 Case C-355/90 *Commission v Spain*.

99 Directive 2009/147 (OJ 2010 L20/7), replacing former Directive 79/409 (OJ 1979 L103/1).
100 Winter (1996), p. 715.
101 Krämer (1993), pp. 430–3.
102 OJ 2000 L327/1.
103 Via the EU RAPID press release system, available for inspection at: http://europa.eu/rapid/latest-press-releases.htm.
104 OJ 2008 L152/1. The member states concerned were the Czech Republic, Estonia, Finland, Greece, Hungary, Luxembourg, Romania, Slovenia and Spain. (See summary reports in the EU Current Survey sections of the *Environmental Liability* law journal covering the months of November–December 2010.)
105 OJ 2008 L164/19. The member states concerned were Cyprus, Estonia, Finland, France, Greece, Ireland, Malta and Poland. (See summary reports in the EU Current Survey sections of the *Environmental Liability* law journal covering the months of January–May 2011.)
106 OJ 2008 L312/3. The member states concerned were Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Greece, Hungary, Latvia, Luxembourg, Poland, Romania, Slovakia and Slovenia. (See summary reports in the EU Current Survey sections of the *Environmental Liability* law journal covering the months of February, March, July, September and October 2011.)
107 OJ 2008 L328/28. The member states concerned were Austria, Cyprus, Czech Republic, Finland, Greece, Italy, Lithuania, Malta, Portugal, Romania, Slovenia and the UK. (See summary reports in the EU Current Survey sections of the *Environmental Liability* law journal covering the months of July, September and October 2011.)
108 Directive 2009/123 (OJ 2009 L280/52). The member states concerned were the Czech Republic, Finland, Greece, Italy, Lithuania, Portugal, Romania and Slovakia. (See summary reports in the EU Current Survey sections of the *Environmental Liability* law journal covering the months of July 2011.)
109 OJ 2010 L153/13. The member states concerned were Bulgaria, Greece, Italy and Portugal. (See summary reports in the EU Current Survey sections of the *Environmental Liability* law journal covering the months of January–February 2013.)
110 The member states concerned were Austria, Belgium, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK. (See summary reports in the EU Current Survey sections of the *Environmental Liability* law journal covering the months of March–June, September and October 2010.)
111 OJ 2000 L327/1. The member states concerned were Belgium, Cyprus, Denmark, Greece, Ireland, Lithuania, Malta, Poland, Portugal, Romania, Slovenia and Spain. (See summary reports in the EU Current Survey sections of the *Environmental Liability* law journal covering the months of May and June 2010.)
112 See Wennerås (2012), pp. 173–4.
113 See e.g. Macrory and Purdy (1997), p. 43; Rawlings (2000), p. 23; Craig and de Búrca (2003), p. 401.
114 See Bonnie (1998), pp. 537 *et seq.*; Theodossiou (2002), pp. 25 *et seq.*
115 Bonnie (1998), pp. 537 *et seq.*
116 By way of exception, this 'contempt of court' factor no longer applies to non-communication cases, which since the Lisbon Treaty may be the subject of fines at first-round stage (see Art. 260(3) TFEU).
117 See e.g. para. 26 of the General Court's judgment in Case T-139/06 *Commission v France*.
118 Notably, SEC(2005)1658 Commission Communication, *Application of Article 228 of the EC Treaty* of 13 December 2005 (OJ 2007 C126) which may be inspected on the following EU Commission website: http://ec.europa.eu/eu_law/infringements/infringements_260_en.htm.

119 See Regulations 1/2003 (OJ 2003 L1/1) and 773/2004 (OJ 2004 L123/18) as amended.
120 Theodossiou (2002), pp. 25 *et seq.*
121 Winter (1996), p. 716; more generally Rawlings (2000), p. 23 and Theodossiou (2002), pp. 25 *et seq.*
122 See e.g. Winter (1996), p. 716; Krämer (2003), p. 391.
123 See comments by Tesauro (1992), p. 489.
124 Demmke (2003), p. 354.
125 See comments by Prete and Smulders (2010), p. 54; Jack (2011), p. 83 and Wennerås (2012), p. 165. See also discussion in Ch. 4 on second-round CJEU judgments.
126 Jack (2011), p. 88, commenting that the maximum duration co-efficient applied by the CJEU (3) may be insufficient to address long-term breaches.
127 The Commission recommended a seriousness co-efficient of 14 in the free movement of workers Case C-119/04 *Commission v Italy* (the CJEU did not impose a fine in the event for lack of evidence) and the CJEU applied a seriousness co-efficient of only 10 in Case C-304/02 *French Fishing Controls (2)*.
128 Jack (2011), p. 90.
129 In Case C-304/02 *Commission v France (French Fishing Controls (2))*.
130 Prete and Smulders (2010), p. 53. For an opposing viewpoint, see Kilbey (2007).
131 Case T-139/06 *France v Commission*.
132 See Tesauro (1992), p. 488.
133 See also comments by Jack (2011), p. 91.
134 Specifically: Case C-387/97 *Commission v Greece (Kouroupitos 2)*; Case C-278/01 *Commission v Spain (Spanish Bathing Waters (2))*; Case C-304/02 *Commission v France (French Fishing Controls (2))*; Case C-121/07 *Commission v France (French GMO Controls)*; Case C-279/11 *Commission v Ireland (Irish EIA (2))*; Case C-374/11 *Commission v Ireland (Waste Water Treatment Systems)*; Case C-533/11 *Commission v Belgium (Belgian Waste Water (2))*; and Case C-576/11 *Commission v Luxembourg (Luxembourg Waste Water (2))*.
135 Krämer (2002b), p. 181.
136 Hedemann-Robinson (2006).
137 This practice was changed after the CJEU confirmed in 2005 in Case C-304/02 *French Fishing Controls (2)* that the CJEU could impose a lump sum as well as a periodic penalty payment.
138 See e.g. Tesauro (1992), p. 489.
139 See e.g. Case 48/65 *Lütticke* and Case 247/87 *Star Fruit*.
140 The Common Foreign and Security policy area (Chapter 2 of Title V TEU) is a notable exception to this general rule of thumb, in respect of which the EU member states have retained a substantial degree control over powers to submit policy proposals at Union level, with the Commission having a parallel and qualified role in conjunction with the High Representative of the Union for Foreign Affairs and Security Policy (see Art. 30 TEU).
141 The Commission is only obliged to inform the EP of its reasons if deciding to reject a legislative request from the latter institution. Likewise, the Commission is not bound to adhere to a request for a legislative proposal from a citizens' initiative (petition backed by at least a million EU citizens from a significant number of member states): see Art. 11 TEU in conjunction with Art. 24 TFEU and Regulation 211/11 (OJ 2011 L65/1).
142 See Art. 192 TFEU.
143 See Williams (1994), p. 352; Williams (2002), p. 271; Hattan (2003), p. 275.
144 Art. 250 TFEU (ex Art. 219 EC).
145 See Ch. 9 for discussion on the EU's access to information rules with respect to information held by EU institutions.
146 Macrory and Purdy (1997), p. 35.

147 Directive 2009/147 (OJ 2010 L20/7), replacing former Directive 79/409 (OJ 1979 L103/1).
148 Krämer (2006a), p. 409.
149 Williams (1994), p. 354.
150 Case C-198/97 *Commission v Germany*.
151 See critical comments from Weatherill and Beaumont (1999), p. 222.
152 At the time of writing, the relevant units are located within Directorate D (Implementation, Governance and Semester) of DG ENV. Periodically, their location may change as organisational changes may be made to each Directorate-General.
153 Williams (1994), p. 364.
154 At the time of writing, Directorate D contains four units: D1–D3, Enforcement, Cohesion Policy and European Semester (Clusters 1–3) and D.4 Compliance Promotion, Governance and Legal Issues (see weblink at: http://ec.europa.eu/dgs/environment/directory.htm).
155 See Williams (1994), p. 358; Scott (1998), p. 151.
156 European Ombudsman Decision 1288/99/OV against the Commission (cited in the EO's Annual Report 2002, p. 98).
157 Regulation 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006 (OJ 2013 L347/320). See notably Art. 6 of Regulation 1303/2013 which stipulates that release of EU funding is conditional on this being in compliance with Union law.
158 The right to good administration from the EU's political institutions is enshrined within Art. 41 of the EU's Charter of Fundamental Rights (OJ 2010 C83/2).
159 See notably the Commission's 2002 Code of Good Administrative Behaviour for Staff of the European Commission in relations with the public, of 13 September 2000 (OJ 2000 L267). (See weblink: http://ec.europa.eu/transparency/code/index_en.htm; http://ec.europa.eu/transparency/code/_docs/code_en.pdf.) Section 2 of the Code stipulates that Commission staff must act objectively and impartially, and ensure that their conduct is not guided by personal or national interests or political pressure. Disciplinary measures against infracting staff may be taken under the aegis of the Commission's Staff Regulations (Regulation 21/62/EEC and Regulation 11/62/EAEC (OJ 1962 L45/1385) as amended).
160 Subsequent to European Ombudsman's report the official served as a Head of Unit and a Director within DG ENV. The official concerned remains in a senior post within DG ENV at the time of writing.
161 Now Art. 13 of Directive 2008/98 (OJ 2008 L312/3), previously Art. 4 of former Directive 75/442 (OJ 1975 L194/39).
162 'MS' signifies 'member states'.
163 See *The Guardian* newspaper report 'Spanish Government Cleared of Blame for Prestige Oil Tanker Disaster' of 13 November 2013 (http://www.theguardian.com/world/2013/nov/13/spanish-prestige-oil-tanker-disaster). The Spanish judge presiding over the case, Judge Juan Luis Piá is reported to have said in his judgment:

> Nobody knows exactly what might have been the cause of what happened, nor what would have been the appropriate response to the emergency situation created by the *Prestige*'s breakdown.

164 Williams (1994), pp. 398–9.
165 Demmke (2003), p. 344.
166 The point that the Commission is not capable of being able to pursue every infringement is well acknowledged; see e.g. Prete and Smulders (2010), p. 17; Kingston (2011), p. 7.

167 Art. 4(3) TEU.
168 Grohs (2004), p. 31.
169 See e.g. Macrory and Purdy (1997), p. 43; Macrory (1996).
170 Demmke (2003), p. 344; Ibáñez (1998a), section 2.7.2.2.
171 Demmke (2003), p. 344. See also Ibáñez (1998a), section 2.7.2.2; and Grohs (2004), p. 31.
172 Jans (2000), p. 169.
173 See e.g. Kingston (2011), p. 7.
174 Best available technique not exceeding excessive cost.
175 Namely the enforcement of directives between private individuals (horizontal direct effect scenario) and the enforcement of directives by public authorities against private individuals (inverse direct effect scenario).
176 Demmke (2001), p. 15.
177 Winter (1996), p. 706.
178 COM(1996)500.
179 COM(1996)500, pp. 4 *et seq.*
180 See e.g. Macrory and Purdy (1997), p. 43; Ibáñez (1998a), section 2.7.
181 See e.g. Jans (2000), p. 169; Hattan (2003), p. 286.
182 Demmke (2003), p. 338.
183 See e.g. Harding (1997), p. 14.
184 Demmke (2003), p. 15.
185 Case C-131/88 *Commission v Germany*.
186 See e.g. Krämer (1993), p. 121; Krämer (2003), p. 375.
187 European Council Doc. SN00150/97.
188 European Council Doc. SN00150/1/98 REV1.
189 SEC(1998)1733.
190 COM(2002)725 Commission Communication, *Better Monitoring of the Application of Community Law*, 11 December 2002, section 3.5.
191 COM(2001)428 Commission Communication, *European Governance – A White Paper*, 27 May 2001.
192 COM(2002)725 Commission Communication, *Better Monitoring of the Application of Community Law*, 11 December 2002.
193 For details see Ch. 5 in the first edition of this book.
194 SEC(2004)1025.
195 The Report gives the example of this being used in respect of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment) OJ 2001 L197/30.
196 See Grohs (2004), p. 37.
197 See Hattan (2003), p. 279.
198 Ibid., p. 279.
199 Grohs (2004), p. 31.
200 COM(2007)502, Commission Communication, *A Europe of Results – Applying Community Law*, 5 September 2007.
201 Ibid., section 1 (Prevention), pp. 12 *et seq.*
202 Ibid., section 3 (Seeking a more efficient management of infringements).
203 The average time taken by the Commission to process infringements over the period 1999–2007, from opening of a file to applying to the Court under Art. 258 TFEU was 24 months (COM(2009)675, *26th Annual Report of the Commission on Monitoring the Application of Community Law* (2008), 15 December 2009, p. 2.
204 COM(2008)773 final, *Commission Communication on Implementing European Community Environmental Law*, 18 November 2008.
205 Art. 17 TEU.
206 Ibid., section 3.3, p. 8.
207 Ibid., pp. 8–9.
208 See also Kingston (2011), p. 7, pointing out the dangers of prioritisation in having a marginalisation effect on complainants.

209 Jack (2011), p. 78.
210 See e.g. Declaration 17 on the Right of Access to Information, attached to the Treaty on European Union 1992. See also the 1993 Inter-Institutional Declaration on Democracy, Transparency and Subsidiarity agreed between the three EU institutions involved in the legislative process.
211 OJ 2001 L145/43.
212 Commission Decision 2001/937 (OJ 2001 L345/94), Annex. The rules on access to documents and accompanying case law of the CJEU are examined in detail in Chapter 9A (online).
213 See Art. 42 of the EU Charter of Fundamental Rights guaranteeing a right of access to EU institutional documentation (OJ 2010 C83/2).
214 See Rawlings (2000), pp. 8 *et seq.*
215 COM(2002)141, Communication, *Relations with the Complainant in Respect of Infringements of Community Law*. The Commission undertook some earlier changes on complainant relations in 1998 (see SEC(1998)1733, *Improvement to the Commission's Working Methods in Relation to Infringement Proceedings*, 15 October 1998).
216 COM(2012)154 Communication, *Updating the Handling of Relations with the Complainant in Respect of the Application of Union Law*, 2 April 2012.
217 OJ 1999 C119/5. Accessible also online from the Commission's Secretariat General's website: http://europa.eu.int/comm/secretariat_general.
218 Accessible on the DG ENV website at: http://ec.europa.eu/environment/legal/law/complaints.htm.
219 Para. 2 (General principles) of COM(2012)154.
220 Ibid., para. 5. Complaints may be sent by post to the Commission's Secretariat General Brussels postal address (1049 Brussels) or to one of the Commission's representative offices in the member states. Alternatively, a complaint may be sent by email to: SG-PLAINTES@ec.europa.eu.
221 Ibid., para. 3.
222 See comments in COM(2010)538, *Commission's 27th Annual Report Monitoring the Application of EU Law*, 1 October 2010, p. 7.
223 COM(2012)154, para. 3.
224 Ibid., para. 4.
225 Ibid., para. 6.
226 Ibid., para. 7.
227 Ibid.
228 Ibid., para. 8.
229 Williams (1994), p. 369.
230 Para. 4 of COM(2012)154.
231 Ibid., para. 9.
232 Ibid., para. 10.
233 Ibid., para. 9.
234 Regulation 1049/2001 regarding public access to European Parliament, Commission and Council documents (OJ 2001 L145/43) as implemented by the provisions set out in the Annex Commission Decision 2001/937 (OJ 2001 L345/94).
235 Para. 12 of COM(2012)154.
236 SEC(2003)260/3, *Commission Working Paper on Public Access to Documents Relating to Infringement Proceedings*, 28 February 2003.
237 Information on EU Pilot may be obtained from the following Commission website: http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm.
238 http://europa.eu.int/comm./secretariat_general/sgb/infringements.
239 http://europa.eu.int/comm/environment.
240 See comments by Krämer (2006a), p. 421.
241 Prete and Smulders (2010) refer to the 'coming of age' of infringement procedures in general in their article.

SELECTED PUBLISHED WORK 2

Selected Journal Article

Hedemann-Robinson M, 'The Emergence of European Union Environmental Criminal Law: A Quest for Solid Foundations – Part I' (2008) 16(3) *Environmental Liability* 71-91 and 'The Emergence of European Union Environmental Criminal Law: A Quest for Solid Foundations – Part II' (2008) 16(4) *Environmental Liability* 111-136. ISSN 0966 2030. (Approx.30,000 words)

The emergence of European Union environmental criminal law: a quest for solid foundations – Part I

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On 21 May 2008, the European Union's political institutions reached agreement on the contents of a prospective European Union (EU) legislative instrument intended to combat environmental crime. Specifically, after some seven years of political negotiations, the Council of the EU and the European Parliament have finally secured political accord on the provisions of a prospective European Community directive on the protection of the environment law through criminal law. For the first time it appears likely that a supranational legal instrument will be adopted in 2008 on the subject of criminal policy. Such a step will be a profound constitutional moment for the EU, given that for much of the time until now the orthodox position has been to deny that the EU possesses legal competence to enact such measures in a policy area which has always been regarded as being within the exclusive domain of individual Member States. The aim of this two-part article is to provide an analysis of the emergence of EU legislation intended to combat environmental crime. In particular, it focuses on the extent to which the EU has provided adequate legal and political justification for the promulgation of supranationally adopted legislation. As will become apparent, the path towards the adoption of such legislation has been protracted, controversial, complex and unpredictable.

Part I of this article examines the initial phase in the development of an EU policy on environmental crime, specifically until 2000. This phase was dominated by concerns on the part of EU Member States to ensure any agreements over that policy should remain based on an intergovernmental footing, so that European cooperation would be subject to the consent of all Member States. Part II of this article will consider the most recent phase of the EU's development of a policy on environmental crime.

Introduction

For several years after the entry into force of the treaties founding the EU, namely the original three European Community treaties,[1] the Member States as well the political institutions of the Union appeared to subscribe to the view that the area of criminal policy remained a matter essentially outside the remit of Community law. The establishment of an intergovernmental framework for the development of agreements between Member States on promoting certain aspects of police and judicial cooperation in criminal matters by virtue of the Treaty on European Union (TEU) 1992 did not alter the orthodox view that supranational Community measures could not be taken in the field of criminal policy. It was not until the European Court of Justice (ECJ) decided in its famous *Environmental Crimes* ruling of 2005[2] that the Community has implied competence under the auspices of the provisions of the EC Treaty on the Community's common environmental policy to enact measures to combat environmental crime. Until the ruling, Member States had fiercely contested the European Commission's view that Community legislation on environmental crime could be validly adopted and had resisted participating in negotiations over an EC legislative text proposed by the Commission in 2001.[3]

However, in the wake of *Environmental Crimes*, subsequent judicial guidance from the ECJ and substantial modification by the Commission of its 2001 legislative proposal for a Community directive, the EU's Member States governments have radically changed their stance. Specifically, they did not block the Council of the EU's participation in legislative negotiations and struck a political agreement on 21 May 2008 with the Council's legislative partner, the European Parliament, over the adoption of a Community measure.[4] It is anticipated that the EC directive

1 Namely the 1951 European Economic and Steel Community, 1957 European Economic Community Treaty and 1957 European Atomic Energy (Euratom) Treaty. The EEC Treaty was renamed as the European Community (EC) Treaty in 1992, by virtue of the Treaty on European Union 1992.

2 Case C–176/03 *Commission v Council* [2005] ECR I-7879.

3 COM(2001)139 (13 March 2001).

4 As noted in p 13 of the minutes of the 2874th Council Meeting (Environment) (Luxembourg 5 June 2008) (Council Doc 9959/08 (Presse 149)).

will be formally adopted by the Community legislature before the end of 2008.

This two-part article tracks as well as appraises the gradual emergence of an agreed EU strategy on cooperation in the area of environmental crime. It is divided into four principal sections. The first two of these focus on the chronological development of EU policy. The first section, which follows here, focuses on the initial phase in the EU's history during which the dominant view held among EU Member States and the Union's political institutions was that cooperation between Member States on the subject of crime could only take place on an intergovernmental basis outside the supranational legal framework of the Community treaties. This phase, which lasted until 2001, witnessed the growth of political will among national governments in Europe to cooperate over fighting serious environmental crime, culminating in a regional European Convention on environmental crime signed in 1998 within the forum of the Council of Europe[5] and supplemented by an EU intergovernmental initiative proposed by the Danish government in 2000.[6] The impact of the early jurisprudence of the ECJ on the interpretation of Community law in relation to the national criminal legal systems of the EU Member States is also considered in this section.

The second, third and fourth sections are contained in Part II of this article, which will be published in the next issue of *Environmental Liability*. The second section turns to consider a change of political direction and a new phase in EU institutional approaches to environmental crime, triggered when the European Commission decided to challenge the orthodox interpretation of Community law competence favoured by the Council of the EU and formally propose a legislative instrument to be adopted under the aegis of the EC Treaty in 2001. It tracks the subsequent inter-institutional legal and political battles between Commission and Council over the question of Community legal competence which led ultimately to the very recent achievement of political agreement on a legislative text in May 2008.

The third and fourth sections of this article consider how EU political developments in the area of environmental crime relate to and tie in with broader discussions concerning the legitimacy of EU activities. Specifically, the third section focuses on recent attempts to render the issue of EU legislation on criminal matters more transparent and democratically accountable, within the context of the wider agenda on the part of Member States to reform the EU's constitutional framework. The fourth section approaches the debate surrounding the legitimacy of EU action on environmental crime beyond the purely legal question of determining the extent of the EU's attributed powers. It considers the impact of broader discussions that have arisen in connection with the political legitimacy of the role of the EU in the field of environmental criminal policy, with particular reference to the relevance of the principles of subsidiarity and proportionality that underpin the EU's legal system.

The article concludes with some brief reflections on the current state of play.

I The initial phase of the EU's approach towards crime and the environment: the rise of intergovernmentalist strategies prior to 2001

The ECJ has confirmed only relatively recently in its case law that the EC has legal competence to adopt legislative measures in relation to environmental crime, starting with its 2005 judgment in *Environmental Crimes*. The impact of this ECJ jurisprudence is discussed in some detail in section II (to follow in the next issue). However, it is useful first to reflect upon the legal and historical backdrop relevant to addressing the nature of the relationship between the EU and criminal policy. Specifically, it is important to consider the extent to which the Union's constitutional framework has provided clear guidance on the question as to what extent, if at all, the EU is empowered to take policy decisions on criminal policy, an area traditionally thought to be a core element of the sovereign make up of a nation state.

1.1 Background: The Union as a tripartite structure

The constitutional structure of the EU is founded upon a tripartite structure. The first pillar is composed of the law pertaining to the provisions contained within the original European Community treaties still in force, specifically the European Community Treaty 1957 and European Atomic Energy (Euratom) Treaty 1957, as amended.[7] The second and third pillars, which were introduced as constituent elements of the EU's framework by virtue of the Treaty on European Union (TEU) 1992, are composed of two parts of the TEU, namely Title V (Provisions on a Common Foreign and Security Policy)[8] and Title VI (Provisions on

5 1998 Convention on the Protection of the Environment through Criminal Law (CETS No 172).

6 Initiative of the Kingdom of Denmark with a view to adopting a Council Framework Decision on combating serious environmental crime (OJ 2000 C39/4).

7 Since 2002, the European Coal and Steel Community Treaty 1951 is no longer in force.

8 Articles 11–28 EU.

Police and Judicial Co-operation).[9] The first pillar contrasts with the other two, notably in terms of its institutional arrangements and legal impact. The legal order pertaining to the first pillar is of a supranational nature unique in the sphere of international relations. Specifically, policy decision-making within the EC is subject to a system of supranational as opposed to intergovernmental governance, orchestrated principally through three international institutions: the European Commission, Council of the EU and the European Parliament.

The influence of individual Member States in the decision-making process has increasingly diminished over time as a result of successive amendments made to the EC Treaty, starting with the Single European Act (SEA) 1985.[10] The so-called 'Community method' of adopting legislative measures under the EC Treaty has always foreseen that the Commission is vested with a monopoly over proposing EC legislation. Moreover, several policy areas covered under the auspices of the first pillar are now wholly subject to majoritarian decision-making. In particular, save for a few policy areas, legislative decisions made by the Council of the EU, the Union institution which represents the individual interests of the Member States, are most commonly subject to qualified majority voting (QMV) which means that no single Member State may, at least in theory, veto the adoption of a Community policy measure. With regard to the common environmental policy of the EC, under Article 175 EC most[11] policy decisions are taken in accordance with the 'co-decision' legislative procedure,[12] which requires QMV at Council level together with a majority of votes within the European Parliament[13] in support of adoption of a legislative proposal. The ECJ has clarified that the first pillar constitutes a special legal order in international relations, in which Member States have limited their sovereignty rights thereby conferring supremacy to Community law in the event of a conflict with national rules[14] and, in certain circumstances, conferring Community rights on individuals that are directly enforceable before their respective national courts (doctrine of 'direct effect').[15] In addition, the ECJ has held that national courts and authorities are under a general duty to ensure that, as far as possible in accordance with national law, they interpret national rules in line with Community law[16] (doctrine of 'indirect effect').

In contrast with the first pillar, the second and third pillars are devoid of any special supranational status and have been constructed on the basis of an intergovernmentalist framework. Specifically, policy decisions are required to be adopted pre-eminently on the basis of unanimous agreement among Member States at Council level,[17] with limited powers being conferred on the European Commission and European Parliament. Moreover, the legal impact of the second and third pillars is far less, their provisions and measures having a legal status essentially akin to that of international agreements under standard rules of international law. The law pertaining to the second and third pillars is not capable of being directly effective,[18] although the ECJ has confirmed that the doctrine of indirect effect applies with respect to framework decisions adopted under the aegis of the third pillar.[19] In addition, the jurisdiction of the ECJ to review pillar three norms and decision-making is relatively restricted compared with its powers of judicial scrutiny in relation to first pillar law.[20] The court has no express powers to review

9 Articles 29–42 EU.

10 The SEA 1985 introduced the so-called 'cooperation procedure' into several EC policy areas (set out in art 252 EC), which envisages qualified majority voting within the Council of the EU and significant powers of influence for the EP (see art 252 EC). By virtue of subsequent amendments made to the EC Treaty, the cooperation procedure has largely been replaced by the co-decision procedure (set out in art 251 EC) as the standard Community legislative procedure.

11 Article 175(2) EC stipulates that in certain areas of environmental policy the Council of the EU is to decide by way of unanimity, namely in relation to: provisions of a fiscal nature; measures affecting town and country planning, quantitative water resources management or water resource availability or land use (apart from waste management); or measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

12 As set out in art 251 EC.

13 It should be noted that art 251 EC prescribes different types of minimum EP majorities at separate stages of the co-decision procedure.

14 First confirmed in Case 6/64 *Costa v ENEL* [1964] ECR 585.

15 The leading case is Case 26/62 *Van Gend en Loos* [1963] ECR 13.

16 See eg Case C–106/89 *Marleasing* [1990] ECR I-4135.

17 See art 23 EU (re second pillar measures) and art 34(2) EU (re third pillar measures).

18 The ECJ has clarified that Member State courts are obliged to interpret national rules as far as possible in accordance with pillar. Three measures are intended to be legally binding on the Member States (doctrine of indirect effect). See Case C–105/03 *Criminal Proceedings against M Pupino* [2005] ECR I–5285.

19 ibid para 43.

20 See art 35 EU, which provides for limited access to the Court of Justice by way of annulment proceedings or by way of a request for a preliminary ruling from national courts in relation to third pillar measures. Only Member States and the Commission have legal standing to bring annulment proceedings (art 35(6) EU) and Member States have the right to opt out of or restrict the operation of the preliminary ruling procedure (art 35(2)-(3) EU). No provision is made for non-contractual liability proceedings against Union institutions and organs involved in third pillar activities. Finally, the ECJ has no jurisdiction to review the validity or proportionality of operations carried out by national law enforcement authorities in relation to the third pillar or the exercise of Member State responsibilities with regard to the maintenance of law and order and safeguarding of internal security (see arts 33 and 35(5) EU).

second pillar activities or provide judicial interpretation regarding measures adopted under the second pillar.

For several years, the extent of the EU's legal competence to adopt measures intended to approximate aspects of national criminal laws of the Member States has been unclear. Due to the ambiguity of the relevant treaty texts underpinning the Union's legal framework, it has been far from straightforward to identify a clear legal base for the development of Union policy in this field.[21] While the first pillar treaty texts have remained silent as to whether the European Community has power to adopt legislative measures to combat crime including in relation to the environment sector, pillar three contains specific provisions concerning the possibility of common action among Member States in the fields of police and judicial cooperation in criminal matters. However, until the ECJ's 2005 judgment in *Environmental Crimes*, the extent to which pillar three had an impact on the question of legal competence for the Community to taken action on crime was uncertain; the relevant EU treaty texts are not clear.

Determination of the appropriate site of legal competence within EU law is crucial for both legal and political reasons, the key ones summarised as follows:

- Member State influence in policy-making: under the first pillar, the common policy on the environment may be decided on the basis of QMV within the Council of the EU (Article 175 EC). Measures decided under pillar three are determined on the basis of Council unanimity. Hence, if the Community is found to have competence to adopt legislation on environmental crime under the auspices of Article 175 EC, individual Member State governments which oppose such a legislative proposal may be outvoted and be bound under Community law to implement the adopted legislative instrument.
- European Commission powers in policy development: while the Commission has an exclusive right to present legislative proposals in the environmental sphere at Community level, this power is shared with Member States in pillar three.[22]
- European Parliament influence: while the EP has joint decision-making powers with the Council under the first pillar for environmental matters, it has limited consultation rights under the third pillar.[23]
- Democratic accountability and governance: affirmation of Community competence over criminal law raises profound issues about how this may impact on the relationship between citizen and government, specifically the degree of accountability of the latter to the former in relation to what extent government may take steps to forfeit the liberty of individuals who act in contravention of legislatively prescribed minimum standards of conduct. Supranational competence means that traditional statal sources of governance (national and sub-national governments and parliaments) relinquish their exclusive powers to develop criminal policy vis-à-vis the inhabitants located with the state. The crafting of criminal liability legislation becomes a task shared among a set of supranational legislative institutions whose activities national electorates and representatives may control collectively but not individually.
- European Commission enforcement powers: under the first pillar, the Commission has a specific mandate[24] and powers[25] to take enforcement proceedings before the ECJ against Member States who fail to implement Community legislation on time and correctly, ultimately with the possibility of requesting the ECJ to impose financial penalties in cases of protracted non-compliance with EC law. Neither the Commission nor other parties have such enforcement powers in respect of measures adopted under the second or third pillars; Member States are effectively solely responsible for their implementation at national level.
- Legal effects of measures: while the ECJ has clarified that, under certain circumstances, individuals may rely upon and enforce first pillar norms directly before national courts and authorities of the Member States, the legal doctrine of 'direct effect' does not apply within the current framework of the second and third pillars.[26]
- ECJ powers: as mentioned earlier, the ECJ has relatively limited jurisdiction to review pillar three activities or

21 As pointed out by several commentators. See eg M Delmas-Marty 'The European Union and Penal Law' (1998) 1 European Law Journal p 88; H Sevenster 'Criminal Law and EC Law' (1992) 29 Common Market Law Review p 29; E Roger France 'The Influence of EC Law on the Criminal Law of the Member States' (1994) 2 European Journal of Crime Criminal Law and Criminal Justice p 324; M Wasmeier M and N Thwaites 'The "Battle of the Pillars": Does the EC Have the Power to Approximate National Criminal Laws?' (2004) European Law Review p 613.

22 Article 34(2) EU.

23 Article 39 EU.

24 Article 211 EC.

25 Articles 226 and 228 EC.

26 Direct effect is specifically ruled out in relation to legislative-type instruments that may be adopted under the auspices of the third pillar, namely framework decisions and decisions (Articles 34(2)(b)-(c) EU).

provide judicial interpretation of third pillar measures[27] as compared with its powers under the first pillar.[28]

I.2 The European Community's initial relationship with criminal policy: 1957–2000

Since the inception of the original three Community treaties in the 1950s, the extent to which European Community legislation could be adopted, imposing obligations on Member States affecting the administration of criminal justice at national level, has been a matter of dispute. Until the European Commission decided in 2003 to take a test case before the ECJ in order to clarify the parameters of legal competence under the first pillar, the matter had remained a largely dormant issue in the context of European legal integration.

The treaty texts comprising the first pillar of the EU legal order have always provided very little in the way of specific guidance as to the extent of the European Community's powers to impose legislative obligations on Member States in the field of criminal policy. Only two sources of primary Community law expressly oblige Member States to undertake criminal law measures, and only in very specific and narrow circumstances. Specifically, Article 194 of the Euratom Treaty requires Member States to prosecute persons who disclose state secured nuclear secrets.[29] In addition, Article 30 of the Statute of the Court of Justice[30] requires Member States, at the instance of the ECJ, to prosecute witnesses and experts who perjure themselves before the court.

In all other respects, the Community treaties are silent on the powers of the Community to intervene in relation to the area of criminal policy. The environmental sector is no different. Title XIX of the EC Treaty, which comprises the treaty's provisions on a common environmental policy, is silent on the extent to which, if at all, the Community may adopt policy measures to combat environmental crime. In the absence of revision to the EC Treaty regarding the issue of competence, a long-standing issue has been whether the Community has implied legal power to develop a criminal law dimension to its common environmental policy. The EC Treaty contains a couple of provisions which refer to the subject of sanctions to enforce Community law.[31] However, the ECJ has declared that these provisions constitute legal bases for the adoption of sanctioning powers by Community institutions only,[32] and accordingly do not provide any textual guidance on the issue of whether Community law may approximate national criminal law or require Member States to enact criminal law sanctions for the implementation of EC obligations.

I.2.1 Initial attitudes of EU political institutions in relation to criminal policy

Until the turn of the millennium, there appeared to be broad if not complete agreement among the EU's political institutions that the first pillar did not provide any implied powers to the Community to take legislative action on criminal matters. Prior to the 2005 *Environmental Crimes* judgment, the position of the Council of the EU in reflecting the interests of Member States was to deny that the Community had any competence to involve itself in the field of criminal policy. This was a matter considered instead to be within the exclusive sovereign domain of Member States and unaffected by the establishment of the Community legal order. Prior to the United Kingdom's accession to the EEC in 1972, the UK government published its opinion on the constitutional implications of EEC membership in the following unambiguous terms: 'Nothing in Community law would [...] materially affect the general principles of criminal law'.[33]

The UK government's view was endorsed by the Council in various documents and steps taken over the course of the first 50 or so years of the EU's history, namely affirming that criminal policy had remained outside the remit of the first pillar apart from those areas in which the Community has been awarded express powers to take action on crime. The Council was of the view that, unless otherwise agreed, it would be for individual Member States to

27 See arts 33 and 35 EU.

28 See arts 220–245 EC.

29 An unofficial consolidated version of the EAEC Treaty 1957, as amended, is provided online at the following official EU website: http://eur-lex.europa.eu/en/treaties/index.htm#founding.

30 Protocol (No 6) on the Statute of the Court of Justice, annexed to the TEU as well as EC and EAEC Treaties (OJ 2006 C321E/211).

31 See art 83(a) EC foreseeing the provision of fines and periodic penalty payments for the enforcement of the competition treaty provisions in articles 81–82 EC (as implemented by reg 1/2003 (OJ 2003 L1/1)), and art 229 EC foreseeing the possibility of the ECJ being provided with unlimited jurisdiction with regard to penalties.

32 Case C–240/90 *Commission v Germany* [1992] ECR I-5383, at para 34 of judgment. It is doubtful whether the court is correct on this point with regard to art 83(a) EC which has never been solely directed at developing EC institutional sanctioning powers. See art 5 of the implementing reg 1/2003 (OJ 2003 L1/1) which stipulates various sanctioning powers for national competition authorities.

33 Legal and Constitutional Implications of UK Membership of the European Communities (1967) Cmnd 3301 at para 25. The UK government presented a similar view to the UK Parliament on the eve of accession in its document The United Kingdom and the European Communities (1971) Cmnd 4715, especially para 31.

determine the best means of implementing Community obligations.[34] It has been argued that in the relatively earliest years of the EC, the Community legislative institutions appeared on occasion to be prepared to require Member States to criminalise certain infringements of Community law, such as in the area of agricultural policy.[35] However, the main EC legislative instruments requiring Member States to impose sanctions for breaches of Community rules have deferred to individual Member States over whether or not this should translate into meaning criminal liability under national law.[36] Community legislation has been used to specify that civil penalties be applicable in certain common policy areas, notably in relation to persons found guilty of fraudulently accessing EC funds.[37]

The incorporation of the principle of subsidiarity[38] within the legal fabric of the Community legal order, by virtue of the TEU and the Treaty of Amsterdam (ToA) 1997,[39] without doubt served to entrench Member State political positions against Community involvement in the field of law and order. It is true that, technically speaking, the principle of subsidiarity does not provide a specific legal tool for assisting in determination of the existence of Community competence in a given policy area. Instead, its principal remit is to offer a framework for the political institutions of the Community to use in order to assess whether EC intervention is more appropriate than leaving the matter to individual Member State action, where competence is recognised as being shared between EC and national levels. The subsidiarity principle places an inherent preference for devolving matters of shared competence to the national level. Specifically, the onus is placed on Community institutions, notably the Commission, to justify the application of Community legislative competence[40] and a strong preference is placed on utilisation of the instrument of the Community directive where EC action is deemed to be warranted.[41]

A Community directive is defined in the EC Treaty as being binding on its Member State addressee(s), but shall leave to the national authorities the 'choice of form and methods'.[42] Directives therefore foresee a certain degree of choice and flexibility allowed to Member States over the implementation of their obligations. Typically, this will mean that where a directive requires Member States to adhere to minimum standards commensurate with the achievement of Community objectives, such as the attainment of a high level of environmental protection as specified in Articles 2 and 174 EC, the instrument of the directive devolves power to the individual Member States to determine how national law should transpose its obligations to apply at national level, namely by way of civil, administrative and/or criminal legal rules. The principle of subsidiarity under EC law therefore envisages that decision-making over the type of legal instrumentation to be used to shape social behaviour so as to conform with EC law, such as the use of criminal law, should ideally be determined at the national as opposed to Community level.

When the ToA incorporated powers for the Community to develop common policies in the areas of customs cooperation[43] and fraud affecting the Community's financial interests,[44] policy areas which would typically be expected

34 See eg point 1 of the joint ministerial Declaration on the Implementation of Community Law annexed to the TEU (OJ 1992 C191) and fourth recital of the Council Resolution on the effective application of Community law and on the penalties applicable for breaches of Community law in the internal market (OJ 1995 C188/1).

35 See eg J Bridge 'The European Communities and the Criminal Law' (1976) Criminal Law Review p 88; J Dine 'European Community Criminal Law?' (1993) Criminal Law Review p 246; Roger France 'Influence of EC Law' (n 21) p 336.

36 See eg art 29 of reg 1616/68 concerning commercial standards on the marketing of eggs (OJ 1968 Sp Ed (II) p 489) cited by Bridge (n 35) as a key example of an EEC regulation requiring the imposition of criminal liability. Whereas the English version of that provision requires Member States to take all appropriate measures to 'penalise' infringements of the regulation, the French version uses the more open-ended term 'sanctionner', which would cover both civil and criminal penalties. Moreover, recital 22 to the regulation in the French version refers only in general terms to the need for Member States to provide for sanctions against persons infringing the requirements of the regulation ('les sanctions applicables aux contrevenants').

37 For instance, in relation to funding under the auspices of the European Agricultural Guidance Fund (referred to in eg Case C–240/90 *Germany v Commission* [1992] ECR I-5383) and funding under the aegis of the European Social Fund (referred to in eg Case C–186/98 *Criminal Proceedings Against M Nunes and E de Matos* [1999] ECR I-4883).

38 Article 5 EC.

39 See para 7 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, annexed to the EC Treaty by virtue of the ToA, where it is stated that with reference to the use of EC measures: 'Regarding the nature and extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the [EC] Treaty. While respecting Community law, care should be taken to respect well-established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.'

40 Article 5(2) EC in conjunction with the Protocol on the Application of the Principles of Subsidiarity and Proportionality, annexed to the EC Treaty (esp para 9).

41 ibid para 6.

42 Article 249(3) EC.

43 Title X (Customs Co-operation) of Part 3 (Community Policies) of the EC Treaty: art 135 EC.

44 Article 280 of Title II (Financial Provisions) of Part 5 ((Institutions of the Community) of the EC Treaty: art 280 EC.

to cut across issues concerning the application of criminal law, the Member States took care to include treaty clauses to ensure that any EC measures adopted under those new policy provisions would 'not concern the application of national criminal law or the administration of justice'.[45] These steps appeared to reflect a widely-held assumption among Member States that it was not legally possible to imply any Community competence to enact criminal measures in other existing policy areas, and therefore there was no need to include clauses excluding Community competence on crime to apply generally across the entire span of Community policies. In the light of the 2005 judgment in *Environmental Crimes*, several Member States may well have regretted this.

The European Commission's position over the issue of Community legal competence in the area of criminal policy has arguably been far less clear and consistent than that of the Council. In the earliest phase of Community development, the Commission appeared to rule out EC competence in the field of criminal policy, as expressed in its 1974 General Report on the Community's activities.[46] Its interest in the area of criminal policy was accordingly relatively limited. In the 1970s, work was carried out with a view to drawing up draft proposals for conventions on criminal liability of Community civil servants and on criminal liability of persons guilty of defrauding the Community budget.[47] It is significant that the Commission considered that none of the provisions of the EC Treaty provided an appropriate legal basis to promulgate Community legislation on these or other criminal matters. The draft conventions were proposed on the basis of the equivalent of Article 48 EU,[48] which foresees an increase in the existing scope of Union activities to be secured by way of consensus among Member States and ratification according to domestic constitutional arrangements.

After the adoption of the SEA 1985, the Commission's position appeared to change. In two draft legislative initiatives forming part of the Community's package of measures to secure realisation of the SEA's objective to secure a single market by the end of 1992, the Commission originally proposed Member States be required to criminalise certain illicit commercial trading activities. Specifically, these were in relation to money laundering[49] and insider dealing.[50] The Commission considered that obligations on Member States to ensure the imposition of criminal liability under national law fell within the scope of the EC Treaty and that the mechanism of the criminal law would be justified on the grounds that it was necessary to ensure that policy implementation would be effective. The Council contested the Commission's view that such obligations fell within the legal competence of the Community and the resulting Community directives[51] for both initiatives contained no specific reference to criminal liability. Instead, it was decided in the EC legislation that Member States would be required to 'prohibit' certain activities and were subject to generally worded obligations to determine to the penalties to be applicable in relation to infringements of the Community legislation.[52]

Since then, and until the turning point achieved in the *Environmental Crimes* case, Community legislative initiatives on combating unfair and fraudulent commercial activity have consistently followed the approach of devolving to Member States how to implement Community legislative obligations requiring the imposition of restrictions on certain types of behaviour in the market place, while imposing general obligations on Member States to ensure that the national rules used to apply sanctions on persons breaching Community requirements are effective, proportionate and dissuasive.[53] Alternatively, where the Community has determined that specific penalties are to be applied by Member States in respect of infringements of Community rules, care has been taken to exclude

45 Article 135 EC, second sentence and art 280(4) EC, second sentence.

46 See point 145 of the Commission's *Eighth General Report on the Activities of the European Communities 1974* (OOPEC 1975, Brussels/Luxembourg).

47 See points 146–147, ibid and OJ 1976 C222/2. Neither initiative was adopted.

48 Article 236 EEC.

49 COM(1990)106 final, Commission Proposal for a Directive on the Prevention of Use of the Financial System for the Purpose of Money Laundering (OJ 1990 C106/6), especially 4th recital and art 2.

50 Commission Proposal for a Directive Coordinating Regulations on Insider Trading (OJ 1987 C153/8 and OJ 1988 C277/13).

51 Former Directive 89/592 coordinating regulations on insider dealing (OJ 1989 L 334/30) and former Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L166/77).

52 The Member States did publish a statement annexed to the former Money Laundering Directive 91/308 promising to enact criminal legislation in order to enable them to comply with the directive's obligations (OJ 1991 L166/83).

53 See Directive 2003/6 on insider dealing and market manipulation (market abuse) (OJ 2003 L96/16) esp art 14; Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L309/15) esp art 39; Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58 (OJ 2006 L105/54) esp art 13.

criminal sanctions from the range of penalties imposed.[54] Any specific measures relating to cooperation between Member States on combating crime had been adopted under the aegis of the third pillar until that judgment. For a long time, the Commission was prepared to accommodate the Council's concerns over legal competence. However, in 2001 the Commission changed tack and decided to propose Community legislation in the area of criminal policy, specifically a proposal for a directive on environmental crime.

1.2.2 The ECJ's early case law on Community law and criminal policy

Until its seminal 2005 judgment in *Environmental Crimes*, the ECJ did not have any specific opportunity to pronounce definitively on the issue of Community legislative competence in the area of criminal policy. However, it would be inaccurate to assume that, prior to this date, there had been an absence of ECJ guidance on the relationship between Community law and national criminal law. Before the *Environmental Crimes* judgment the court had developed a substantial body of caselaw on the impact of EC law in relation to the rules of national criminal law.

Implementation of EC law through national criminal law

The ECJ has developed a considerable body of jurisprudence on the impact of Community law over the manner in which Member States implement first pillar obligations, where Community law does not provide for any specific mode of implementation. The ECJ has essentially developed its case law on the basis of Article 10 EC,[55] which imposes a general obligation of good faith on Member States to take active steps to ensure that they fulfil their EC obligations and desist from taking any measures that might undermine EC objectives.

From a relatively early stage in its history, the ECJ established that Member States do not have absolute discretion over implementing Community legislation at national level, notwithstanding the absence of any EC Treaty provisions specifically limiting Member State autonomy in this regard. This is so even where Community legislation defers to individual Member States as to how best to secure implementation and where national implementation takes the form of criminal measures. Although the ECJ has conceded on a number of occasions that criminal legislation and rules of criminal procedure are in principle matters for which the Member States, as opposed to the Community, have responsibility in the absence of provision on sanctions by the latter,[56] according to the court this does not mean that Member States have unqualified powers to act as they see fit in the domain of criminal policy.[57] In a number of cases, the court has fleshed out the qualifications it considers are attached to national autonomy by virtue of Community law.

Where national rules conflict with Community legal obligations, the ECJ has made it clear that national courts and authorities are obliged to refrain from applying the conflicting national rule, irrespective of its legal form or nature. The fact that a Community norm may conflict with a national rule of criminal law will not affect application of the principle of supremacy of Community law. For instance, in the *SAIL* case[58] the ECJ rejected the submissions of the Italian government that it had no jurisdiction to receive a request from an Italian court for a preliminary ruling under Article 234 EC on the interpretation of certain CAP legislation, on the grounds that its answers would influence the application of Italian criminal law. The ECJ confirmed that the effectiveness of EC law could not vary according to the various branches of national law which it may affect.[59] Consequently, in several cases the ECJ has confirmed that Member States are obliged to ensure that their national criminal rules accord with obligations under Community law. For instance, the ECJ has held that Member States are obliged to ensure that their criminal laws do not constitute a disproportionate interference with the exercise of fundamental economic rights to freedom of movement guaranteed under the EC Treaty[60] or conflict with Community norms prohibiting discrimination against individuals.[61] Any such interference will render national

54 See eg reg 150/2001 laying down detailed rules for the application of reg 104/2000 as regards the penalties to be applied to producer organisations in the fisheries sector for irregularity of the intervention mechanism and amending reg 142/98 (OJ 2001 L24/10) esp. art 3(4).

55 Article 10 EC states: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

56 See eg Case 50/76 *Amsterdam Bulb BV v Produktschap voor Siergewassen* [1977] ECR 137, esp paras 31–33 of judgment.

57 See eg Case 203/80 *Criminal Proceedings Against G Casati* [1981] ECR 2595, at para 27 of judgment.

58 Case 82/71 *Pubblico Ministero della Repubblica Italiana v Società Agricola industria latte (SAIL)* [1972] ECR 119.

59 ibid para 5 of judgment.

60 See eg *Criminal Proceedings against G Casati* (n 57) at para 27 of judgment and C–193/94 *Criminal Proceedings against S Skanavi and K Chryssanthakopolous* [1996] ECR I-929.

61 Case 186/87 *IW Cowan v Trésor Public* [1989] ECR 195.

criminal rules unenforceable against individuals relying upon directly enforceable Community rights.

The ECJ has also confirmed that Member States have a number of general obligations under Community law to ensure that their implementation of first pillar norms through national legislation and in practice is effective. In a series of cases, the court has ruled that Member States will be in breach of Article 10 EC if it is evident that the national legal framework used to ensure compliance with Community rules is inadequate for that purpose. In the leading case of *Greek Maize*,[62] the ECJ spelt out the duties incumbent on Member States to provide for sufficiently stringent sanctions where Community law prohibited certain conduct. In that case, the Commission had taken infringement proceedings against Greece on account of it having failed to take criminal or disciplinary proceedings against customs officials who had issued false export documentation in respect of consignments of Yugoslavian maize in contravention of EC trade rules. The relevant EC legislation did not stipulate that any specific penalties were to be established under national law. Nevertheless, the court clarified that, by implication, a number of important obligations existed under Article 10 EC for Member States:

> For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.[63]

As the Commission was able to show that the Greek authorities had not taken any action to institute criminal or disciplinary proceedings against the officials participating in the fraud, the court held that Greece had violated Article 10 EC. The principles set out in *Greek Maize* have subsequently been confirmed and expanded upon by the ECJ.[64] Most importantly, Member States must ensure that when using a system of penalties under national law in order to carry out Community obligations these must be: effective in practice; similar in nature to legal proceedings used to take action on relation to analogous contraventions of national law (equivalence principle); carried out with the same due diligence as would be expected in relation to similar types of contraventions of national law; and proportionate in nature. These principles apply, whether or not Community legislation obliges Member States to enact penalties to counter conduct prohibited or otherwise restricted by its provisions.[65]

As far as the principles of effectiveness and due diligence are concerned, the ECJ has shown that it is prepared to confirm that a breach of Article 10 EC occurs under this heading where there is evidence of persistent and manifest failure on the part of Member State authorities to sanction transgressors of Community obligations, whether this be on account of inadequate of national sanctions or due to lack of application of penalty provisions under national law. For instance, the Commission brought a successful infringement action under Article 226 EC against France in the *Spanish Strawberries*[66] case, in respect of the French authorities' failure over a lengthy period of time to take effective legal action under French law against individuals interfering with the free movement of goods. In *French Overfishing*,[67] the ECJ agreed with the Commission that France had committed a breach of Community rules by failing to enforce fishing quotas set under the Common Fisheries Policy. The court dismissed the French government's defence that it had encountered substantial difficulties in gathering the requisite evidence for the purpose of prosecuting cases. Specifically, it rejected the Member State's submission that it was necessary to secure evidence of over-fishing through the presence of a sworn agent employed at sea. According to the court, evidence of over-fishing could be gleaned from considering the quantity of fish landed at port.[68] The ECJ has accepted that, in the absence of Community provisions to the contrary, Member States are not bound to enact specific types of penalties in order to fulfil their EC obligations. At the same time, it has confirmed that Member States remain free to opt for criminal law sanctions if they so choose, unless this is ruled out by Community rules[69] or constitutes a plainly disproportionate means of securing Community policy objectives.[70]

62 Case 68/88 *Commission v Greece* [1989] ECR 2965.
63 ibid paras 24–25 of judgment.
64 See eg Case C–326/88 *Anklagemyndigheden v Hansen & Soen* [1990] ECR I-291, paras 17 of judgment and Case C–186/98 *Criminal Proceedings against M Nunes and E de Matos* [1999] ECR I-4883, paras 9–12 of judgment.
65 *Criminal Proceedings against M Nunes and E de Matos* (n 37) para 12 of judgment.
66 Case C–265/95 *Commission v France* [1997] ECR I-6959.
67 Case C–333/99 *Commission v France* [2001] ECR I-1021.
68 ibid paras 53-54 of judgment.
69 *Criminal Proceedings against M Nunes and E de Matos* (n 37).
70 See eg Case C–326/88 *Anklagemyndigheden v Hansen & Soen* [1990] ECR I-291and Case C–491/06 *Danske Svineproducenter v Justis Ministeriet* 8.5.2008 (nyt).

The principle of equivalence established in the ECJ's case law requires that the penalty used under national law to effect compliance with Community law should be similar to the systems for sanctioning analogous transgressions of national law. This principle has the capability of assisting in national law enforcement as well as providing a limited degree of legal protection for defendants. Its impact will depend upon how stringently individual Member States decide to craft their penalty regimes. ECJ caselaw confirms that the equivalence principle entitles national authorities to uphold a strict approach towards law enforcement of Community rules, in so far as they apply equally stringent sanctions to combat infractions of national law that are similar or analogous to the EC rules in question. This was, for instance, a relevant factor in the ECJ's judgment in *Hansen*.[71] In that particular case, the court upheld that Denmark could impose strict criminal liability rules as a means of enforcing EC rules on road transport safety, taking into account that such liability corresponded with the system generally applicable in that country for the protection of employees within the working environment.[72] At the same time, the equivalence principle offers a basic legal safeguard to defendants that Member States will not adopt measures imposing sanctions which are significantly stricter than applicable in relation to transgressions of domestic law.[73] In this sense, the equivalence principle may feed into and underpin application of the fourth principle of proportionality.

Proportionality, which the ECJ has confirmed as having the status of a general principle of EC law (and therefore a source of primary EC law), requires Member States to ensure that implementation measures are suitable and necessary to achieve the desired objective, and to consider whether, taken in context, the measure imposes a burden or burdens on individuals that may be considered to be excessive in nature in relation to the objective. Accordingly, where a Member State adopts implementing measures that serve to undermine attainment of one or more Community legislative objectives, the national rules may be considered liable to be disproportionate in nature.[74] National implementing rules may also fall foul of the proportionality principle if they constitute an excessive interference with rights guaranteed under Community law, such as in relation to the free movement of persons[75] or EU citizenship rights.[76]

Together with the fourth principle of proportionality, the ECJ has developed a number of other minimum legal safeguards for the benefit of defendants and required to be guaranteed by Member States electing to implement Community law by way of criminal sanctions. Several of these safeguards serve to protect or otherwise underpin the basic human right of there being no crime or criminal punishment except in accordance with the law (*nullem crimen nulla poene sine lege*), as expressed in Article 7 of the European Convention of Human Rights and Fundamental Freedoms 1950 and Article 49 of the Charter of Fundamental Rights of the EU 2000.[77] This human right, which is a specific expression of the broader principle of legal certainty, is recognised by the ECJ as an integral part of the unwritten general principles of EC law and is a directly enforceable binding norm of primary Community law.[78] It has been applied on a number of occasions by the ECJ in connection with the implementation of EC rules by means of national criminal law. For instance, the ECJ has used it to prevent national authorities seeking to punish infringement of EC fishing rules retroactively.[79]

In addition, the ECJ has held that Member State authorities are not entitled to rely on provisions contained in a Community directive that have not been, as required by the EC Treaty, properly transposed into national law in order either to determine or aggravate the liability in criminal law of persons acting in contravention of the directive.[80] Accordingly, directives may not be directly enforced against individuals by national authorities seeking to impose criminal liability.[81] Neither may national authorities seek to rely on EC directives indirectly, by interpreting national rules on criminal liability in line with the provisions of Community directives in order to secure or intensify the criminal liability of a defendant.[82] This well-established seam of ECJ case law, which has addressed a number of attempts on the part of national authorities to rely on various EC environmental directives in the context

71 ibid *Anklagemyndigheden v Hansen & Soen*.
72 ibid para 18 of judgment.
73 See eg Case 118/75 *Watson and Belmann* [1976] ECR 1186.
74 See eg *Danske Svineproducenter v Justis Ministeriet* (n 70).
75 See eg Case C–348/96 *Donatella Calfa* [1999] ECR I-11.
76 See eg Case C–413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, esp para 91 of judgment.
77 OJ 2000 C364/1.
78 See eg Case 63/83 *R v Kent Kirk* [1984] ECR 2689. The ECHR 1950 is not binding on the EU , given that the Union is not a Contracting Party to the Convention. The EU Charter on Fundamental Rights 2000 is not a legally binding document but a political proclamation by the Community political institutions and EU Member States.
79 Case 63/83 *R v Kent Kirk* [1984] ECR 2689.
80 See eg Case C–168/95 *Criminal Proceedings against L Arcaro* [1996] ECR I-4705.
81 See Case 14/86 *Pretore di Salò v Persons Unknown* [1987] ECR 2545, Case 80/86 *Criminal Proceedings against Koplpinghuis Nijmegen BV* [1987] ECR 3969 and Case C–343/98 *Collino & Chiappero v Telecom Italiana* [2000] ECR I-6659.
82 *Criminal Proceedings against L Arcaro* (n 80).

of criminal proceedings under national law,[83] serves to underpin a fundamental point stipulated in the EC Treaty that it is Member States and not individuals who are considered, from a legal perspective, to be addressees of the obligations contained in directives.[84] Accordingly, unless there are national rules of law in place which have transposed EC directives accurately and fully into national law, it would be a clear breach of the principle of legal certainty if individuals were to be treated as being directly or indirectly bound by provisions contained in Community directives. The same principles of legal certainty apply in the case of other Community legislative instruments, including EC regulations, where they require or empower Member States to adopt penalties with respect to infringements of their provisions.[85]

Apart from restricting the possibilities for Member States to rely on EC legislative provisions in order to assist in the prosecution of a criminal case, the ECJ has on several occasions confirmed that individual persons may, under certain conditions, rely on EC directives directly or indirectly as defendants in the context of criminal proceedings at national level. Specifically, the ECJ has confirmed that individuals may rely upon provisions contained in directives as directly enforceable rights before national courts against national authorities, so long as the relevant provisions of the directive are clear, precise and unconditional (the doctrine of vertical direct effect).[86] In addition, the ECJ has confirmed that national courts and other public authorities are under a duty to interpret national laws, including national criminal laws, in accordance with the provisions of Community directives insofar as it is possible to do this under the rules of statutory construction of national law (the doctrine of 'indirect effect').[87]

ECJ jurisprudence and Community legal competence in relation to crime prior to the Environmental Crimes *judgment*

Prior to its *Environmental Crimes* judgment in 2005, the ECJ was not called upon to address the question of whether the Community has competence to enact measures on crime. As already noted, it was clear by the 1980s that the Council of the EU was steadfastly opposed to the adoption of Community legislation requiring either the approximation of national criminal laws or the adoption of criminal sanctions in order to further the objectives of Community policies. As a consequence, no Commission proposals for EC criminal legislation had the chance of seeing the light of day, given that they would either be rejected or amended so as to be devoid of any specific reference to the field of criminal law. Moreover, given that under the EC Treaty the Council is perfectly entitled to decide to amend or reject the adoption of draft Community legislative proposals, any refusal on the Council's part to adopt EC legislation relating to crime is not of itself capable of being successfully challenged by way of judicial review proceedings before the ECJ.[88] Accordingly, the issue of legal competence over criminal policy remained dormant for several years in the absence of any prospect of a test case being brought before the court.

However, in various cases before 2005, the ECJ did make some general *obiter dicta* comments on Member State competence in criminal matters, which in turn gave rise to speculation as to the definitive position of the court on the issue of Community competence. in a number of cases the ECJ made statements that might have appeared, at first glance, to indicate that the Member States were exclusively competent to take legislative action on crime. For instance, in *Casati* the ECJ confirmed that 'in principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible'.[89] However, as has been commented elsewhere, the court's statements on Member State competence to construct sanctions regimes in order to enforce EC rules were always qualified rather than absolute. Specifically, the court only ever affirmed Member State competence to take measures in the absence of Community rules providing for specific sanctions to be imposed on individuals.[90]

83 See notably *Pretore di Salò v Persons Unknown* (n 81); *Criminal Proceedings against L Arcaro* (n 80); Case C–235/02 *Criminal Proceedings against M A Saetti and A.Frediani* [2004] ECR I-1005; Case C–457/02 *Criminal Proceedings against A Niselli* [2004] ECR I-10853.

84 See the definition of a Community directive in art 249(3) EC.

85 See Case C–60/02 *Criminal Proceedings against X* [2004] ECR I-651, where the ECJ confirmed that an EC regulation, notwithstanding that it does not require national implementing measures under art 249(2) EC, may not of itself and independently of a law adopted by a Member State have the effect of determining or aggravating personal criminal liability where the EC regulation empowers Member States to adopt penalties for infringements of its provisions.

86 See eg Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629.

87 See eg Case 14/83 *Von Colson and Kamann v Nordrhein-Westfalen* [1984] ECR 1891.

88 Article 230 EC (action for the annulment of Community acts breaching Community law; art 232 EC (action for a failure to act in contravention of a legal requirement so to do under Community law).

89 Case 203/80 *Criminal Proceedings against G Casati* [1981] ECR 2595, first sentence of para 27 of judgment.

90 See eg Roger France 'Influence of EC 1994) (n 21) p 336.

In a case decided in 1992, the court came close to addressing the issue of Community competence in the criminal area.[91] Germany had sought to annul certain EC regulations adopted by the Commission stipulating that Member States were required to impose certain sanctions on farmers committing financial irregularities when applying for EC funds. The regulations envisaged the following types of sanctions be imposed on persons found guilty of fraudulent activity: recovery of any payment together with interest; imposition of a surcharge; and exclusion from Community financing schemes for a certain minimum period. Germany conceded that the EC had implied powers under the relevant common agricultural policy provisions of the EC Treaty[92] to impose civil sanctions, which would cover the first two types of financial sanctions. It denied that the Community had competence to require the exclusion of persons from EC funding schemes, submitting that this amounted to de facto criminal sanction. The ECJ dismissed the German government's submissions, holding that all the sanctions set by the EC legislation fell within the powers envisaged for the Community under the EC Treaty's agricultural policy provisions. The court rejected that the sanction of exclusion amounted to a penal measure, holding that there was no significant difference between the imposition of a surcharge and exclusion from an economic benefit. As a result, it took the view that there was no need to express any view on the Community's powers in the sphere of penal policy.[93] The court decided not to comment on Advocate General Jacob's opinion in that case that the Community did have implied powers under the EC Treaty to harmonise Member State criminal laws if that were necessary to attain one of the objectives of the treaty.[94] It did not do so until its judgment in *Environmental Crimes* in 2005.

I.3 The initial rise of intergovernmentalism in European cooperation on environmental crime: 1993–2000

The establishment of the tripartite framework of the EU by virtue of the TEU 1992[95] facilitated the possibility of cooperation being developed between EU Member States on the subject of criminal policy. While EU Member States declared themselves willing ultimately to cooperate over certain aspects of environmental criminal policy, particularly those that proved necessary within the context of elimination of customs frontiers within the single market, it was clear that they wished to entrench the utilisation of intergovernmental as opposed to any supranational mechanisms for developing agreement on common approaches to combating crime. Specifically, this would mean that political agreement would have to be crafted upon the basis of the express consent of each Member State and would not be expected to have any legal force, other than that attributed to agreements under standard principles of international law.

I.3.1 The establishment of the third pillar of the EU

Upon entry into force of the TEU in 1993, for the first time it appeared that the Member States had agreed to construct a clear legal basis for the development of political cooperation over crime at EU level in the form of the third pillar (Title VI TEU).[96] The creation of the third pillar served to underpin a widely held view, and one most clearly shared by the Council of the EU, that cooperation on crime at Union level should be and could only be legitimately based on an intergovernmental as opposed to supranational basis.

Although the third pillar was constructed relatively early in the 1990s,[97] it was a number of years before the Member States were prepared to make use of its provisions and begin to craft common policies in the crime sector, including environmental crime. This was largely due to the fact that the third pillar's original provisions required subsequent substantial changes by virtue of later amending treaties, principally the ToA (1997)[98] and also the Treaty of Nice 2001 (ToN), before they provided a sufficiently detailed and viable framework for policy development on crime. The original version of the third pillar, entitled Title VI Provisions on Cooperation in the Field of Justice and Home Affairs,[99] cited a range of policy areas as being matters of common interest among Member States, criminal and non-criminal, for the purpose of achieving the Union's objectives, in particular the free movement of persons. These areas included asylum, immigration, judicial cooperation in civil matters and customs cooperation. It was clear from this that the priority for Member States in relation to developing a criminal political dimension to Union affairs would be to focus on security aspects relating

91 Case C–240/90 *Germany v Commission* [1992] ECR I-5383.
92 See notably arts 34(2) and 37(2) EC (ex rts. 40(2) and 43(2)).
93 See paras 24–25 of judgment in *Germany v Commission* (n 91).
94 See para 12 of his Opinion in Case C–240/90.
95 OJ 1992 C191.
96 For an in-depth legal analysis of the evolution of the third pillar which is beyond the scope of this article, see eg S Peers *EU Justice and Home Affairs* (2nd edn Oxford University Press 2006).
97 The TEU entered into force on 1 November 1993, one month after all the Member States had ratified the treaty.
98 OJ 1997 C347.
99 Arts K.1-K.9 EU, original 1992 version.

to personal cross-border migration, over other policy fields such as the environment. Two types of cooperation were addressed. Specifically, 'judicial cooperation in criminal matters'[100] as well as 'police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation'[101] constituted areas that were to be regarded as matters of common interest in criminal policy among EU Member States.

Environmental crime was not specifically addressed. The initial range of policy instruments made available for the purposes of the developing cooperation under the auspices of the third pillar reflected Member States' intentions to ensure that any agreements over policy would not have any legal force over and above that expected under international law. Specifically, the range of instrumentation included the classic format of conventions as well as novel mechanisms of joint positions and joint actions, the legal effects of which were unclear.

The ToA 1997, which entered into force in May 1999, substantially restructured the third pillar to focus it solely on the sector of criminal policy. The other elements to the third pillar were transferred to the first pillar,[102] thereafter falling within the supranational competence of the Community. Subject to a few minor amendments[103] that were made by virtue of the ToN 2001,[104] the ToA version of the third pillar has remained substantially the same. In order to reflect the third pillar's remit, Title VI to the TEU was renamed as containing Provisions on Police and Judicial Cooperation on Criminal Matters.[105] While the intergovernmental nature of the decision-making and legal status and force of third pillar norms were not substantially changed by these treaty amendments, the contents of the third pillar were expanded, providing far greater detail on the scope, type and intensity of Union policy integration in relation to combating crime.

Admittedly, the main political priority for political cooperation on crime post-ToA remained focused on providing a basis for policing increased personal mobility within the emerging single market, specifically to provide citizens with a high level of safety within 'an area of freedom, security and justice'.[106] Moreover, the subject of environmental crime remained unspecified as an area for third pillar cooperation. However, the fact that environmental crime was not expressly mentioned in the treaty provisions did not exclude it from being addressed under the auspices of Title VI TEU; the absence of any specific reference to it as a potential area for intergovernmental discussions merely reflected the relative lack of political priority attached to the field at the time.

The changes made to the original version of the third pillar by the ToA and ToN allowed the Union to engage in in-depth political cooperation over a broad range of criminal policy matters, covering not only aspects of cross-border cooperation between national institutions involved in the application of criminal law but also the harmonisation of national criminal law. Article 29 EU sets out the broad objectives underpinning Title VI TEU as well as its material scope:

> *Article 29* Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia.
>
> That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:
> – closer co-operation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;
> – closer co-operation between judicial and other competent authorities of the Member States, including co-operation through the European Judicial Co-operation Unit ('Eurojust'), in accordance with the provisions of Articles 31 and 32;

100 Article K.7 EU.
101 Article K.9 EU.
102 The areas of asylum, immigration and judicial cooperation in civil matters became incorporated within the provisions of Title IV to the EC Treaty on Visas, Asylum, Immigration and Other Policies relating to the Free Movement of Persons (Arts 61–69 EC (ex arts 73i-k)), while the sector of customs cooperation now fell under the remit of art 135 EC (ex art 116).
103 Specifically with regard to arts 31 and 40 EU.
104 OJ 2001 C80.
105 Arts 29–42 EU (ex arts K.1-K.14).
106 The objective of transforming the geographical area of the EU into an area of freedom and security of justice was introduced into the Union's treaty framework by virtue of the ToA. See arts 2, fourth indent, 29(1) EU and 61 EC.

– approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(1)(e).

Articles 30–32 EU flesh out in detail the essential parameters of interstate cooperation with regard to the first two indents of the second paragraph of Article 29 EU. Those first two indents are intended to provide a basis for developing cooperation between Member State authorities on addressing the handling of cross-border crime, the major preoccupation of the third pillar. Article 30 EU foresees a number of steps to be taken in the field of police cooperation between Member States[107] and at European level[108] through Europol[109] and the European Judicial Cooperation Unit (Eurojust).[110] Collaboration between national police authorities is to include: operational cooperation in relation to the prevention, detection and investigation of offences;[111] exchange and management of information held by law enforcement services subject to personal data protection;[112] cooperation and joint initiatives research;[113] and common evaluation of particular investigative techniques used to detect serious forms of organised crime.[114] Article 31(1) EU provides that common action on judicial cooperation in criminal matters at national level between national authorities shall include: facilitating and accelerating cooperation between national authorities in relation to proceedings and enforcement of decisions;[115] facilitating extradition between Member States; ensuring compatibility of national rules where necessary to improve judicial cooperation;[116] preventing jurisdictional conflicts between Member States;[117] and progressively adopting measures establishing minimum rules relating to constituent elements of criminal acts and penalties in certain fields of crime.[118] Article 32 EU requires the Council to stipulate the conditions and limitations under which national police and judicial bodies may operate in territories of other Member States in liaison and in agreement with the authorities of the host Member State.

107 Article 30(1) EU.
108 See arts 30(2) and 31(2) EU.
109 The European policing body established by the 1995 Europol Convention (OJ 1995 C316/1).
110 Eurojust is an EU agency established to facilitate cross-border cooperation between national prosecutors (OJ 2002 L63/1).
111 Article 30(1)(a) EU.
112 Article 30(1)(b) EU.
113 Article 30(1)(c) EU.
114 Article 30(1)(d) EU.
115 Article 31(1)(a) EU.
116 Article 31(1)(b) EU.
117 Article 31(1)(c) EU.
118 Article 31(1)(e) EU.

In addition to facilitating cross-border cooperation between national authorities, the third pillar envisages a deeper level of collaboration among Member States on the subject of crime. Specifically, the third indent of the second paragraph to Article 29 EU envisages the approximation of national criminal laws, where necessary. Such legal integration is to be conducted 'in accordance' with Article 31(1)(e) EU which provides:

> *Article 31* Common action on judicial co-operation in criminal matters shall include:
> [...]
> (e) progressively adopting measures establishing minimum rules relating to constituent elements of criminal acts and penalties in the fields of organised crime, terrorism and illicit drug trafficking.

Whereas the initial version of the third pillar provided a limited and conservative range of policy instrumentation for implementing its agenda,[119] later amendment by virtue of the ToA made some important changes. Specifically, the amended and current version in Article 34(2) EU offers the possibility of a broader range of pillar three measures being adopted, namely: common positions; framework decisions for the purpose of approximation of Member State rules; decisions for pursuing objectives other than approximation; and conventions. Of most significance is the innovation of the framework decision, a legislative-type instrument not requiring ratification (unlike the format of a convention) as described in Article 34(2)(b) EU:

> *Article 34*
> [...]
> 2. The Council shall take measures and promote co-operation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:
> [...]
> (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.

119 Former art K.6 EU.

While for the first time in EU history the amended third pillar appeared to introduce a viable legal framework dedicated to addressing the subject of cooperation between EU Member States on aspects of criminal policy, it was not clear what legal impact this would have on the question regarding the extent of the Community's legal competence, if any, to adopt measures to combat crime (including environmental crime). On the one hand, the general intentions of the Member States appeared to be clear, namely to house policy discussions on crime under the intergovernmental umbrella of the third pillar. However, the provisions of the TEU had not been crafted clearly or rigorously enough to ensure that the EC Treaty would not be capable of providing a basis for Community measures to be adopted on crime.

Specifically, provisions in the TEU state that the second and third pillars are without prejudice to the scope and application of the provisions of the first pillar,[120] including the common environmental policy of the Community under Articles 174–176 EC. Accordingly, the extent to which the third pillar may be used as a legal framework for the development of EU policy on environmental crime is dependent upon the extent of the Community's competence to adopt measures on the basis of Article 175 EC. As discussed earlier, the question of the extent of Community competence in the criminal policy sector has never been satisfactorily addressed in the first pillar treaties. However, for several years this issue did not need to be resolved at EU institutional level, given that a specific EU legislative proposal on the subject of environmental crime was only placed on the table for negotiation in 2000. In any event, during the 1990s Member States appeared to select the forum of the Council of Europe rather than the EU to develop European intergovernmental cooperation on addressing the subject of environmental crime.

I.3.2 The 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law

The Council of Europe Convention on the Protection of the Environment through Criminal Law (CPECL),[121] signed on 9 September 1998, was the first significant attempt to secure regional cooperation over the combating of environmental crime at a European level. The official origins of the Convention may be traced to the establishment of a selected committee of experts in 1991, set up in the wake of a 1990 resolution adopted under the auspices of the Council of Europe's Committee of Ministers and recommending the development of common guidelines for the purpose of combating environmental impairment.[122] The objective of CPECL is both broad and bold in scope, namely the pursuit of a common criminal policy aimed at the protection of the environment.[123] The CPECL does not simply focus on enhancing international cooperation with respect to the prosecution of environmental offences of a directly cross-border nature, where law enforcement agencies and jurisdictions of more than one state are involved. It also contains a number of provisions intended to achieve a common understanding among CoE Member States on the minimum that would be expected in principle to constitute a criminal offence in respect of conduct perpetrating damage to the environment. By the end of July 2008 14 CoE Member States had signed CPECL; 13 of these are EU Member States.[124] CPECL has not yet entered into force, given that only one state, Estonia, has so far ratified the Convention;[125] its entry into force requires at least three states to have ratified or signed without reservation as to subsequent internal ratification, acceptance or approval.[126]

Ten years after being opened for signature, the entry into force of CPECL looks remote. Events subsequent to 1998 have ultimately led to the emergence of EU legislation on environmental crime. This has had the effect, both politically and legally speaking, of diverting the EU membership's focus away from the Council of Europe as a site for the development of policy cooperation. In addition, CPECL has a number of inherent structural weaknesses which have been the subject of substantial comment elsewhere.[127] Several of these weaknesses either do not apply at all or do not appear to be relevant in as marked a fashion with respect to EU legislative instrumentation, particularly with regard to first pillar measures. In particular, it is apparent that even if the CPECL were to

120 See arts 29 and 47 EU.

121 1998 CETS 72. The Convention is available for inspection on the Council of Europe's website: http://conventions.coe.int.

122 Resolution No 1 of the 17th Conference of Ministers of Justice (1990 Istanbul). See s I (Historical Background) of the explanatory report accompanying the convention, available on the Council of Europe's website (n 121). Prior to the 1990 ministerial resolution, the Council of Europe had studied possibilities of developing a criminal dimension to environmental protection; see C Selin 'Your Money or Your Life: A Look at the Convention on the Protection of the Environment through Criminal Law' (2001) 10(1) Review of Community and International Environmental Law p 106.

123 Recital 2 of CPECL.

124 Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Romania and Sweden. The non-EU signatory state is the Ukraine.

125 Estonia ratified on 26 April 2002.

126 Article 13 CPECL.

127 See eg Selin 'Your Money or Your Life' (n 122).

come into force its impact would be liable to be rather uncertain and fractured. Specifically, a number of its provisions are poorly defined or entirely open to interpretation.[128] A number of key provisions are optional rather than mandatory.[129] Moreover, some provisions are open to be subject to unilateral reservations made by Contracting Parties,[130] and a party is entitled to denounce the Convention subsequent to ratification.[131] In common with most international treaties, there are no specific legal sanctions against Contracting Parties which fail to implement CPECL obligations[132] and no rights under the Convention for individuals to be able to rely on its terms in order to enforce it before national authorities and courts. In spite of its poor prospects of becoming legally binding and its numerous legal deficiencies, CPECL represents an important milestone in terms of the development of a substantial European dimension to law and policy on environmental crime. A number of the Convention's provisions have been in practice very influential, serving as benchmarks during the course of political negotiations over a general EU legislative text on environmental crime.

The core structure of CPECL is founded upon two main sections, Sections II[133] and III,[134] which respectively seek to address matters pertaining to the prosecution of domestic as well as cross-border environmental crime.[135] Section II contains a range of provisions obliging Contracting Parties to take a series of measures at national level. These may be divided roughly into different groups, namely provisions concerning: the definition of certain environmental offences; corporate liability; sanctions to be imposed on offenders; and provisions addressing domestic jurisdictional and institutional issues. Each of these groups of provisions will be examined briefly in turn.

An integral part of CPECL is the aim to agree upon a minimum common core of environmental offences applicable within the jurisdictions of the Contracting Parties. Articles 2–4 of the Convention provide for common definitions for a series of environmental offences. Articles 2–3 identify the most serious of offences causing or very likely to cause damage to the environment and/or human health, and require parties to outlaw them under criminal law. Whereas Article 2 addresses crimes committed intentionally, Article 3 focuses on negligence. The key provision is Article 2 which stipulates:

Article 2 – Intentional offences

1. Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law:

   a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which:

   i) causes death or serious injury to any person, or

   ii) creates a significant risk of causing death or serious injury to any person;

   b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;

   c) the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

   d) the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

   e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants, when committed intentionally.

2. Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences

128 For instance, art 6 CPECL defers to Contracting Parties as to what criminal sanctions to apply in respect of any of the environmental offences defined in the convention.

129 For instance, art 3(2) CPECL allows the Contracting Parties the option of restricting criminalising negligence to covering gross negligence. Other examples include arts 7, 8 and 9 CPECL, which provide parties with the option of deciding whether to provide for confiscation, reinstatement and criminal corporate liability respectively.

130 Article 17 CPECL.

131 Article 20 CPECL.

132 Article 19 CPECL makes provision for the settlement of disputes over the interpretation or application of the convention. However, this may be performed by informal confidential negotiation between disputants and is not required to be carried out by an independent third party. Moreover, CPECL does not provide for the monitoring of compliance with the Convention by an independent body, in contrast with the position applicable to the EC Treaty in respect of which the European Commission is vested with specific supervisory responsibilities and powers (see arts 211, 226 and 228 EC).

133 Articles 2–11 CPECL.

134 Article 12 CPECL.

135 Section I (art 1) and Section IV (arts 13) of CPECL deal with definitions and general obligations pertaining to the legal effects of the Convention respectively.

under its domestic law aiding or abetting the commission of any of the offences established in accordance with paragraph 1 of this article.

Article 3 CPECL requires parties in principle to criminalise the offences listed in Article 2(1) where committed with negligence. However, this requirement is subject to a number of caveats. First, parties may decide to restrict criminal liability to covering acts committed with 'gross negligence'.[136] Secondly, by virtue of Article 3(3), parties may opt out of criminalising negligence in respect of certain offences.[137]

Articles 2–3 address offences which actually cause or are likely to cause damage to the environment or human health and are considered by the Convention to constitute the most serious type of environmental crime (concrete offences). By way of contrast, seven offences defined in Article 4 are considered by the Convention to be less serious in nature in that they involve infringements of environmental law, and belong to a different group of offences (abstract endangerment offences).[138] Parties are required to provide for sanctions in respect of these particular offences, whether committed intentionally or negligently, although they need not necessarily subject them to the criminal law. Article 4 refers to the following conduct as belonging to this category, namely the 'unlawful':[139] discharge, emission or introduction of a quantity of substances or ionising radiation into environmental media;[140] causing of noise;[141] disposal, treatment, storage, transport, export or import of waste;[142] operation of a plant;[143] manufacture, treatment, use, transport, export or import of radioactive substances or hazardous chemicals;[144] causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas;[145] or possessing, taking, damaging, killing or trading of or in protected wild flora and fauna species.[146]

136 Article 3(2) CPECL.
137 Specifically offences listed in art 2(1)(a)(ii) and art 2(1)(b) CPECL.
138 See Section III (Commentary) of the Explanatory Report regarding arts 2–4 CPECL accompanying the convention.
139 Just like for the majority of offences covered by arts 2–3, art 4 CPECL makes liability dependent on the defendant acting in breach of domestic rules of law. Accordingly, if the activity in question is covered by a licence issued by a competent authority, no offence will be committed under the terms of art 4.
140 Article 4(a) CPECL.
141 Article 4(b) CPECL.
142 Article 4(c) CPECL.
143 Article 4(d) CPECL.
144 Article 4 (e) CPECL.
145 Article 4 (f) CPECL.
146 Article 4 (g) CPECL.

A number of features stand out for comment in relation to these particular provisions on the common definition of offences. First and foremost, it is important to note that all offences cited in Articles 2–4 except one[147] are dependent upon the offender having perpetrated a breach of domestic law when committing a particular act. Specifically, the vast majority of offences are defined on the basis of an offender acting on an 'unlawful' basis. This means that no liability will triggered for these offences if a person is carrying out an activity authorised by law or administrative decision of a competent authority.[148] Given that the definition of 'unlawful' depends ultimately upon the parameters set by national rules, this represents a serious qualification to the commonality of standards underpinning the definition of offences. A number of key elements to the definition of offences listed in the Convention are not defined, and therefore effectively defer implementation in practice to Contracting Parties. This risks a distorted and differentiated application of the convention among parties on various points of law, such as regarding the issue of what constitutes a 'dangerous activity' and 'substantial damage' for the purposes of the offence referred to in Article 2(1)(d) CPECL.

It is also noteworthy that there is a strong anthropocentric streak in the way in which the Convention categorises the seriousness of offences. For instance, the only autonomous offence, ie the only offence in respect of which it is no defence for a person to rely upon the existence of authorisation under national law legitimising their activities, is the one defined in Article 2(1)(a) CPECL. This provision requires parties to criminalise the release of substances or radiation that cause or risk causing human death or serious injury. In contrast, under Article 4 CPECL, parties are not required to criminalise illegal trade in wildlife, nor are they required to criminalise conduct infringing domestic law which causes detrimental changes to wildlife habitats where their activities are not specifically defined by Articles 2–3. Accordingly, illicit development projects and hunting activities that interfere with protected nature sites are not required to face criminal sanction by the CPECL.

Another notable feature of the manner in which offences are addressed under Articles 2–4 CPECL is that the Convention does not adopt a strong preventive approach to tackling conduct which poses a risk to the environment. The way that offences are constructed under the Convention has meant that the factor of deterrence is

147 Article 2(1)(a) CPECL.
148 See definition of 'unlawful' in art 1(a) CPECL.

applied in a relatively modest fashion. Specifically, the Convention rejects the application of a strict liability approach, integrating the element of mental culpability within all of the offences in Articles 2–4 (intention or negligence).[149] In addition, it is arguable that the Convention tends to favour a reactive use of criminal law. The only offences covered in Articles 2–3 that are required to be criminalised are based on actual harm having been caused or evidence being present of the defendant's conduct in question having presented a risk of serious harm. The requirement to criminalise based on evidence of a risk of serious harm admittedly reflects a precautionary approach to liability,[150] but this is tempered by the fact that the Convention's provisions appear to require proof by the prosecuting authorities that a very high level of threat is being or has been posed by the defendant's illicit activities. Moreover, the conduct covered by Article 4 CPECL, recognised by the national law of parties to pose an unacceptably high risk to the environment, is not required to be criminalised, and may be subject to other types of sanctions such as administrative penalties.

With regard to the issue of scope of personal liability, the Convention adopts a very flexible and mild approach concerning the responsibility of corporations. Article 9(1) CPECL requires that parties are to adopt either criminal or administrative sanctions or measures on legal persons on whose behalf offences under Articles 2 or 3 have been committed. Accordingly, not only does the Convention avoid imposing mandatory criminal liability on legal persons, it envisages that the existence of corporate liability is to be dependent upon the existence of proof of culpability of an individual. The idea of imposing a stricter form of liability at the corporate level as compared with individual level is ruled out. Moreover, there is no provision for corporate responsibility, criminal or otherwise, in respect of offences covered in Article 4. By way of a declaration, parties are entitled fully or partially to opt out of the general obligation in Article 9(1) to impose sanctions on corporations.[151] The Convention does however confirm that the existence of corporate liability may not be used as a defence against the prosecution of natural persons under criminal law.[152]

As far as the general subject of sanctions is concerned, the Convention is again short on detail and generous in terms of granting discretion to Contracting Parties. With respect to the most serious offences covered by Articles 2–3, the Convention lays down a general and vague requirement that these are to be punished by criminal sanctions which take into account their serious nature. No specific punitive measures must be imposed, but instead parties are required to make imprisonment and pecuniary sanctions 'available' as possible outcomes. The Convention allows parties to determine whether they are to include confiscation measures[153] or reinstatement[154] as supplementary sanctions.

Section II of the convention also includes various provisions seeking to improve the management of casework within the territories of the Contracting Parties. Article 5 CPECL lays down the circumstances whereby parties are required in principle to accept jurisdiction over criminal offences. The article adopts an approach that seeks to maximise individual territorial jurisdiction of the parties. Under Article 5(1), each party is required to accept jurisdiction if an offence is committed either: within its territory;[155] on board a ship or aircraft carrying its flag or registered in it;[156] by one of its nationals if the offence is punishable under the criminal law where it was committed or if the offence is committed in a place not falling under any territorial jurisdiction.[157] Article 5(2) stipulates that each party is to accept jurisdiction where the offender is present within its territory but is not extradited to another party as requested. A key objective underpinning Article 5 is to assist in minimising if not eradicating legal uncertainty over determining jurisdictional competence as between parties in instances of cross-border environmental crime. Accordingly, this treaty provision has an important bearing on the issue of facilitation of cross-border cooperation. In particular, Article 5(1)(a) clarifies that the so-called principle of ubiquity is to apply in transboundary pollution cases, so that wherever a constituent element of an offence or an effect occurs, that is to be considered as the place of perpetration or commission. However, the effectiveness of Article 5 is rather undermined by the fact that the Convention allows parties to opt out of its obligations.[158] Article 10 CPECL contains some limited obligations for each Contracting Party to ensure that inter-institutional cooperation is enhanced, with a view to improving internal public administrative action against environmental crime.

149 Under art 3(2) CPECL parties may restrict the criminal penalisation of negligent acts to acts committed with 'gross negligence'.
150 Selin 'Your Money or Your Life' (n 122) p 114.
151 Article 9(3) CPECL
152 Article 9(2) CPECL
153 Article 7 CPECL
154 See arts 6, final sentence, and 8 CPECL.
155 Article 5(1)(a) CPECL.
156 Article 5(1)(b) CPECL.
157 Article 5(1)(c) CPECL.
158 Article 5(4) CPECL.

In particular, Article 10(1) specifies that parties are required to ensure that their environmental protection authorities cooperate with the relevant authorities responsible for investigating and prosecuting environmental offences by, on their own initiative, providing the latter with information they suspect constitutes a commission of an offence under Article 2, as well as providing law enforcement agencies with information upon request. Disappointingly, this information exchange obligation is rather meek, in the sense that active provision of information must only relate to suspected cases of intentionally committed crime[159] and that parties may decide to opt out of these obligations partially or altogether.[160] Finally, Article 11 CPECL stipulates that parties may declare that they will grant rights to environmental NGOs to participate in criminal proceedings. However, this provision is largely symbolic, given that it does not have the status of a treaty obligation.

Whereas Section II of the Convention addresses the internal regulation of environmental crime within each Contracting Party, Section III seeks to address the subject of international cooperation in relation to cross-border crime. Disappointingly, Section III contains only a single article, with minimal provision for cooperation between Member States involved in the prosecution of environmental crime which concerns more than a single state. Specifically, Article 12(1) CPECL imposes a vague obligation on parties to afford each other 'the widest measure of cooperation' in investigations and judicial proceedings relating to criminal offences established by the Convention, with Article 12(2) making it optional for parties to do the same in relation to the acts specified in Article 4 which are not covered by the definitions of intentional and negligent offences in Articles 2–3. Accordingly, the CPECL fails to address a number of key issues liable to arise in relation to the handling of cross-border crime including, among others, provision for the exchange and handling of data and other forms of mutual assistance between police forces and prosecutors and recognition and enforcement of judgments on criminal liability. As mentioned earlier, to some extent Article 5 addresses questions in connection with jurisdictional competence in the event of environmental impairment affecting more than one party.

Bearing in mind its limitations, uncertainties and caveats, it is clear that, if it ever enters into force, the CPECL would offer only a limited way forward towards greater European legal integration in the sphere of environmental crime. It has been rightly pointed out that the primary value underpinning the treaty's text is state sovereignty, although this is not expressly stated to be the case in the Convention.[161] In many respects, the CPECL reflects an era when intergovernmentalist approaches to addressing international issues of environmental crime at European level were especially dominant.

I.3.3. The Danish initiative for a third pillar EU measure on environmental crime

While it was fairly clear that for the most of the 1990s the Council of Europe seemed to many EU Member States to be an appropriate forum for negotiating the development of common approaches to the subject of environmental criminal conduct, it was evident that by 1998 there was also willingness among Member States to foster cooperation under the auspices of the third pillar.

The European Council first indicated that it wished to develop intra-EU cooperation on environmental crime at its summit in December 1998. It endorsed an action plan,[162] agreed to by the Council of the EU and European Commission, on the implementation of the ToA agenda of realising an area of freedom, security and justice within the Union. This action plan specifically recommended that environmental crime, with its 'strong cross-border implications' should be approached in an equally effective manner across the EU.[163] At a later summit in Tampere in October 1999, the European Council called for efforts to focus on obtaining agreement on 'common definitions, incriminations and sanctions' within the area of environmental crime as part of the Union's freedom, security and justice agenda.[164] No specific details of a prospective legislative programme accompanied these political commitments on environmental crime, from either the European Commission or Council. In fact, it was the Danish government which took the lead on the issue, by independently proposing a specific third pillar legislative initiative in 2000.

In February 2000, the Danish government's proposal for a Council framework decision on combating serious environmental crime was published in the EU's Official Journal.[165] Based upon provisions in the third pillar,

159 Article 10(1)(a) CPECL.
160 Article 10(2) CPECL.

161 Selin 'Your Money or Your Life' (n 122) p 106.
162 Vienna Action Plan (OJ 1999 C19/1).
163 ibid point 18.
164 Point 48 of the Presidency Conclusions of the European Council (Tampere 16 October 1999).
165 Initiative of the Kingdom of Denmark with a view to adopting a Council Framework Decision on combating serious environmental crime (OJ 2000 C39/4).

specifically Articles 31 and 34(2)(b) EU, the legislative initiative appeared to be a move to consolidate the regional European agreement struck over environmental crime under the CPECL.

In broadly similar vein to the CPECL, the Danish proposal sought to secure broad agreement between states on the means to addressing the most serious instances of environmental crime. However, its approach to achieving this objective is substantially different to the one adopted by the Convention. Specifically, it does not provide a core list of offences but instead requires Member States to criminalise[166] 'serious environmental crime'. Serious environmental crime is defined as the perpetration of actual or an obvious risk of substantial environmental damage caused by certain acts or omissions under 'aggravating circumstances'.[167] The acts and omissions concern a relatively narrow range of conduct as compared with CPECL, namely the pollution of environmental media[168] or the storage or disposal of waste or 'similar substances'.[169] The draft text uses the term 'aggravating circumstances' to limit considerably the scope of crime which it covers, by defining[170] it to mean that the conduct 'cannot be considered part of the normal, everyday operation of an otherwise lawful activity' and that either the offence is 'major in scale'[171] or that financial gain was obtained or sought. This effectively restricts the definition of serious environmental crime to a very narrow range of organised criminal activity.[172]

The Danish initiative is less anthropocentric in its approach than the CPECL, choosing to focus on environmental impairment alone and leaving aside questions concerning human health impacts of environmental crime. It also sets out as a basic requirement that Member States must criminalise serious environmental criminal conduct.[173] Criminalisation is foreseen to be mandatory, including in cases of offences perpetrated by legal persons.[174]

Notwithstanding these differences and innovations, the Danish proposal did not seek to present itself as a rival international instrument to the Convention; rather, in several respects it was designed to serve more as a complementary intergovernmentalist measure. This was underlined by the fact that the Danish proposal required Member States to ensure that they proposed ratification of CPECL by the beginning of 2001 to their respective national parliaments and that as far as possible no reservations on their part were entered against it.[175] The Danish proposal sought to beef up several of the provisions of CPECL, in areas where the latter merely contained a number of options as opposed to legal requirements for Contracting Parties. For instance, a number of sanctions for offenders are set out as mandatory in the Danish initiative, including in relation to the confiscation of equipment, proceeds and assets of criminal activity, as well as environmental rehabilitation. The Danish initiative also goes further than CPECL, notably in stipulating for disqualification of offenders from activities requiring authorisation or from corporate management where there is, in particular, a risk of recidivism. In addition, Member States are to ensure that 'effective compensation rules' cover the criminal activity targeted by the legislative proposal. The Danish proposal also contains a number of general provisions designed to enhance the process of investigation and judicial procedure, both domestically within individual Member States[176] and between Member State authorities engaged in law enforcement.[177] For the most part, these provisions substantially reiterate or underpin commitments contained in CPECL and in other Council of Europe conventions related to regional cooperation over crime in general. Innovatively, the proposal envisages the creation of a centralised pool of data on serious environmental crime to be kept for the mutual benefit for Member States, specifically a register of special skills and know-how that would ultimately fall under the auspices of Europol if it were to become responsible for with dealing with environmental crime.[178]

For just over a year after its publication in the Official Journal in February 2000, the Danish proposal appeared to be on course to becoming adopted under the auspices of the EU's third pillar. During this period it did not appear

166 ibid art 2(1).
167 ibid art 1(1).
168 ibid art 1(1)(a).
169 ibid art 1(1)(b).
170 ibid art 1(2) first subpara.
171 The draft refers to certain factors to be taken into account in assessing whether the offence is major in scale, specifically whether the crime is systematic or persistent, pre-meditated or has been the subject of attempts of concealment (art 1(2), second subpara).
172 The range of targeted behaviour is narrower than that addressed under CPECL, which is mostly focused on behaviour considered unlawful under national level.
173 ibid art 2(1).
174 ibid art 2(1)(b).
175 ibid art 14.
176 Specifically, the Danish proposal's requirements that Member States ensure law enforcement authorities are endowed with effective investigative powers (art 3) and appropriate coordination of national authority activity (art 5).
177 Specifically, the Danish proposal's provisions concerning territorial jurisdiction (art 4), transnational cooperation between agencies involved in investigation and prosecution (art 6), exchange of information (art 7), transfer of proceedings and enforcement of criminal penalties (art 8), and the establishment of national contact points for collection and exchange of information on crime (art 9).
178 ibid arts 10–13.

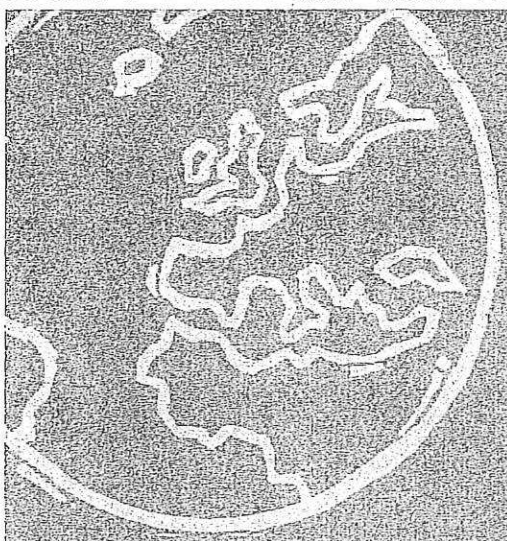
that there was any disagreement among the EU's legislative decision-making institutions about its prospective promulgation. The Commission remained silent on the initiative, which suggested tacitly that it had no legal disagreement about the legal basis used for the proposal. The European Parliament adopted a resolution[179] in July 2000 in favour of the initiative, raising no questions about the use of the third pillar instead of the common environmental policy Title XIX of the EC Treaty as a legal basis (Article 175 EC).

However, in early spring 2001 the picture began to change quite radically. In March, on the eve of a substantive discussion within the Council of the EU on the Danish initiative, the Commission decided to publish a separate legislative proposal on environmental crime based upon Article 175 EC and place it before the Council for legislative negotiation. It submitted that the first and not the third pillar of the EU's treaty framework was the appropriate basis for the promulgation of EU measures concerning certain aspects of environmental crime, and that a first pillar measure setting out minimum core offences and sanctions would be significantly more effective than intergovernmental instruments such as the CPECL and Danish initiative. The scene was set for a major institutional battle between Commission and Council over the heart and soul of EU environmental criminal policy, one that would not be resolved between them until some seven years later and that may well continue at a national level once EU legislation has finally been adopted, as it is most likely to be in the autumn of 2008.

Part II of this article will examine developments subsequent to the Danish initiative of 2000. When the Commission published its first draft EC Directive on the protection of the environment through criminal law in 2001, this marked the beginning of a new, supranational phase in the development towards an EU policy on environmental crime.

Part II will be published in the next issue of *Environmental Liability* and the complete article will be available at www.lawtext.com.

179 OJ 2001 C121/502.



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The emergence of European Union environmental criminal law: a quest for solid foundations – Part II*

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On 21 May 2008, the European Union's political institutions reached agreement on the contents of a prospective European Union (EU) legislative instrument intended to combat environmental crime. Specifically, after some seven years of political negotiations the Council of the EU and the European Parliament have finally secured political accord on the provisions of a prospective European Community directive on the protection of the environment through criminal law. For the first time it appears likely that a supranational legal instrument will be adopted in 2008 on the subject matter of criminal policy. Such a step will constitute a profound constitutional moment for the EU, given that for much of the time prior to this point the orthodox position has been to deny that the EU possesses legal competence to enact such measures in a policy area classically associated to be within the exclusive domain of individual Member States.

The aim of this two-part article is to provide an analysis of the emergence of EU legislation intended to combat environmental crime. In particular, it focuses on the extent to which the EU has provided adequate legal and political justification for the promulgation of supranationally adopted legislation. As will become apparent, the path towards the adoption of such legislation has been protracted, controversial, complex and unpredictable.

Part I of this article, published in the previous issue of Environmental Liability ([2008] 3 Env Liability 71) *examined the initial phase in the development of an EU policy on environmental crime, specifically until 2000. This particular phase was dominated by concerns on the part of EU Member States to ensure that any agreements over that policy should remain based on an intergovernmental footing, so that European co-operation would be subject to the consent of all Member States.*

Part II of this article, printed here, considers the most recent phase of the EU's development of a policy on environmental crime, a phase which has witnessed a transformation towards a substantially more supranational framework.

II The EU and environmental crime after 2001: the rise of a supranationalist agenda for policy development

When the European Commission published its first draft legislative proposal for an EC directive on environmental crime in March 2001[1] (the First Draft PECL Directive), with hindsight this marked the beginning of the end of the high-water mark of hitherto exclusively intergovernmental approaches promoted by Member States towards developing a common European policy in the area. As a result of the Commission's intervention, progress on the Danish initiative stalled and Council attention focused on the content and implications of the Commission's first pillar initiative instead. Although the focus of the Council's legislative deliberations changed, its fundamental position was that the outcome of negotiations would not lead to anything other than a third pillar measure.

The First Draft PECL Directive was based on Article 175 EC, namely the first pillar of the EU legal framework, and accordingly proposed founding policy development upon a supranational footing. As mentioned in Part 1, the choice of legal basis matters a great deal for a number of reasons, legislative as well as legal. In terms of legislative decision-making, first pillar measures based on Article 175 EC are predominantly decided according to the co-decision procedure, which involves qualified majority voting within the Council of the EU; accordingly, individual Member States may be outvoted in contrast with the basic requirement of Council unanimity built into the third pillar. From a legal perspective, it is evident that first pillar measures can be enforced far more effectively than their third pillar counterparts. Under the EC Treaty, specific provisions empower the Commission to take enforcement proceedings[2] before the ECJ against Member States which

* The first part of this article was published in the previous issue of *Environmental Liability* see Env. Liability 3 [2008] 71 and is also available on the Lawtext website http://www.lawtext.com/lawtextweb/default.jsp?PageID=2&PublicationID=4.

1 COM(2001)139, Commission Proposal for a Directive on the Protection of the Environment through Criminal Law (13 March 2001).

2 Articles 226 and 228 EC.

fail to implement their first pillar obligations, ultimately with a view to requesting that financial sanctions be imposed.[3] No similar powers of enforcement exist in respect of third pillar measures and the possibility for private individuals to rely on their provisions is extremely restricted, the doctrine of direct effect being inapplicable. It should, however, be pointed out that the ECJ has held that national courts are under a duty, so far as is possible in accordance with national law, to ensure that they interpret national law in accordance with the terms of framework decisions adopted under the aegis of the third pillar[4] (the doctrine of indirect effect).

The aim of this section is to focus on how the Commission's supranational stance on the subject of environmental crime came to gain a foothold on and then ultimately dominate subsequent EU political developments. This second phase in the EU's development of policy has been a fairly difficult and protracted one so far, characterised by intense political and legal struggle for the Commission, which has ultimately and most crucially had to rely upon the support of the ECJ to underpin its interpretation of the material scope of the EC Treaty's provisions in relation to the subject of environmental crime. After a brief overview and impact of the First Draft PECL Directive, this section considers how the issue of Community competence has come to be resolved effectively at EU level.

II.1 The Commission' s First PECL Directive of 2001

Before considering the particular provisions of the First PECL Directive, it is useful to take on board the Commission's principal motivations for proposing a first pillar legislative initiative. It is evident from the documents accompanying the draft legislative text that the prime motivation was the need to enhance the effectiveness of EC environmental protection legislation in practice, particularly to prevent the most serious violations of Community obligations more effectively. The Explanatory Memorandum prefacing the draft proposal and ancillary Commission Staff Working Paper[5] mention a number of related points on this front. Notably, the Commission refers to the fact that not all Member States criminalise the most serious breaches of environmental law,[6] although well-established ECJ jurisprudence makes it clear that under Article 10 EC Member States are obliged to impose sufficiently dissuasive and effective penalties on persons perpetrating breaches of EC law.[7]

In its Explanatory Memorandum the Commission also refers to criminal sanctions as being in many cases the only genuine means of deterring offenders from perpetrating serious violations of EC environmental law, bearing in mind the relative severity and social stigma that may be attached to and associated with criminal penalties.[8] Moreover, it perceives material advantages in using criminal rather than administrative law as the means to take action against serious breaches of the law, in that responsibility for investigating and prosecuting offences usually then comes under the aegis of authorities independent from those with responsibility for permitting activities that impact on the environment. The Commission takes note of the presence of organised cross-border crime within a borderless EU in a number of environmental sectors, notably illicit trade in protected flora and fauna, ozone depleting substances and transboundary movements of hazardous waste, as a factor in favour of strengthening common approaches to tackling such activities.[9] These arguments and others have subsequently been developed and explored by the Commission in order to support its justification for first pillar involvement in the area of environmental crime. They are scrutinised in more detail in section IV below.

The element of effectiveness constitutes a key feature of the First Draft PECL Directive. Article 1 specifies that the measure's purpose is to ensure a more effective application of Community law concerning environmental protection by establishing a minimum set of criminal offences. These offences are set out principally in Article 3, the core substantive provision of the draft text:[10]

> *Article 3 – Offences*
> Member States shall ensure that the following activities are criminal offences, when committed intentionally or with serious negligence, as far as they breach the rules of Community law protecting the environment as set out in the Annex and/or rules adopted by Member States in order to comply with such Community law:

3 Article 228(2) EC.
4 See para 43 of ECJ judgment in Case C–105/03 *Criminal Proceedings against M Pupino* [2005] CR I–5285.
5 SEC (2001) 227, Commission Staff Working Paper 'Establishment of an *Acquis* on Criminal Sanctions against Environmental Offences' (7 February 2001).
6 COM(2001)139 p 2.
7 As discussed earlier in Part I of this article at s II.2.2; Env.Liability [2008]3.
8 COM(2001)139 p 2.
9 SEC(2001) 227 p 5.
10 Article 4 of the First Draft PECL Directive also requires Member States to criminalise 'participation in or instigation' of Article 3 offences. The approach of the draft text with regard to addressing inchoate offences is similar to that in the CPECL (see art 2(2) of the Convention).

(a) the discharge of hydrocarbons, waste oils or sewage sludge into water;
(b) the discharge, emission or introduction of a quantity of materials into air, soil or water and the treatment, disposal, storage, transport, export or import of hazardous waste;
(c) the discharge of waste on or into land or into water, including the operation of a landfill;
(d) the possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof;
(e) the significant deterioration of a protected habitat;
(f) trade in ozone-depleting substances;
(g) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used.

From this provision it can be noted that in certain important respects the approach of the First Draft PECL Directive is radically different from its European intergovernmental predecessors as regards establishing a common minimum definition of environmental crime. In contrast with the CPECL (Council of Europe Convention on the Protection of the Environment through Criminal Law), the draft proposal is focused solely on criminalising conduct that causes either actual harm or a risk of harm to the environment. Anthropocentric concerns relating to human health do not feature in the legislative text. Moreover, the draft proposal requires Member States to criminalise instances of both abstract and concrete types of offences, without requiring evidence that an obvious or significant risk has been created. In this sense, the Commission's draft proposal adopts a far more preventive approach to environmental damage than its Council of Europe counterpart.[11]

It is also evident that the draft Community instrument avoids several of the traps of legal uncertainty into which the CPECL falls; notably, it does not allow for options or derogations. Moreover, liability is predicated fundamentally upon the breach of specific Community legislation,[12] which avoids the risk of distorted implementation among Member States. The position may be contrasted with that under the CPECL. Given that it only aims to target behaviour that has not been authorised at national level, the CPECL does not address the problem of its contracting parties adopting substantially different minimum levels of environmental protection standards for the purposes of determining the material scope of criminal sanctions. The effect of the CPECL model may be to risk undermining national initiatives to adopt relatively high environmental protection systems, as Contracting Parties may harbour concerns of imposing enforcement regimes that might deter inward investment towards lowest common denominator jurisdictions. The First Draft PECL Directive also avoids incorporating any vaguely worded terms within the definition of offences, a factor that could lead to significantly distorted application of law enforcement among Member States. As pointed out in the Commission's Staff Working Paper,[13] the problem of ill-defined terminology is a serious flaw of CPECL.

While the First Draft PECL Directive seeks to achieve more effective application of environmental law through the use of criminal law, it is clear that the Commission's supranational agenda is deliberately limited so as to focus on harmonising aspects of national criminal laws of the Member States considered essential for the attainment of Community environmental protection objectives. The Commission has been aware from the outset of the need to ensure that the draft text does not affect certain areas of criminal policy which fall outside the legal competence of the Community, as required inter alia by Article 5(1) EC. Given that the subject of criminal law has not been expressly integrated within the first pillar, the Commission considered that Community competence is limited so that EC law would not be able to change the fundamental aspects of the national criminal legal systems of the Member States. However, this did not mean that the Community could not compel Member States in general to criminalise certain types of conduct.[14] Secondly, the Commission has also consistently recognised that, even where the Community may be considered to have legal competence in a policy field shared with Member States (as in the case of the environment under Title XIX of the EC Treaty), Community action is subject to compliance with the subsidiarity and proportionality principles by virtue of Article 5(2)–(3) EC.[15] The latter two principles place the onus on the

11 The preventive approach of the First Draft PECL Directive accords with the EC Treaty's requirements that the Community's common environmental policy should be based on the principle of preventive action. The approach also accords with principles of precaution and attainment of a high level of environmental protection, both constituent elements of EC environmental policy (see arts 6 and 174(2) EC).

12 Exhaustively cited in the proposal's Annex.

13 SEC(2001) 227 p 2.

14 See SEC(2001) 227 Commission Staff Working Paper s 2.1; Also F Comte 'Criminal Environmental Law and Community Competence' [2003] European Environmental Law Review p 216.

15 See also the Protocol on the Application of Subsidiarity and Proportionality, annexed to the EC Treaty by virtue of the Treaty of Amsterdam 1997.

Community to justify the adoption of first pillar instrumentation rather than leaving legislative action to the national and/or sub-national levels.

These priorities are crystallised in the First Draft PECL Directive in a number of respects. First, the draft proposal is careful not to concern itself with the enforcement of any legislative instrumentation other than Community legislation. Secondly, like CPECL, the draft proposal focuses on the most blatantly serious instances of culpable conduct, namely offences committed either intentionally or with 'serious negligence'. Accordingly, the Commission confirmed its wish to require Member States to address the most inexcusable acts and omissions, while deferring to the latter how they wish to define the parameters of *mens rea* and whether they wish to apply more stringent criminal rules on a strict liability basis. Thirdly, as far as sanctions and the question of corporate liability are concerned, the Commission proposed relatively general obligations with a view to providing a considerable degree of flexibility for Member States in implementing their core commitments in Article 3 on offences. Article 4 of the First Draft PECL Directive, which deals with the area of sanctions, compels Member States to provide for criminal penalties for natural persons caught committing Article 3 offences. However, as the Explanatory Memorandum to the proposal makes clear,[16] the draft text does not compel Member States to use criminal sanctions in every case, but merely to include them within the range of available sanctions under national rules. Article 4(2) requires the provision of a minimum set of non-penal sanctions[17] in respect of corporate offenders, allowing Member States the option of applying criminal rules to legal persons.[18] Moreover, the First Draft PECL Directive excludes states and public bodies exercising sovereign rights from its scope, leaving individual Member States to determine the degree and availability of criminal sanctions with respect to their activities and omissions.[19] Finally, the draft text defers to Member States as to the type and level of criminal penalty to be made available with respect to offenders, merely setting out a general requirement that Article 3 offences are to be punishable by 'effective, proportionate and dissuasive sanctions'.[20]

The impact of the First Draft PECL Directive at the political institutional level of the EU was marked but not decisive. The immediate effect on the Council of the EU was to deflect its consideration away from the Danish third pillar initiative and allow time for consideration of the Commission proposal. However, contrary to the advice of its Legal Service,[21] the Council ultimately refused to accept that Article 175 EC would be the correct legal basis for Union legislation on environmental crime and decided not to participate in the co-decision procedure foreseen for the adoption of a Community legislative measure. The political impact elsewhere, however, was more favourable. The European Parliament issued resolutions in support of adoption of a first pillar instrument,[22] and the advisory European Economic Social Committee also indicated its support.[23] In the absence of the Council submitting a common position on the proposal, the Commission decided to issue a revised version of the First Draft PECL directive in 2002,[24] in order to address proposed amendments made by the EP. However, without the participation of the Council in the co-decision legislative process, it would not be possible to adopt a Community legislative measure on environmental crime.

In March 2003, the Council eventually decided to adopt a framework decision on environmental crime under the auspices of the third pillar. The framework decision on the protection of the environment through criminal law[25] (the PECL Framework Decision) included a number of provisions in areas covered by the First Draft PECL Directive, notably regarding the definition of offences and sanctions. Consequently, the Commission decided to take advantage of the minimal legal powers made available to it under Title VI TEU by bringing an annulment action before

16 COM(2001) 139 p 4.

17 Specifically: fines, exclusion from public financial assistance, temporary or permanent disqualification from the practice of commercial activities, and judicial supervision or winding up orders.

18 Interestingly, the Danish initiative was more stringent in this respect in seeking to make compulsory criminal corporate liability in respect of serious environmental crime.

19 By virtue of art 2(a) First Draft PECL Directive on the definition of 'legal persons'.

20 This is a basic minimum requirement that is already established by virtue of ECJ case law, as discussed earlier in Part I of this article s II.2.2.

21 As detailed by Comte (n 14) p 150.

22 EP Resolutions of 9 April 2002 on the First Draft PECL Directive and draft Council Framework Decision (Docs T-5-0147/2002 and T-5-0151/2002 respectively).

23 Draft Opinion of the 'Agriculture, Rural Development and Environment' section of the EESC of 11 April 2001 (Doc NAT/114). In the absence of a Council common position stalling progress of completion of the co-decision legislative procedure under art 251 EC, the EESC did not feel it within its formal powers to be able to issue a formal opinion.

24 COM(2002) 544 final (30 September 2002). In the absence of the Council acting, the Commission is entitled under art 250(2) EC to revise its legislative proposals unilaterally.

25 Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law (OJ 2003 L29/55).

he ECJ[26] on the grounds that the framework decision was essentially adopted ultra vires, in encroaching upon spheres of Community legal competence in contravention of EU law. The annulment proceedings, which ultimately led to the seminal 2005 judgment in *Environmental Crimes* (Case C–176/03 *Commission v Council* discussed in section II.3 below), allowed the ECJ for the first time to pronounce definitively on the crucial but hitherto unresolved issue relating to the existence of Community legal competence in the domain of environmental crime, and aspects of criminal policy pertinent to the development of other common EC policies under the auspices of the EC Treaty. It is to this issue that this article now turns.

II.2 The struggle over legal competence: EC Treaty or third pillar measure?

The European Commission's move to publish the First Draft PECL Directive raised some profound constitutional issues concerning the legitimacy of first pillar instruments being adopted that cut across the domain of criminal policy. The EC Treaty has never granted any express powers to the Community to enact legislative measures concerning criminal policy. Silence on the part of the EC Treaty has divided academic and EU institutional opinion on whether the Community has implied powers to take action in the policy field. The matter is made all the more poignant in that an affirmation of EC competence assumes that Member States have agreed to pool sovereignty in a domain very closely associated with the core elements of a nation state and without having subjected this transfer of power to full and open political debate and agreement between Member States and their national Parliaments in accordance with domestic constitutional arrangements.

It is a basic principle underpinning the EC legal order that the Community has not been afforded unlimited competence to act. In contrast with a nation state, it does not possess inherent competence to determine the extent of its activities; it does not have 'Kompetenz-Kompetenz'. Instead, the extent of the powers accorded to the Community have been set down by the EU Member States by way of agreement in treaty form. This basic principle is underscored by the attributed powers clause in the EC Treaty, namely Article 5(1) EC which stipulates that the Community must act within the limits of the powers conferred upon it by the EC Treaty and of the objectives assigned to it therein. Provision is made within the EU's treaty framework for the possibility of the powers of the Community to be extended where necessary, this change being subject to the consent of all Member States.[27] However, the ECJ has established in a series of cases that the Community may be held to have implied competence to take action in order to fulfil an established Community objective, notwithstanding the absence of express powers to take the specific action in question.[28] In practice the dividing line between what is necessary and desirable to fulfil a Community objective is a very difficult question to answer conclusively from a purely legal perspective, not least because Community objectives are crafted very broadly in the EC Treaty and are open to widely varying interpretations. However, the distinction is crucial to determining the boundaries of the Community's legal competence to act.

The relevance of the implied powers doctrine developed by the ECJ is a key issue in terms of the discussion about the EU's involvement in criminal policy, given that to date the EC Treaty contains no express powers for the Community to act on crime in relation to any of its common policies. As far as environmental policy is concerned, the position is no different; the EC Treaty is silent on the question of whether the Community has powers to take action on environmental crime. Community policy is founded upon a set of broad objectives and principles, as stipulated in Article 174(1)–(2) EC:

> Article 174
>
> 1. Community policy on the environment shall contribute to pursuit of the following objectives:
>   - preserving, protecting and improving the quality of the environment;
>   - protecting human health;
>   - prudent and rational utilisation of resources;
>   - promoting measures at international level to deal with regional or worldwide environmental problems.
> 2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

26 Article 35(6) EU provides inter alia that the ECJ has jurisdiction to review the legality of framework decisions in actions brought by the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TEU or of any rule relating to its application, or misuse of powers.

27 See art 308 EC and art 48 EU.

28 See eg Cases 281–5, 287/85 *Germany v Council (Migration case)* [1987] ECR 3203, C–84/94 *UK v Council (Working Time Directive case)* [1996] ECR I–5755.

Whether or not an implied power exists for the Community to take action over crime, including environmental crime, is a matter open to interpretation. Academic opinion has been equally divided on this point.[29] As has been pointed out, viewpoints often turn upon whether or not criminal policy is regarded as a distinct field.[30] If it is considered to be a policy field in its own right, then the absence of express powers vested in the Community points towards the area remaining as a policy area within the exclusive domain of Member States. For the Community has no implied powers to increase the range of its common policies and objectives, unless these are necessary to the delivery of an existing task entrusted to it.[31] However, if the application of criminal policy is considered in a functional light, namely as merely one of a number of potential ancillary tools for delivering Community objectives, it is more likely to be accepted that EC Treaty provisions on common policies have an implied reach into the sphere of criminal policy. Several academic commentators have taken the view that, in the absence of express powers, the Community has no competence to harmonise the national criminal laws of the Member States.[32] Without an express mandate being granted to the Community, some have questioned the democratic legitimacy of the proposition that the Community may have implied competence.[33] Others appear to have adopted a more nuanced view, submitting that while the Community is not vested with powers to approximate national criminal rules, it does by implication have power to require Member States to adopt criminal legislation in order to implement EC obligations.[34] Some commentators are of the view that the EC does have implied powers to take legislative action on crime, taking the view that criminal law should be considered as a potential instrument to be used to deliver Community policy objectives.[35]

The impact of the amendments made to the EU's legal framework in the 1990s, notably the creation of the third pillar and particular amendments to the EC Treaty, did nothing to lessen debate relating to the question of Community competence in relation to criminal policy. A number of commentators have been of the opinion that the establishment of a set of EU treaty provisions specifically relating to the area of crime in the form of the third pillar, namely Title VI of the TEU on Provisions on Police and Judicial Cooperation in Criminal Matters, has had the effect of confirming that the Community has no legal competence to take measures on crime. For instance, some commentators have taken the view that the third pillar acts effectively as an agreement by the Member States for discussions on criminal policy at EU level to be held exclusively under the auspices of the third pillar, with the effect that the Community is prevented from adopting measures in the same area.[36] The third pillar is viewed by this school of thought as a *lex specialis* on matters of crime. Some have pointed to the *passerelle* (or bridging) clause within the TEU, Article 42 EU, as evidence in support of this interpretation.[37] This particular TEU provision enables the Member States to transfer third pillar matters to fall under the aegis of Title IV of the EC Treaty. The opinion that criminal policy matters are vested exclusively within the domain of the third pillar has, until the outcome of the *Environmental Crimes* litigation, been consistently endorsed by the Council of the EU. In addition, the specialist working group on freedom, security and justice matters of the European Convention undertaking preparatory work in relation to the construction of the 2004 EU Constitutional Treaty, expressed the view that approximation of substantive and procedural aspects of criminal law currently fall under the auspices of the third pillar.[38]

29 See eg S White 'Harmonisation of Criminal Law under the First Pillar' (2006) 31(1) European Law Review p 86; A Weyembergh 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme' (2005) 42 Common Market Law Review p 1571.

30 See eg the comments of H Sevenster 'Criminal Law and EC Law' (1992) 29 Common Market Law Review p 67.

31 See eg Cases 281–5, 287/85 *Germany v Council* (n 28) at para 28 of judgment. See also Opinions 1/94 *(Accession of the EC to the WTO)* [1994] ECR VI–5267, 2/94 *(Accession of the EC to the ECHR)* [1996] ECR I–7159.

32 See eg E Roger France 'The influence of EC Law on the criminal law of the Member States' (1994) 2 European Journal of Crime Criminal Law and Criminal Justice p 354; M Delmas-Marty 'The European Union and Penal Law' (1998) 1 European Law Journal p 87; M Kaiafa-Gbandi 'The Development towards Harmonisation within Criminal Law in the EU – A Citizen's Perspective' (2001) 9(4) European Journal of Crime, Criminal Law and Criminal Justice p 249.

33 See eg C Corstens 'Criminal Law in the First Pillar?' (2003) 11(1) European Journal of Crime, Criminal Law and Criminal Justice 144, Roger France (n 32) p 358.

34 See eg J Bridge 'The European Communities and the Criminal Law' (1976) Criminal Law Review p 91; J Dine 'European Community Criminal Law?' (1993) Criminal Law Review p 246; Roger France (n 32) p 354.

35 M Wasmeier, N Thwaites 'The "Battle of the Pillars": does the EC have the power to approximate national criminal laws?' (2004) European Law Review p 614.

36 P-A Albrecht, S Braum 'Deficiencies in the Development of European Criminal Law' (1999) 5(3) European Law Journal p 302.

37 See eg C Corstens 'Criminal Law in the First Pillar?' (2003) 11(1) European Journal of Crime Criminal Law and Criminal Justice p 136; M Kaiafa-Gbandi 'Development towards Harmonisation within Criminal Law in the EU – A Citizen's Perspective' (2001) 9(4) European Journal of Crime Criminal Law and Criminal Justice p 42.

38 Final Report of Working Group X 'Freedom, Security and Justice' to the European Convention (WGX 14 CONV 426/02, 2 December 2002).

However, a number of other commentators have suggested that the amendments made to the EU's constitutional framework in the 1990s did not necessarily have the effect of excluding implied Community legal competence in the area of criminal policy. Notably, specific provision[39] is made within the TEU to guarantee that neither the second nor third pillars may be interpreted or applied so as to encroach upon the existing scope of Community powers.[40] This undermines the view that the third pillar is to be considered as a *lex specialis* in relation to the EC Treaty, and accordingly does not affect the existing scope of legal competence of the Community. In addition, it has been pointed out that the third pillar provisions do not appear to confer comprehensive powers to the Union under the auspices of Title VI to address the subject of environmental crime.[41] Specifically, upon close inspection of Articles 29 and 31(1)(e) EU, it appears that the remit for the Union to harmonise national criminal rules under the auspices of the third pillar appears limited. These provisions refer only to certain types of crime that may be subject to approximation as part of the third pillar's freedom, security and justice objective, namely: organised crime, terrorism and drug trafficking. The third pillar does, however, specifically provide for the possibility of measures being adopted to facilitate cooperation between investigative, prosecuting and judicial authorities to prevent and combat crime.[42] Accordingly, it has been questioned whether the third pillar provides an appropriate legal basis for the adoption of all types of measures designed to combat environmental crime, namely an area not specifically addressed by Title VI TEU and a subject not specifically flagged up for approximation under Article 31(1)(e) EU.[43]

It has been argued that the effect of Articles 135 and 280(4) EC, namely provisions incorporated within the EC Treaty by virtue of the ToA expressly excluding the possibility of the Community adopting rules on criminal law relating to the common policies of customs cooperation and countering EC budgetary fraud, confirms that Member States do not rule out the possibility of the Community having implied competence to combat crime in other policy fields such as the environment.[44] However, this particular argument seems rather unconvincing. It appears instead far more plausible that the Member States included exclusion clauses in relation to these two particular common policies because it was apparent that the latter's objectives directly relate to combating particular types of criminal behaviour. No doubt the Member States assumed that there was no need to provide for exclusion clauses elsewhere, on the grounds that the link between criminal policy and the other Community common policies was too tenuous and remote to consider that criminal policy powers were implied in relation to them.

II.3 Case C–176/03 *Commission v Council* (Environmental Crimes)

In the absence of textual clarity on the existence of Community competence in relation to environmental crime in the EC Treaty and the marked difference of opinions expressed within the EU political institutional set up, it was inevitable that the ECJ would become involved at some point to provide judicial clarification on the matter. The decision of the Council of the EU in January 2003 to adopt the PECL Framework Decision[45] under the auspices of the third pillar and reject adopting a first pillar instrument provoked the European Commission into bringing annulment proceedings before the ECJ under Article 35(6) EU. The Commission submitted that the Council had acted ultra vires in passing the third pillar instrument, given that the PECL Framework Decision contained provisions concerning matters which the Commission considered fell within the remit of the first pillar environmental policy, specifically provisions concerning the definition of offences and sanctions.

The PECL Framework Decision contained provisions concerning both substantive and procedural aspects of the application of environmental criminal law. It was far more wide-ranging in its scope than the Danish initiative of 2000, and was loosely modelled upon the approach adopted by the CPECL. Articles 2–4 of the Decision provided that Member States were obliged to establish a set of common environmental offences under their criminal laws, committed or organised intentionally or perpetrated on account of serious negligence. Article 6 addressed the question of the extent of corporate liability for offences committed for the benefit of legal persons. Articles 5 and 7 contained general obligations relating to sanctions to be applied in respect of natural and legal persons. As regards natural persons, Article 5 provided that Member States ensure that punishment would be secured through effective, proportionate and dissuasive penalties, with deprivation

39 See arts 29, first sentence and 47 EU.
40 Wasmeier, Thwaites (n 35) p 614.
41 ibid p 628; A Weyembergh 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme' (2005) 42 Common Market Law Review p 1568; L Krämer 'Environment, Crime and EC Law' (2006) 18(2) Journal of Environmental Law p 277.
42 See art 29 EU, first two indents.
43 Comte (n 14) p 153.
44 Wasmeier, Thwaites ' (n 35) p 625.
45 Council Dec 2003/80/JHA (OJ 2003 L29/55).

enabling the possibility of extradition 'at least in serious cases'. Article 7 was more general in nature, leaving Member States to determine whether to impose criminal or non-criminal penalties, so long as the sanctions chosen by them were 'effective, proportionate and dissuasive'. Both provisions set out a list of possible but not obligatory types of non-criminal penalties that might be applied to corporate and non-corporate offenders.[46] In addition, the PECL Framework Decision contained a number of provisions related to facilitating cross-border cooperation on environmental crime,[47] which were accepted by the Commission as properly falling within the remit of the third pillar, on the grounds that these were matters more closely connected to the subject of police and judicial cooperation than environmental protection.[48]

The ECJ pronounced judgment on the dispute between the Commission and Council in September 2005,[49] in one of the most controversial and important institutional legal cases in recent times. Eleven Member States intervened in support of the defendant Council of the EU, while the European Parliament presented legal counsel in support of the Commission. The judgment has been the subject of substantial comment and analysis elsewhere,[50] some of it very critical,[51] and need only be addressed relatively briefly here. The court in *Environmental Crimes* upheld the Commission submission that the PECL Framework Decision should be annulled on the basis that the decision encroached upon the Community's powers contrary to Article 47 EU. While it confirmed that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, according to the court this:

> does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.[52]

The Member States had indicated in the first three recitals to the PECL Framework Decision that criminal penalties were necessary for combating serious environmental offences, a key factor that the court took into account in affirming that a third pillar instrument had been agreed which should have been based upon Article 175 EC.

In its judgment, the ECJ appeared to take a broader view of the scope of the Community's implied powers than the Commission. In holding that the first seven articles of the PECL Framework Decision had violated Article 47 EU, the court ruled that its provisions on sanctions should have been adopted on the basis of Article 175 EC. As already noted, Articles 5 and 7 of the PECL Framework Decision contained some specific and detailed provisions regarding the type of sanctions adopted at national level by Member States. Specifically, Article 5(1) required that, in serious cases, punisbable conduct must include penalties involving deprivation of liberty which can give rise to extradition. Article 7 contained a list of non-criminal sanctions that Member States could select when sanctioning corporate offenders. The Commission's position with respect towards sanctions had been that, while the Community could require conduct in breach of EC environmental legislation to be criminalised under national rules, the EC did not have implied powers to stipulate specific types of criminal sanctions.

In his opinion on the case delivered to the court in May 2005, Advocate General Ruiz-Jarabo Colomer

46 ibid arts 5(2) and 7(a)–(e).

47 ibid; namely, arts 8 (jurisdiction) and 9 (extradition and prosecution).

48 See Commission's early appraisal of the extent of implied powers of the Community under art 174 EC in SEC (2001) 227 (n 5).

49 Case C–176/03 *Commission v Council (Environmental Crimes)* [2005] ECR I–7879.

50 See eg A Biondi, K Harmer '2005 in Luxembourg: Recent Developments in the Case Law of the Community Courts' (2007) 13(1) European Public Law p 33; A Dawes, O Lynskey 'The Ever-longer Arm of EC Law: the Extension of Community into the Field of Criminal Law' (2008) 45 Common Market Law Review at p 156 esp.; M Hedemann-Robinson 'The EU and Environmental Criminal Liability: A Legal Analysis in the Light of the Recent Ruling of the ECJ on EC Competence (Case C–176/03)' (2005) 6 Env Liability p 149; E Herlin-Karnell '*Commission v Council*: Some Reflections on Criminal Law in the First Pillar' (2007) 13(1) European Public Law p 69; F Jacobs 'The Role of the ECJ in the Protection of the Environment' (2006) 18(2) Journal of Environmental Law p 202 ff; L Krämer 'Environment, Crime and EC Law' (n 41) p 277; C Tobler 'Case Comment on Case C–176/03' (2006) 43 Common Market Law Review p 835.

51 Francis Jacobs, former Advocate-General of the ECJ, made the following acerbic comment at a guest lecture in the United Kingdom on the role of the ECJ in environmental protection in reaction to a comment in *The Times* newspaper: 'The judgment, which the British government called "disappointing", was according to an editorial in *The Times*, "as ominous as it is deluded" and a "transparent attempt at empire-building beyond the boundaries laid down for Europe's bureaucrats". It was also branded a "lamentable judgment" which strikes at the heart of national sovereignty and Britain's ability to decide the law for itself. The editorial concluded that "democracy yesterday suffered a grievous defeat in a court whose contempt for sovereignty verges on the criminal". However, on arrival today from Luxembourg to give this lecture, I am glad to say that I was not arrested on charges of high treason'. Extract from his lecture Jacobs 'The Role of the ECJ' (n 50) p 202.

52 Paragraph 48 of judgment in Case C–176/03.

considered that the Community was not legally competent to provide for specific types or levels of penalties in respect of offences. He considered that Article 5(1) and Article 7 of the framework decision lay outside the scope of first pillar powers.[53] Given that the ECJ had not adopted the approach taken by the Advocate General, it appeared that the court had confirmed that the Community did have legal competence to prescribe legislative rules on both the nature and level of criminal penalties, whereas the Community legislature had determined it essential for the implementation of Community obligations to be enforced by criminal law. The Commission interpreted the court's ruling in this light. Some have questioned, rather unconvincingly, whether it was reasonable to come to such a far-reaching conclusion.[54] The court did appear in one part of its judgment to consider erroneously that the PECL Framework Decision did not compel the Member States to adopt specific types of criminal or other penalties. However, there was nothing of real substance in the judgment to give the Commission cause for doubting that the court had adopted a different conclusion to the Advocate General.

The reaction of the Commission to the judgment in *Environmental Crimes* was both swift and far-reaching. The importance attached to the judgment by the Commission was demonstrated by the fact that it adopted a Communication[55] a couple of months after the judicial decision on 23 November 2005 for the purpose of setting out its analysis of the judgment's implications for the subsequent development of EU decision-making in relation to criminal policy in general. The Communication considered that, by virtue of the fact that the ECJ had annulled Articles 1–7 of the PECL Framework Decision in their entirety, the court had confirmed that the Community was competent to prescribe not only the imposition of criminal penalties and definition of offences but also the nature and level of penalties. As a consequence, the Commission signalled that it would now take steps to revise existing EU legislative instruments in the field of criminal policy so as to ensure that they accorded with the court's ruling. It announced that it would end the 'double text' mechanism that the EU legislative institutions had used up until this point, whereby Community measures had been accompanied by third pillar instruments in order to compel Member States to criminalise certain conduct. Typically, a double text approach would involve the EC measure referring to an accompanying third pillar instrument stipulating in detail the nature and level of criminal penalties to be applied at national level. In its Annex, the Communication contains a list of proposed and adopted EU policy instruments to be earmarked for legislative revision. These include a first and accompanying third pillar instrument adopted in 2005 on ship-source pollution.[56] On the day the Communication was published, the Commission decided to bring annulment proceedings in respect of the Council's framework decision on ship-source pollution. That litigation, which led to another important ECJ judgment in late 2007 addressing the subject of legal competence, is discussed below in section II.5.

II.4 The Second Draft PECL Directive of 2007

It was not until early 2007 that the Commission decided once again to take the initiative in developing a general EU legislative instrument on environmental crime. In the wake of the *Environmental Crimes* judgment, the next legislative move was not immediately apparent. Rather ironically, the Commission's 2005 Communication appraising the judgment's implications did not specify how it would approach the next stage of inter-institutional negotiations on a legislative text. It might have been expected that the onus would fall on the Council to forge a common position on the amended First Draft PECL Directive under the co-decision procedure,[57] given that it had lost the case. However, the Council is under no legal obligation to act upon a legislative proposal, and for a considerable period it was not evident that the Council was prepared to proceed to participate in the legislative process. In the autumn of 2006 the European Parliament had signalled that it was losing its patience, calling upon the Commission to issue a fresh legislative proposal if the Council did not provide legislative input on the draft directive.[58]

As a move intended to relaunch negotiations over a Community legislative text, the Commission published a fresh proposal for an EC directive on environmental crime

53 See paras 83, 94 and 95 of the Advocate General's Opinion in Case C–176/03.

54 Jacobs 'The Role of the ECJ' (n 50) p 205; Dawes, Lynskey (2008) 'The Ever-longer Arm' (n 50) p 137 ff.

55 COM (2005) 583 Commission Communication to the EP and Council on the Implications of the Court's Judgment of 13 September 2005 (Case C–176/03 *Commission v Council*) (23 November 2005).

56 Directive 2005/35/EC on Ship-source Pollution and on the Introduction of Penalties for Infringements and Framework Decision 2005/667/JHA to Strengthen the Criminal Law Framework for the Enforcement of the Law against Ship-source Pollution (OJ 2005 L255/11 and 164).

57 As foreseen to be the applicable legislative decision-making procedure under art 175 EC, the legal basis of the draft directive.

58 Paragraph 8 of EP Resolution P6_TA(2006)0458 of 26 October 2006 (Use of Criminal Law to Protect the Environment).

in February 2007[59] (the Second Draft PECL Directive). As expected, the draft instrument reflected the Commission's understanding on the impact of the *Environmental Crimes* judgment with respect to the subject of sanctions. However, the Second Draft PECL Directive did not simply tack on a few provisions to the original proposal but crafted a substantially different new initiative. This took on board several elements of previously negotiated inter-governmental agreements which were struck at European level, as discussed earlier in this article, no doubt with a view to making Council participation in legislative negotiations more attractive and realistic. Notably, the definition of common offences in Article 3 is modelled in large part upon the structure and approach adopted in the 2003 PECL Framework Decision[60] and to a lesser extent the 1998 CPECL:

Article 3 – Offences

Member States shall ensure that the following conduct constitutes a criminal offence, when committed intentionally or with at least serious negligence:

(a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes death or serious injury to any person;
(b) the unlawful discharge, emission, or introduction of a quantity of materials or ionising radiation into air soil, or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
(c) the unlawful treatment, including disposal and storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
(d) the unlawful operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
(e) the illegal shipment of waste as defined in Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and Council for profit and in a non-negligible quantity, whether the shipment is executed in a single operation or in several operations which appear to be linked;
(f) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;
(g) the unlawful possession, taking, damaging, killing or trading of or in specimens of protected wild fauna and flora species or parts or derivatives thereof;
(h) the unlawful significant deterioration of a protected habitat;
(i) the unlawful trade in or use of ozone-depleting substances.

It is apparent from the above provision that a number of features previously spurned by the Commission were woven into the legislative fabric of the Second Draft PECL Directive. Notably, there are a number of significant preconditions and limits attached to the triggering of liability. First, the vast majority of offences defined are not abstract in nature, but focus mostly on concrete situations of damage arising or the causing of a significant risk of damage.[61] Secondly, the 2007 draft instrument reflects anthropocentric concerns and values contained in previous intergovernmental instruments on environmental crime, expressed by its focus on taking action in respect of conduct causing or risking serious damage to human health as well as to the environment. In addition, the 2007 draft prioritises human health protection over environmental impairment, by virtue of the fact that the only autonomous offence relates to pollution causing either death of serious injury. Thirdly, a number of concepts within Article 3 are uncertain in scope, such as the requirement for several offences that damage to environmental services must be at least 'substantial' or constitute 'significant deterioration'.

Akin to the structuring used in the PECL Framework Decision, the majority of offences are predicated on the term 'unlawful'. The Second Draft PECL Directive defines 'unlawful' to mean either an infringement of Community

59 COM(2007)51, Commission Proposal for a Directive on the Protection of the Environment through Criminal Law (9 February 2007). See also accompanying Commission press releases on RAPID: IP/07/166 and MEMO/07/50 (Brussels 9 February 2007) (available for inspection on the EU's official website www.europa.eu.int).

60 As confirmed in the Explanatory Memorandum to the Second Draft PECL Directive, COM(2007) 51 s 5.1 p 7.

61 ibid; the only abstract offences concern illicit trade in waste and ozone depleting substances, as set out in art 3(e) and (h).

law or breaches of national environmental protection rules and decisions of competent authorities.[62] Its focus is, therefore, not simply on EC environmental legislation but also encompasses breaches of national rules aiming at protection of the environment. The draft is also broader in material scope by covering nuclear radiation.[63] By including infringements of Community environmental protection rules within the definition of 'unlawful', the 2007 draft text is intended to avoid the risk of defendants relying upon instances of defective transposition of Community legislation at national level.[64] In other respects, the Second Draft PECL Directive mirrors elements contained in the PECL Framework Decision, including in respect of corporate liability and inchoate offences.[65] Like all previous Commission-inspired initiatives, the approach of the draft directive is to allow Member States a choice as to whether to impose criminal liability.

As widely anticipated, the Second Draft PECL Directive contains substantially enhanced obligations in the area of criminal and non-criminal sanctions. The draft text reflects the understanding that Community legislation may determine both the type and severity of sanction. Articles 5 and 7 of the 2007 draft contain detailed provisions on sanctions, including certain criminal and non-criminal penalties with minimum and maximum thresholds,[66] to be made available to punish both natural and legal persons. The nature and level of sanctions are based upon a three-step scale envisaged as a basic guideline for sentencing rules agreed in the conclusions adopted by the Justice and Home Affairs Council in April 2002.[67] Article 5 set out a list of criminal penalties to be applicable by Member States to natural persons, tiered according to three general levels intended to reflect the perceived relative gravity of an individual offence. Specifically, it envisages Member States being obliged to make the most serious types of offences causing death or serious personal injury punishable by a maximum of at least between 5–10 years' imprisonment, namely certain intentionally committed crimes.[68] In respect of certain offences committed with serious negligence and resulting in death or serious personal injury, committed with the intention of causing substantial environmental damage or committed by way of organised crime, Member States are obliged to make available for punishment the maximum criminal sanction of at least between 2–5 years' imprisonment.[69] Finally, Member States are required under the draft proposal to ensure that certain offences causing substantial environmental damage through serious negligence would be punishable by a maximum of at least between 1–3 years' imprisonment.[70] The tiering of offences reflects strong anthropocentric concerns and values relative to environmental protection. No minimum specific sanctions were foreseen in respect of abstract offences defined in Article 3 of the Second Draft PECL Directive, although it contained a general obligation for Member States to ensure that such violations would be subject to 'effective, proportionate and dissuasive criminal sanctions'.[71] Accordingly, the approach adopted on sanctions by the Second Draft PECL Directive reflects a distinct move away from the earlier emphasis on prevention fostered in the First Draft PECL Directive of 2001. The 2007 draft text defers to Member States as to whether to apply a range of non-criminal sanctions to natural persons, namely: disqualification from activities, publication of judicial decisions imposing convictions or sanctions, or environmental reinstatement.[72]

As regards the sanctioning of corporate offenders, the Second Draft PECL Directive adopts a similarly detailed and prescriptive approach. Member States are obliged in Article 7 to set fines with maximum and minimum scales for corporate offenders, while retaining the choice as to whether to classify the penalties as criminal or non-criminal sanctions.[73] The draft divides offences according to the same three levels of penalties applicable in relation to natural persons under Article 5. Instead of custodial punishment, the sanction used for corporate offenders is a fine. Member States are obliged to stipulate a maximum fine of at least between €750,000–1.5m for the most serious offences, between €500,000–750,000 for the next most serious category of offences, and between €300,000–500,000 for

62 ibid art 2(a).
63 It is arguable but unclear whether the subject matter of nuclear radiation should be addressed under the auspices of the European Atomic Energy Treaty 1957, as amended, rather than the EC Treaty, on the grounds that the former treaty may be considered to be *lex specialis*.
64 This is a fundamental weakness of previous European intergovernmental instruments on environmental crime.
65 Articles 6 (Liability of Legal Persons) and 4 (Participation and Instigation) COM(2007) 51.
66 It is not clear how the stipulation of a maximum sanction could be reconciled with the requirements of art 176 EC, which allows Member States to maintain or introduce 'more stringent protection measures'.
67 See p 8 of the Explanatory Memorandum of the Second Draft PECL Directive, COM(2007) 51 and the press release of the JHA Council of 25-26.2002 (accessible via the EU's RAPID press release database on www.europa.eu.int).
68 COM(2007)51 art 5(4).
69 ibid art 5(3).
70 ibid art 5(2).
71 ibid art 5(1).
72 ibid art 5(5).
73 ibid art 7(1).

the least serious category of offences deemed by the draft proposal to warrant a minimum specific figure for a financial penalty.[74] If they so choose, Member States have the option to apply a different system level to fines connected with the relative financial strength of the offender,[75] provided that the system sets maximum fines at levels that are at least equivalent to the minimum thresholds set by the draft directive.[76] This option effectively confirms that Member States can apply more stringent fines in practice than the basic model envisaged in the draft text.[77] As is the case for natural persons, the draft text allows Member States to decide whether they wish to provide for a range of accompanying non-criminal sanctions.[78]

II.5 The *Ship-Source Pollution* and *Intertanko* judgments (Cases C–440/05 and C–308/06)

Within a few months of publication of the Second Draft PECL Directive, in the autumn of 2007 the ECJ issued another key ruling on the subject of Community competence in the area of environmental criminal policy. Like the *Environmental Crimes* judgment, this ruling had the effect of requiring significant adjustments to be made to the contents of an EC legislative draft on environmental crime. Specifically, on 23 October 2007 the court pronounced judgment on another dispute between the Commission and Council involving questions of validity relating to a third pillar instrument adopted in order to combat environmental pollution generated by the marine transport sector (the *Ship-Source Pollution* decision).[79]

The *Ship-Source Pollution* judgment and its background, which have been the subject of substantial comment elsewhere,[80] need only be summarised here. As an integral part of its maritime transport safety strategy, the Community legislature decided in 2005 to adopt under the auspices of Article 80(2) EC, the relevant legal basis for EC transport policy measures, a directive on combating marine pollution from ships (Directive 2005/35).[81] Legislative action had been deemed warranted on the part of the Commission in the light of evidence of persistent failures by the shipping industry to respect prohibitions of discharges of significant quantities of pollutant from vessels into the marine environment set down by international agreement in the MARPOL 73/78 Convention.[82] Following the sinking of the *Prestige* oil tanker off the Galician coast in the autumn of 2002, by the end of that year Member States specifically called for common action to be taken on the subject of ship pollution.[83] Directive 2005/35 requires Member States to take steps to combat the discharge of polluting substances from ships into the aquatic environment that contravene internationally agreed standards set under the auspices of the MARPOL 73/78 Convention, where the discharge is committed either intentionally, recklessly or by virtue of serious negligence. Originally, the Commission had proposed that the EC measure should contain provisions obliging Member States to provide for some specific minimum criminal and non-criminal sanctions for natural and legal persons committing infringements of its terms.[84] However, the Community legislature ultimately decided to use an accompanying third pillar measure in order to address the subject of applying criminal law. Specifically, the Council adopted a framework decision[85] in 2005 requiring Member States to establish

74 ibid arts 7(2)(c), (b) and (a) respectively.

75 The draft text refers to turnover or financial gain attained or envisaged by commission of the offence as examples that could be used as the basis for calculation of individual fines.

76 ibid art 7(2) final para.

77 By way of comparison, fines for substantive breaches of EU competition law, notably arts 81–82 EC, are required to be calculated on the basis of up to 10 per cent annual turnover of a defendant (art 23 of Regulation 1/2003 (OJ 2003 L1/1). As a result, fines may be substantial and have a stronger chance of rendering a deterrent effect. For example, Microsoft was fined in 2004 by the Commission close to €500m in respect of its abuse of a dominant position prohibited under art 82 EC (Case COMP/C–3/37.792).

78 ibid art 7(4) (a)–(g). This provision cites seven additional non-criminal sanctions by way of example: obligations relating to environmental reinstatement or adopting specific measures to eliminate consequences of illegal conduct, exclusion from public financial assistance, disqualification from practising an activity, judicial supervision and winding up orders, and the publication of relevant judicial decisions such as those relating to conviction and/or sanction.

79 Case C–440/05 *Commission v Council* (23 October 2007) (nyr). The judgment may be inspected on the ECJ's website: www.curia.eu.int.

80 See eg A Dawes, OLynskey 'The Ever-longer Arm EC law: the Extension of Community into the Field of Criminal Law' (2008) 45 Common Market Law Review p 131; M Faure 'The Continuing Story of Environmental Criminal Law in Europe after 23 October 2007' (2008) European Environmental Law Review p 68; M Hedemann-Robinson 'The EU and Environmental Crime: the Impact of the ECJ's judgment on Framework Decision 205/67 on ship source pollution' (2008) 20(2) Journal of Environmental Law 279; J Lowther 'Case Law – EC Law Criminal Penalties Case (C–440/05)' (2007) 19 ELM p 305.

81 Directive 2005/35 on Ship-Source Pollution (n 56).

82 1973 International Convention for the Prevention of Pollution from Ships (12 ILM (1973) 1319), as amended by its 1978 Protocol (17 ILM (1978) 546), and subsequently updated.

83 See notably, Transport Council's conclusions on ship safety and pollution prevention of 6 December 2002 and the Presidency Conclusions of the European Council (Copenhagen 13 December 2002).

84 See art 4 of COM(2003) 92 Commission Proposal for a Directive on Ship-source Pollution and on the Introduction of Sanctions, Including Criminal Sanctions, for Pollution Offences (5 March 2003).

85 Council Framework Decision 2005/667/JHA to Strengthen the Criminal Law Framework for the Enforcement of the Law against Ship-source Pollution (OJ 2005 L255/164).

riminal offences and related specific penalties as a means o enforce the EC directive (Framework Decision 2005/667/JHA).

When first adopted, Directive 2005/35 did not contain ny specific obligations on the part of Member States to dopt criminal offences but cross-referred to the fact that ne third pillar framework decision regarded infringements f its terms as criminal offences.[86] The Community nstrument contained simply the standard mantra that Member States were obliged to ensure that infringements would be 'subject to effective, proportionate and dissuasive enalties'.[87] However, in the wake of the *Environmental Crimes* judgment, the Commission considered that the ramework decision in parts unlawfully encroached upon Community competence within the field of transport, and s a consequence brought legal proceedings before the ECJ[88] with a view to seeking an annulment of the third pillar neasure.

The Commission gained what could be described as a artial victory in the *Ship-Source Pollution* case. The ECJ nnulled Framework Decision 2005/667/JHA on the rounds that, contrary to Article 47 EU, certain of its key rovisions contained obligations that should have been egislated for under the auspices of Article 80 of the EC reaty. Specifically, these related to requirements on Member States to criminalise infringements of EC Directive 2005/35 for natural persons[89] and to impose either criminal or non-criminal liability on corporate offenders in respect of such infringements committed for their benefit.[90] In these respects, the court confirmed the reasoning it adopted in *Environmental Crimes*. However, supported by the Advocate General's opinion[91] and contrary to the Commission's view, he ECJ held that decisions over the type and level of the riminal penalties do not fall within the Community's phere of competence.[92] Accordingly, the provisions ontained in the framework decision relating to detailed riminal and non-criminal sanctions fell within the remit of the third and not the first pillar of the EU's constitutional ramework. These provisions, imposing minimum mprisonment terms for natural persons and fines for legal persons,[93] were of a similar nature and structure adopted in the Second Draft PECL Directive.

The *Ship-Source Pollution* judgment accordingly had the effect of determining a major adjustment in legal appraisal of the relative balance of powers between, on the one hand, the Community and, on the other, the Union acting under the aegis of the third pillar in relation to the area of criminal policy in general. The ECJ had confirmed that the Community may, where it deems this to be essential to fulfil one or more of its policy objectives, require Member States to criminalise certain conduct and for that purpose determine in broad terms the parameters of liability such as defining common offences and requiring Member States to apply their criminal laws to enforce against offenders effectively, proportionately, and dissuasively. However, Community competence does not appear to reach beyond these elements, so that in particular matters relating to criminal procedure and specification of type and intensity of sanction should be agreed upon under the legal basis and decision-making arrangements foreseen in Title VI TEU on police and judicial cooperation in criminal matters. In the wake of the court's judgment, in March 2008 the Commission published a proposal[94] for a Community directive to amend Directive 2005/35, so that the provisions considered to have been adopted ultra vires in the annulled framework decision are to be incorporated within the 2005 Community legislative instrument. A fresh third pillar instrument will be promulgated in due course to replace Framework Decision 2005/667/JHA and provide a reformed 'double text' package of EU legislative instrumentation on the subject of sanctioning illicit ship-source pollution.

Subsequent to the *Ship-Source Pollution* case, the ECJ has recently issued a judgment concerning the validity of Directive 2005/35 which also has wider implications for the future construction of criminal policy measures at Community level. Specifically, in its preliminary ruling in *Intertanko* in June 2008,[95] the ECJ upheld that the EC directive had been adopted in accordance with requirements of the EC Treaty. In that case the International Association of Independent Tanker Owners had sought judicial review in the English and Welsh High Court in respect of the validity of Directive 2005/35, on grounds

86 Article 4 (Infringements) of Directive 2005/35.
87 ibid art 8 (Penalties).
88 Under art 35(6) EU.
89 Articles 2 (Criminal Offences) and 3 (Aiding Abetting and Inciting) of Council Decision 2005/667/JHA.
90 ibid art 5.
91 Opinion of Advocate General Mazak in Case C–440/05 *Commission v Council*, delivered on 28 June 2007.
92 See para 70 of the Court's judgment in Case C–440/05 *Commission v Council*.
93 Articles 4 (Penalties) and 6 (Penalties against legal persons) of Council Decision 2005/667/JHA.
94 COM(2008) 134, Commission Proposal for a draft Directive amending Directive 2005/35 on Ship-source Pollution and on the Introduction of Penalties for Infringements (11 March 2008).
95 Case C–308/06 *R v Secretary of State for Transport, ex parte International Association of Independent Tanker Owners (Intertanko) et al* (3 June 2008) (nyr). The judgment may be inspected on the ECJ's website: www.curia.eu.int.

that it not only contravened the standards set under international law for liability exposure in respect of ship-source pollution (both MARPOL 73/78 and the 1982 UN Convention on the Law of the Sea(UNCLOS)), but also that its use of general undefined concepts with regard to the determination of infringements (eg serious negligence) breached the Community legal principle of legal certainty and the closely related derivative principle of *nullem crimen nulla poena sine lege*.[96] The High Court requested that the ECJ issue it with a preliminary ruling[97] on the question of the legal validity of the EC directive. The ECJ held that, since the Community was not a party to MARPOL and the relevant provisions on innocent passage rights for vessels under UNCLOS were not sufficiently precise or unconditional, it would not be possible for the EC directive's validity to be examined in the light of these international rules at the behest of private individuals.[98] More significantly, the ECJ also upheld that the Community directive complied with the requirements of legal certainty.

As a general point, the court noted that the general principle of legal certainty under EC law required that rules should be clear and precise, so that individuals may ascertain their rights and obligations unequivocally and take steps accordingly.[99] With regard to the undefined legal concepts used in the EC directive to determine the extent of liability for infringements of its provisions, the court noted that it was impossible in any event to provide a comprehensive definition to terms such as intent, recklessness, and serious negligence. Such concepts were, however, familiar to all national legal systems of the EU Member States. The concept of 'serious negligence' could be understood as entailing an unintentional act or omission entailing the commission of a patent breach of a duty of care. Moreover, given that the directive was required under the EC Treaty[100] to be transposed into national law, national rules would be required as an integral part of the implementation process to be provided for appropriately detailed definitions on liability.[101] As a result, the court concluded that the rules under Directive 2005/35 had defined the scope of liability for infringements of its provisions with sufficient certainty.

Both the *Ship-Source Pollution* and *Intertanko* judgments are relevant to the promulgation of general environmental criminal legislation adopted under the auspices of the EC Treaty. In the wake of the *Ship-Source Pollution* judgment it was readily apparent to the EU political institutions that the Second Draft PECL Directive's provisions on penalties required amendment. Its detailed provisions on penalties would have to be removed and transferred to an accompanying third pillar instrument. The *Intertanko* judgment has served to allay concerns that the general terminology used in the Second Draft PECL Directive, notably in relation to the definition of offences, might be vulnerable from a legal certainty perspective.

II.6 Agreement on the PECL Directive

Notwithstanding the challenges raised by the impact of the *Ship-Source Pollution* case, the Community legislature has at the time of writing almost completed the legislative procedure for adopting the Commission's Second Draft PECL Directive. The Commission did not need to produce a third draft proposal. Instead, the Council decided to engage in crafting suitable amendments to the 2007 proposal over the autumn of 2007 and early months of 2008 via a specialist working party on substantial criminal law operating under the supervision of the Council Presidency.[102] Ensuing consultations with the European Parliament[103] were productive, leading relatively swiftly to political agreement between the two institutions being achieved at first reading stage of the co-decision procedure on 21 May 2008.[104] At the time of writing both institutions had yet to adopt formally the agreed legislative text. Accordingly, it is evident that the Council has dropped its concerns relating to the issue of Community legal competence in criminal matters, in light of the ECJ's judgments in *Environmental Crimes* and *Ship-Source Pollution*.

Although the PECL Directive has not yet been formally adopted, the joint text agreed politically between the European Parliament and Council has been published on the European Parliament's website[105] and the Commission's online database containing information on the state of

96 This translates roughly to mean no crime or punishment without law to cover the offence in question.
97 Under art 234 EC.
98 Paragraph 45 of the ECJ judgment in Case C–308/06.
99 ibid para 69.
100 Article 249(2) EC.
101 ibid paras 71–78.
102 See eg Council of the EU Press Release 16183/07 (Press 286) of the minutes of the 2842nd Council Meeting (Environment) (Brussels 20 December 2007).
103 By the beginning of March 2008, the Slovenian Presidency had consulted informally the Rapporteurs of the European Parliament's Committee on Legal Affairs and Committee on the Environment, Public Health and Food Safety (see Council Doc 6749/1/08 REV1 (DROIPEN 16) of 4 March 2008).
104 As noted in p 13 of the minutes of the 2874th Council Meeting (Environment) (Luxembourg 5 June 2008) (Council Doc 9959/08 (Presse 149)).
105 The agreed consolidated text of the prospective PECL Directive is available for scrutiny as EP Document P6_TA-PROV(2008)0215 on the European Parliament's website: www.europarl.europa.eu.

progress regarding EU legislative proposals (PreLex).[106] As it is most unlikely that this agreed text will be subject to any subsequent substantial amendments, it is effectively already possible to see what the formal legislative instrument will eventually look like. For this purpose, it is sufficient to focus on the main points of the agreed text. Subject to some changes, the agreed version corresponds in substantial part with the structuring and approach adopted by the Commission's Second Draft PECL Directive.

As before, Articles 3–4 cover the definition of offences. The core provision is Article 3, focusing on intentionally committed and serious negligent conduct leading to damage to the environment and/or human health:

Article 3 – Offences

Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

(a) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals or plants;
(b) the collection, transport, recovery and disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as a dealer or a broker (waste management) which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals and plants;
(c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
(d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals and plants;
(e) the production, processing, handling, use, holding, storage, transport, import, export and disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals and plants;
(f) the killing, destruction, possession and taking of specimens of protected wild fauna or flora species, except for cases when the conduct concerns a negligible quantity of those specimens and has a negligible impact on the conservation status of the species;
(g) trading in specimens of protected wild fauna and flora species or parts or derivatives thereof, except in cases when the conduct concerns a negligible quantity of those specimens and has a negligible impact on the conservation status of the species;
(h) any conduct which causes the significant deterioration of a habitat within a protected site;
(i) production, importation, exportation, placing on the market or use of ozone-depleting substances.

Although changes have been made to the original draft text in order to flesh out in more detail a number of individual heads of infringement and incorporate greater precision into the main provision defining offences, the essence of Article 3 remains unchanged. Two changes perhaps stand out for particular comment here. First, it is noticeable that all offences defined in Article 3 are now subject to the precondition of being 'unlawful', and so none are autonomous. The agreed legislative text limits this term to encompassing the following: breaches of environmental legislation adopted under the auspices of the EC or Euratom Treaty and which are specified in Annexes[107] attached to the directive, or breaches of Member State rules or decisions of national competent authorities intended to give effect to such EC and Euratom legislation.[108] This contrasts with the approach adopted in the text of the Commission's Second Draft PECL Directive, which also covers national rules and decisions of national competent authorities on the protection of the environment. Secondly, it is apparent from these changes that the agreed text no longer reflects a hierarchical approach regarding the consideration of anthropocentric and ecological interests. Specifically, human health and environmental protection concerns are equally valued. In contrast, the Commission's Second Draft PECL Directive envisaged creating an offence without the

106 http://ec.europa.eu/prelex.
107 Annex A lists EC environmental legislative measures and Annex B lists certain Euratom legislation in the agreed text of the prospective PECL Directive.
108 ibid art 2(a)(i)–(iii).

need for proving 'unlawful' behaviour where either death or serious personal injury have been caused as a result of discharge of pollutant materials into environmental media. Article 4 of the legislative text agreed between the EP and Council requires criminalisation of the incitement, aiding and abetting of Article 3 conduct that is intentionally committed.[109] Article 6 of the agreed text on corporate liability makes no significant changes to the Commission's Second Draft PECL Directive.

As anticipated, the major changes to the prospective legislation relate to the subject of sanctions. In line with the *Ship-Source Pollution* judgment, all detailed specifications relating to the type and level of sanction for natural and legal persons have been removed from the relevant provisions in the agreed text, namely Articles 5 and 7. With respect to sanctions for natural persons, Article 5 simply requires Member States to ensure that Article 3 and 4 offences are punishable by 'effective, proportionate and dissuasive criminal penalties'. Article 7 imposes a similar general requirement, with the difference that Member States are allowed to determine whether penalties for legal persons should be criminal or non-criminal in nature. The agreed text does not cross-refer to any prospective third pillar instrument that would address other aspects, such as relating to the type and level of penalties, jurisdictional issues, inter-statal cooperation in criminal investigations and judicial procedures. However, it is to be anticipated that a framework decision adopted under Title VI TEU will be adopted in due course so as to complement the Community directive and complete the EU's aim to address all aspects of Member State cooperation on combating environmental crime.

The Community legislature has after all been prepared to agree to adopt legislation on environmental crime, although express powers have not been granted to the Community to do so under the EC Treaty. This is perhaps rather surprising, not least given that the Member States have for some considerable period championed the need to clarify the extent of the EU's legislative powers by reforming the current treaty framework underpinning the Union. As discussed in the next section, the Union has recently witnessed various attempts to try and clarify this issue by way of overt amendments to the EU's current constitutional architecture.

109 In comparison, the Commission's 2007 draft proposal was broader in scope, covering instigation of and participation in serious negligent as well as intentional conduct (art 4 of COM(2007) 51).

III The EU agenda for treaty reform and the need for constitutional clarity

Running alongside the specific sporadic and often unpredictable twists and turns of legislative proposals, counter proposals and legal challenges in the field of environmental crime at EU level has been an important, albeit to date unsuccessful, political initiative to raise the level of transparency and accountability of EU decision-making under the heading of constitutional reform. This culminated in the signing of the Lisbon Treaty on 13 December 2007[110] by all EU Member States. The treaty contains a number of provisions that are very significant in terms of their potential to reshape the debate as to how the EU decides to enact measures in the future in the field of environmental crime. As is well-known, the referendum held in Ireland on 12 June 2008 rejected Irish ratification of the Lisbon Treaty. Given that the entry into force of the Lisbon Treaty is dependent upon all 27 Member States signing and ratifying it,[111] it is doubtful that it will ever become legally binding.[112] The European Council decided on 20 June 2008[113] to postpone any collective decision over the Irish 'no' vote and reconvene in October 2008 to reconsider the issue. This effectively allows the Irish government some breathing space to reflect on whether or not it may propose going ahead with a second referendum, as it did in relation to the Treaty of Nice 2001[114] and Denmark agreed to do in relation to the 1992 Maastricht Treaty[115] after initial referendums on those treaties resulted in majority 'no' votes. At the time of writing (July 2008), it is too early to predict the fate of the Lisbon Treaty with certainty.[116]

110 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ 2007 C306/1). In May 2008, the EU published consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, in anticipation of the impact that entry into force of the Lisbon Treaty would have on the legal framework of the EU (OJ 2008 C115/1).

111 Article 6(2) of the Lisbon Treaty.

112 Pending a decision by Ireland on its next steps, the President of Poland Lech Kaczynski has decided to suspend completion of Polish ratification of the treaty (as reported in *The Guardian* 'Poland Threatens Sarkozy's Scheme to Rescue Lisbon Treaty' (2 July 2008) p 18).

113 See paras 1–5 of the Presidency Conclusions of the Brussels European Council of 19–20 June 2008, COL Doc 11018/08. Conclusions available for inspection at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf.

114 OJ 2001 C80/1.

115 Original version of the Treaty on European Union 1992 (OJ 2002 C191/1).

116 At its June 2008 summit, the European Council also noted that Czech ratification of the treaty is subject to the Czech Constitutional Court ruling in proceedings pending before it that

The origins of the initiative for a fundamental constitutional reform of the EU may be traced back to two significant joint declarations made by the Member States around the turn of the millennium in the Treaty of Nice (ToN) 2001 and followed up at a European Council summit at the end of 2001. In recognising that the ToN completed institutional changes necessary for the accession of new Member States, its Declaration 23 called for a 'deeper and wider debate about the future of the European Union', recognising a 'need to improve and monitor the democratic legitimacy and transparency of the Union'. Specifically, it envisaged that this should involve a process addressing, inter alia, the following questions to be addressed at an intergovernmental conference (IGC) in 2004: how to establish and monitor a more precise delimitation of powers between the EU and its Member States, reflecting the principle of subsidiarity; the status of the Charter of Fundamental Rights of the EU; a simplification of the treaties of the EU with a view to making them clearer and better understood; and the role of national parliaments in 'the European architecture'. These statements of intent were followed up by the European Council summit in December 2001[117] in the so-called 'Laeken Declaration on the Future of Europe',[118] which officially launched the convening of a convention on the future of Europe with a view to drawing up a document to constitute a starting point for discussions at IGC level. The Laeken Declaration considered that four key questions should be considered in the context of treaty reform discussions, namely: how to secure a better division and definition of competence in the EU; simplification of the EU's political instruments; how to attain more democracy, transparency and efficiency within the EU institutional set up; and consideration of the question of the need for the adoption of a constitutional text for the EU.

The first of these questions is particularly relevant in relation to the development of a common policy on environmental crime, where to date no express or clearly implied mandate for first pillar involvement exists. The following comments in the Laeken Declaration are especially pertinent, and highlight ongoing challenges concerning transparency and democratic accountability issues facing the Union:

> A first series of questions that needs to be put concerns how the division of competence can be made more transparent. Can we thus make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States? At what level is competence exercised in the most efficient way? How is the principle of subsidiarity to be applied here? And should we not make it clear that any powers not assigned by the Treaties to the Union fall within the exclusive sphere of competence of the Member States? And what would be the consequences of this?
>
> [...]
>
> Lastly, there is the question of how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States and, where there is no provision for this, regions. How are we to ensure at the same time that the European dynamic does not come to a halt? In the future as well the Union must continue to be able to react to fresh challenges and developments and must be able to explore new policy areas. Should Articles 95 and 308 of the [EC] Treaty be reviewed for this purpose in the light of the 'acquis jurisprudential'?[119]

The Laeken Declaration's concern with regard to the issue of creeping Community competence directly relates to the lack of transparency and democratic accountability surrounding the operation of the doctrine of implied powers in EC law. As already mentioned earlier in this article, the caselaw of the ECJ on the extent to which the Community has implied power to fulfil a Community policy objective is difficult to determine in practice and rests ultimately on the judicial determination of the ECJ itself. The application of the implied powers doctrine in EC law has raised concerns that, if applied in an expansive manner, it may undermine a fundamental democratic principle underpinning the EU treaty framework that Member States determine the extent of the powers that the Community is

the Lisbon Treaty is compatible with the Czech constitutional order. There are no longer any question marks over UK ratification as the High Court in England and Wales dismissed an application for judicial review of the UK Government's decision not to hold a referendum on the Lisbon Treaty on 25 June 2008 in *R (on the application of Wheeler) v Office of the Prime Minister and Another* [2008] All ER (D) 333. At the time of writing in July 2008, 19 EU Member States had completed ratification of the Lisbon Treaty.

117 Presidency Conclusions of the European Council Meeting at Laeken, 14–15 December 2001 (Council Doc SN 300/1/01 REV1).

118 ibid Annex I (Laeken Declaration on the Future of the European Union).

119 Section II (Challenges and Reforms in a Renewed Union) of Annex 1, pp 21–22.

able to exercise in relation to the discharge of policy. In its famous ruling in the *Brunner* case,[120] confirming the compatibility of the TEU with the Basic Law of the German constitution, the German Federal Constitutional Court sounds a clear note of warning with regard to the subject of implied powers at EU level. Specifically, it declared that, although under the principle of attributed powers which governs the EU's legal system a particular EU treaty provision conferring duties or powers can be interpreted in the light of treaty objectives, a treaty objective is not in itself sufficient to create or extend the duties or powers of the EU.[121] Accordingly, it declared that Germany would not, under its constitutional law, be legally bound by any interpretation of the EC Treaty that would be equivalent to an extension of the treaty.[122]

The Treaty establishing a Constitution for Europe 2004[123] (TECE) which resulted from the IGC negotiations took on board the concerns expressed in the Laeken Declaration and envisaged a much more transparent legal basis for the promulgation of EU measures in relation to approximation of Member States' criminal laws than exists under the current treaty framework of the Union.[124] The TECE never came into being as it was not ratified in referendums held in France and the Netherlands in May and June 2005; the governments of these countries decided not to hold second ballots on the treaty. Subsequent to the demise of the TECE, in June 2007 the European Council under the auspices of the German Presidency decided to relaunch the political initiative over EU treaty restructuring with a fresh treaty proposal. Presented as a reforming instrument as opposed to a constitutional blueprint for Europe, the Lisbon Treaty was subsequently signed by all Member States on 13 December 2007. Given that the provisions contained in the TECE and the Lisbon Treaty with regard to the legislative competence of the Union on criminal policy matters are essentially the same, discussion in this article focuses on the relevant treaty norms in the Lisbon Treaty.

Unlike the current EC Treaty and TEU, the Lisbon Treaty 2007 specifically and expressly provides for decision-making procedures relating to the promulgation of EU measures designed to harmonise criminal laws of the Member States. The key provision is Article 83[125] of the prospective Treaty on the Functioning of the European Union (TFEU), a treaty that the Lisbon Treaty will establish as a replacement to the current EC Treaty if it enters into force.[126] Article 83 TFEU is housed within Chapter 4 (Judicial Cooperation in Criminal Matters) of Title V TFEU (Area of Freedom, Security and Justice).[127] Effectively, Title V of the TFEU is based upon a merging as well as expansion of the policy fields covered by Title IV of the EC Treaty (on Visas, Asylum, Immigration and other Policies related to Free Movement of Persons) and those policy areas addressed in Title VI of the current TEU (on Police and Judicial Cooperation in Criminal Matters). In addition to establishing a more transparent decision-making framework for the development of EU criminal policy, Article 83 TFEU introduces a far more consensual decision-making process at the level of the Council of the EU, with the effect that the principle of unanimity among Member States ultimately trumps the standard method of qualified majority voting (QMV) in Council decision-making envisaged to apply in relation to TFEU policy matters. It is clear that Article 83 TFEU is intended to serve as the relevant sole provision determining decision-making over criminal policy matters at Union level. First, the article is a *lex specialis* to other provisions containing general mandates for Union engagement in policy sectors such as environmental policy. Secondly, the TFEU makes it clear that the European Parliament and Council must refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.[128] These clauses rule out any prospect of Article 192 TFEU, the successor equivalent provision to Article 175 EC, being used as an alternative legal basis for the adoption of EU measures on environmental crime.

Article 83 TFEU contains two potential legal bases for the adoption of EU directives to approximate national

120 *Manfred Brunner et al v The European Union Treaty* (Cases 2 BvR 2134/92 and 2159/92) [1994] 1 CMLR 57.
121 ibid para 98 of judgment.
122 ibid para 99 of judgment.
123 OJ 2004 C310/1.
124 See art III-271 TECE. For reasons explained below, this provision will not be considered in detail in this article.
125 The treaty numbering for the TFEU used in this article is the one applied in the consolidated versions of the Treaty on the EU and Treaty on the Functioning of the EU published in May 2008 in the EU's Official Journal (OJ 2008 C115/1).
126 If it enters into force, the Lisbon Treaty will discontinue usage of the terminology 'European Community' so that the European Union as sole legal entity will take over responsibility for discharging treaty provisions formerly taken care of by the EC under the auspices of the EC Treaty. The Union is to be founded on the TEU and TFEU, the two treaties having the same legal value (see art 1 TEU, third para and art 1(2) TFEU, as amended by the Lisbon Treaty). A special distinct regime will continue to apply in relation to the European Atomic Energy Community Treaty 1957 (EAEC), as amended (see Protocol 2 amending the Treaty establishing the EAEC of the Protocols annexed to the Treaty of Lisbon (OJ 2007 C306/99)).
127 Articles 67–89 TFEU.
128 Article 296 TFEU, final sentence.

criminal laws in Articles 83(1) and (2) respectively. From the perspective of environmental policy, Article 83(2) is the most significant provision. Both legal bases envisage decision-making at Council level as being governed principally by way of QMV. However, the use of QMV is heavily qualified by a number of derogations requiring Council unanimity, notably the special procedure contained in Article 83(3) enabling any Member State to force a suspension of QMV. In addition, it is envisaged under Article 76 TFEU that legislative proposals for both procedures could be introduced formally either by a quarter of Member States or by the European Commission; this would end the latter's current monopoly in proposing legislative initiatives on environmental crime to the extent they are covered by Article 175 EC. Article 83(1) TFEU provides for the adoption of directives by way of ordinary legislative procedure[129] to establish minimum rules concerning the definition of certain criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, resulting from the nature or impact of such offences or from a special need to combat them on a common basis. A specific list of the areas of crime covered by the treaty provision is provided; none of these areas specifically refers to or directly addresses environmental criminal offences.

However, Article 83(1) further provides that, 'on the basis of developments in crime', the Council may decide on the basis of unanimity and after gaining the EP's consent to expand the list to identify other areas of crime. For a number of reasons, it is not expected that this provision would be likely to be used to provide a legal platform for the adoption of Union measures on environmental crime. First, the EU legislature would be faced with having to justify prospective measures on environmental crime on the basis of parameters which may be considered from an environmental protection perspective to be either arbitrary (cross-border dimension) or vague and difficult to satisfy (special need). Secondly, before Article 83(1) could be utilised to enact measures on combating environmental crime, unanimous agreement would have to be obtained at Council level after providing evidence of 'developments in crime' that would warrant such an addition. Thirdly, the alternative legal basis for legislative action contained in Article 83(2) offers a much more coherent platform upon which to proceed.

Article 83(2)TFEU provides a legal basis which is based on the broad reasoning utilised by the ECJ in the *Environmental Crimes* judgment to justify environmental crime measures under the auspices of Article 175(1) EC. Specifically, the treaty provision provides a broad and flexible mandate to the EU legislature based on the criterion of essential need in relation to policy implementation:

> *Article 83 [TFEU]*
>
> [...]
>
> 2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the areas concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

This particular legal basis for decision-making would be particularly well-suited to the adoption of measures on environmental crime, particularly as it follows an approach to policy development with which the principal EU institutions and stakeholders are familiar.

As mentioned earlier, Article 83(3)TFEU provides for a special deviation within the Council of the EU from the standard rule of QMV envisaged in the ordinary legislative procedure, and is commonly know as an 'emergency break' procedure, providing a safeguard for the preservation of national sovereignty. Specifically, it provides that where a Council member considers that a draft directive based on either Article 83(1) or (2) 'would affect fundamental aspects of its criminal justice system' the member may request that the proposal be referred to the European Council, whereupon the ordinary legislative procedure is to be suspended. If within four months there continues to be disagreement among Member States, the proposal will not be considered any further. However, if at least nine Member States wish to pursue its adoption, then the measure may be adopted by those Member States on the basis of enhanced cooperation and related decision-making procedures under the auspices of Article 20(2) TEU and Title III TFEU.[130] This would mean that a core of Member States would be able to adopt EU environmental crime measures as binding among themselves alone, with the other Member States

129 The TFEU envisages the 'ordinary legislative procedure' to replace the co-decision procedure currently used in Community legislative decision-making under art 251 EC. The ordinary legislative procedure is described in art 294 TFEU.

130 Articles 326–334 TFEU, notably art 329 TFEU.

remaining unaffected from a legal perspective, unless and until they might wish to participate in the enhanced cooperation.

Accordingly, it can be seen that Article 83 TFEU introduces a considerable amount of influence for individual Member States over the legislative process in relation to Union policy on crime. Notably, it ensures that it would not be possible to force through legislative instrumentation on the supranational basis of QMV. Both legal bases for policy development in Article 83 TFEU are ultimately subject to the principle of Council unanimity having to be applied where this is required by one or more Member States. The United Kingdom, Ireland and Denmark have additional safeguards, in that their special opt-in arrangements negotiated in relation to Title IV of the EC Treaty are carried over so as to apply to the whole of Title V TFEU.[131] Consequently, these three Member States will have to provide the EU with specific notification from the outset if they wish to participate in the adoption of any measure adopted under Article 83 TFEU.

In this context it should also be mentioned that the Lisbon Treaty 2007 creates specific powers for Member State national Parliaments to issue reasoned opinions if they consider an EU legislative proposal is in breach of the principle of subsidiarity.[132] If a majority of reasoned opinions are against a particular Commission legislative proposal covered by the ordinary legislative procedure, not only will the Commission have to justify why it considers that the proposal complies with the subsidiarity principle, but the EP and Council will be required to undertake a review to scrutinise compatibility with the subsidiarity at first reading. If either 55 per cent of the Council members or a majority of EP votes cast consider the proposal to conflict with the principle of subsidiarity, the legislative initiative is to be given no further consideration.

If they ever come into force, Article 83 TFEU together with the revised Protocol on Subsidiarity and Proportionality will have a profound impact on the future decision-making process at EU level in relation to political strategies on environmental crime.

First, an important innovation and improvement would be that the EU policy-making process would be considerably simplified. Specifically, the Union's legislative process would become much less complex, with all aspects of policy cooperation able to be housed within a single legislative instrument with exactly the same type of decision-making procedure being applicable. The existing method of using the 'double text' approach, namely first and third pillar instruments for distinct aspects, would end. The legal effects of a legislative package on environmental crime would accordingly be uniform, rather than fractured as is the case at the moment. Secondly, in providing for the first time an express mandate for the EU to cooperate upon criminal matters in the environmental domain, including notably the aspect of approximation of national laws, the TFEU also unequivocally confers the requisite element of democratic legitimacy to support the promulgation of EU legislation on environmental crime. Thirdly, another significant change would be the considerable enhancement of the powers of individual Member States. Policy development at EU level could ultimately be forced by a single Member State to be subject to the principle of consensus being achieved within the Council. This would effectively introduce a strong intergovernmental quality to the decision-making process. The powers of influence vested in national parliaments under the Lisbon Treaty would serve to underscore the revitalisation of the influence of national sovereign interests in this regard. These innovations would transform the current supranational framework of EU decision-making in the field, according to which the Council decides by way of QMV on the basis of Article 175 EC.

IV Appraising the need for EU intervention in environmental crime

The question of legal competence is part of a broader and deeper political discussion surrounding the legitimacy of EU intervention in the area of environmental crime. Testing whether or not a particular legislative instrument has been founded upon an appropriate legal basis does not, of course, specifically address more important questions as to whether or not the type of political tool or legislative forum selected is actually suitable to achieve agreed policy objectives. This section considers briefly some of the key arguments that have been raised to justify and question the appropriateness of EU action on environmental crime, particularly with regard to its decision to use criminal law as a means to enhance law enforcement. Two distinct but related issues concerning suitability arise in connection with the emergence of the EU as a site for policy cooperation in combating environmental crime. These relate first to

131 See Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice (OJ 2008 C115/295; OJ 2007 C306/185) and Protocol (No 22) on the position of Denmark (OJ 2008 C115/299; OJ 2007 C306/187), annexed to the TEU and TFEU as amended by the Lisbon Treaty 2007. Both protocols are contained in the consolidated versions of the TEU and TEFU, as amended prospectively by the Lisbon Treaty 2007, published in the EU Official Journal (OJ 2008 C115).

132 See the Protocol on the Application of the Principles of Subsidiarity and Proportionality, as adopted by the Lisbon Treaty in order to replace the existing 1997 Protocol of the same title attached to the EU Treaties.

whether, and to what extent, an EU, as opposed to a national response to environmental crime is justified. This discussion brings into play operation of the subsidiarity principle. Secondly, some have questioned the need for minimum criminal sanctions to be introduced at EU level, given that non-criminal sanctions may arguably be just as effective, if not more effective. This particular angle to the discussion on suitability relates to the question of the proportionality of EU measures. The perspectives of subsidiarity and proportionality will be addressed in turn.

IV.1 Subsidiarity and the suitability of EU measures

As indicated above, part of the debate about the degree to which EU intervention on environmental crime is appropriate concerns the issue of the level of governance that should be selected in determining the extent to which a common approach to policy between Member States should be developed. Specifically, this issue raises questions about the extent to which, if at all, policy competences should be allocated between EU and national levels in order to facilitate attainment of particular policy goals, such as combating environmental crime, agreed by all Member States to be desirable. Under the current EU constitutional framework, political negotiation over the extent to which EU intervention is appropriate in policy fields shared between EU and Member States, such as the environment, is conducted within the broad terms set down by the subsidiarity principle, which was incorporated into the EU treaty framework[133] by virtue of the TEU in 1992. Article 5(2) of the EC Treaty, the principal EU treaty provision on subsidiarity, clarifies that the subsidiarity principle requires evidence that Community action in an area of shared competence is best suited to achieve the relevant common policy objectives, on the grounds that they cannot be sufficiently achieved by action taken by Member States individually and can therefore, by reason of the action's scale or effects, be better achieved by the Community. The EC Treaty accordingly contains a presumption that, unless the EU decides otherwise, the level of the national state should be considered as the most appropriate site of governance for areas of shared competence.

As far as environmental crime is concerned, the debate over selection of levels of governance has been muted, not least because the EU political institutions have been in agreement that some form of Union dimension to policy development is warranted. Specifically, the institutional conflicts between Council and Commission have centred around the type of EU involvement, namely whether policy cooperation should be negotiated via the supranational arrangements of the European Community or under the auspices of the intergovernmentalist framework of Title VI of the TEU. Inter-institutional debate has not turned upon the question of whether EU intervention is needed. The subsidiarity principle might receive closer attention if the Lisbon Treaty is ever ratified, given that, as mentioned above, the treaty envisages vesting national parliaments with new powers of influence over the application of the subsidiarity principle.[134] However, this appears unlikely.[135]

The Commission's approach has assisted in minimising any significant potential for inter-institutional conflict within the EU over application of the subsidiarity principle. From the outset, the Commission's basic position has always been to recognise the importance of retaining as much national sovereignty as possible when proposing to stipulate common minimum standards on environmental crime. Its aim has never been to propose full-scale harmonisation of all aspects of national environmental criminal laws, but instead to ensure that a minimum common level of sanction may be expected to apply across the EU with respect to the perpetration of the most serious instances of culpable breaches of first pillar environmental legislation. Accordingly, the Commission's First and Second Draft PECL Directives grant Member States considerable autonomy as to how they should implement various key concepts underpinning the legislative texts, such as questions relating to the definition of *mens rea* (intention, serious negligence) and substantial damage.[136]

The proposals allow Member States to decide whether or not they are to establish criminal liability for legal persons, corporate crime constituting a notable source of serious breaches of environmental legislation. In addition, the Commission's proposals have consistently left Member States to determine what type of sanction they are to apply

133 See art 5(2) EC and art 1 EU.

134 For instance, it is not inconceivable that national parliaments might use powers envisaged to be granted to them under the Lisbon Treaty in order to register strong concerns about the Union taking decisions directly impinging on issues of personal criminal culpability and liberty, given that the EU's legislature is not wholly directly elected.

135 To date there does not seem to be a notable degree of adverse national parliamentarian opinion in relation to the current EU legislative developments on environmental crime. The UK Parliament, for instance, has been prepared to signal its acceptance of the adoption of a PECL Directive: see eg 20th Report of the UK Parliament's House of Commons Select Committee on European Scrutiny (2007–08 Session), 2 April 2008 (available for inspection at http://www.parliament.the-stationery-office.co.uk).

136 See eg Comte (n 14) p 149, F Comte 'European Environmental Criminal Law – recent developments' *Yearbook of European Environmental Law* (OUP Oxford 2005). p 216; Wasmeier, Thwaites (n 35) p 629 fn 21.

in individual cases. Contrary to doubts voiced by some commentators,[137] the Commission's draft proposals have never required Member States to impose specific types of sanction, subject to the basic requirement that they be effective, proportionate and dissuasive. Instead the proposals require Member States to ensure that their national laws include the possibility of certain types of sanction being made applicable in respect of dealing with certain defined environmental offences. The decision as to what type of sanction, criminal or non-criminal, is to be selected with respect to a natural or legal person's conduct was always to be a matter for national authorities, and not determined by EC legislation.[138]

IV.2 Proportionality and EU environmental criminal law

The second strand of discussions relating to the suitability of EU action on environmental crime concerns whether or not the EU should be focusing on the adoption of criminal law instruments as the most effective means of enhancing implementation of its environmental protection legislation. In substance, one could describe this particular debate as focusing on the proportionality of policy tools used by the EU in order to meet its objectives. Proportionality is a key principle of the EU's legal system and is crystallised most clearly in the EC Treaty requirement that any 'action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'.[139] This broader debate concerning the suitability of EU political intervention in the area of environmental crime has been the subject of substantial comment and analysis.[140] A number of questions have been raised as to whether the EU political institutions are right to conclude that it is essential that a minimum common core of criminal measures be required to be adopted by Member States in order to provide the most effective legal armoury to combat serious environmental crime.

The Commission sets out in some detail the principal arguments in support of the adoption of an EU measure on environmental crime in its impact assessment document[141] accompanying the Second Draft PECL Directive of 2007. While identifying particularly serious forms of environmental crime as essentially a major international phenomenon, the Commission stresses that existing policy tools used to combat environmental crime at national level have proved to be of limited benefit, including within the EU. Key examples of transboundary related environmental crime concern the illicit trade in waste, species of protected flora and fauna and ozone-depleting substances carried out in contravention of international law.[142] The Commission cites US estimates[143] that the global annual turnover in relation to the illicit trade in these items is vast, amounting approximately to between $10–12bn, $6–10bn and $20–25m respectively.

A number of studies and reports have highlighted the significant presence of cross-border related environmental crime operating within the EU. For instance, in inspection projects[144] of shipments of waste carried out by Member State authorities under the auspices of IMPEL,[145] it was found that 51 per cent of the waste shipments located at various seaports and 12 per cent of waste otherwise inspected during the various phases of its management contravened EU rules. The elimination of national frontier checks of goods since 1992 within the European single market has presented particular difficulties and challenges to national law enforcement authorities in controlling illicit traffic in goods contrary to EU and international environmental protection standards. Consequently,

137 See Corstens (n 37) p 137 and M Faure 'European Environmental Criminal Law: Do We Really Need It? (2004) European Environmental Law Review 18 p 23.

138 Explanatory Memorandum of the Commission's First Draft PECL Directive (COM(2001)139) s 3.(c).

139 Article 5(3) EC.

140 See eg G Heine, C Ringelmann 'Approximation of European Criminal Legislation' and P Pagh 'Administrative Criminal Law Systems in Europe: An Asset for the Environment?' chs 17 and 15 in F Comte, L Krämer (eds) *Environmental Crime in Europe: Rules of Sanctions* (Europa Publishing 2004); F Comte 'Environmental Crime and the Police in Europe: a Panorama and Possible Paths for Future Action' (2006) European Environmental Law Review p 190; M Faure 'European Environmental Criminal Law: Do we really need it?' (2004) European Environmental Law Review 18 at 23; Faure (n 80) p 70; T Hitchcock, N Trounson 'Green Crimes: the EU Proposal for an Environmental Crimes Directive' (2007) 19 ELM p 119; Krämer (n 41) p 277; R Pereira 'Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the EU?' (2007) European Environmental Law Review p 255; M Watson 'The Use of Criminal and Civil Penalties to Protect the Environment: A Comparative Study' (2006) European Environmental Law Review p 108.

141 SEC(2007)160 Commission Staff Working Document accompanying the Proposal for a Directive on the Protection of the Environment through Criminal Law – Impact Assessment 9 February 2007.

142 Specifically, the 1989 Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (28 ILM 657(1989)), the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna CITES (993 UNTS 243), as updated, and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (26 ILM 154 (1987)).

143 US Government commissioned 'International Crime Threat Assessment' of 2000 (available at http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45270chap2.html#6).

144 IMPEL TFS Seaport and Verification Projects 2004-2006, reported on http://ec.europa.eu/environment/impel/impel_tfs.html.

145 EU Network for the Implementation of Environmental Law.

Member State authorities are becoming increasingly reliant on one another for information and assistance in detecting and prosecuting offenders who may move across national boundaries relatively swiftly. The frequently transboundary nature of environmental crime can mean that its commission and effects may appear in two or more jurisdictions, each containing different rules relating to the sanctioning of illicit conduct.

In its impact assessment document, the Commission points to a growth in illicit trade within Europe, driven by large profits, low risk of detection, and insufficient sanctions. In particular, it submits that widely varying levels of penalties across the EU against offenders may have a number of adverse effects for the realisation of key environmental and competition policy objectives of the Union. From an environmental protection perspective, the imposition of relatively minor sanctions in respect of serious breaches of environmental law may serve to undermine the achievement of EU and other internationally agreed environmental protection standards. For example, persons organising the illicit traffic of protected species within the EU may choose to be based in jurisdictions where the laws and/or law enforcement practices offer relatively little deterrence against offending.[146] In addition, the application of relatively low criminal penalties in a particular country may serve to restrict the amount of resources and equipment allocated by Member States to detect and prosecute environmental crime sufficiently effectively.[147] These factors may be seen as serving to undermine the EC Treaty commitments to ensuring a high level of environmental protection in the EU.[148]

Widely varying levels of sanctions in respect of environmental offences may also distort competition within the single market, contrary to the basic objectives underpinning the EC Treaty. Economic operators who comply with EU environmental standards may shoulder considerably more costs than competitors who fail to do so. Accordingly, there is a compelling case for arguing that economic operators competing with one another in the single market should be subject to sanctioning regimes that are at least roughly equivalent in their effectiveness in punishing and deterring criminal behaviour. Where sanctions in a particular Member State for breaches are minor, their deterrent effect becomes questionable, and as a result compliance costs in such a country may be substantially lower than in other Member States. Following up data from comparative studies it previously commissioned, the Commission points to a number of examples of wide variations in approaches taken by Member States in respect of environmental criminal activity. For instance, it notes that Portugal does not subject wildlife trade offences to any criminal sanctions, and in Spain and Greece the illegal shipment of waste is not subject to criminal prosecution. However, elsewhere in the EU, breaches of these sources of environmental law may attract significant criminal penalties. For instance, illicit shipment of waste or trade in protected species is reported to be punishable by up to six years' imprisonment in the Netherlands or in Finland.[149]

The argument that the application of criminal law is the most effective form of legal instrument in deterring serious breaches of environmental law lies at the heart of the Commission's motivation for the adoption of a common minimum European core of environmental criminal offences. In essence, the Commission and others in favour of the promulgation of EU measures on environmental crime consider that at root the problem of ensuring effective implementation of EU environmental legislation lies with the fact that, for the most part, the legal systems of EU Member States have not addressed the subject of environmental crime sufficiently seriously. The perception that pollution is a frequent and inevitable by-product of economic growth is deeply rooted in society, and has served to down-play social disapproval of its adverse effects on the environment. As a result, the detection of environmental crime does not receive the political priority it deserves,[150] and its commission is often considered not grave enough to warrant the attention of the criminal law.[151] Moreover, the absence of powerful economic vested interests prepared to take legal action to uphold environmental standards against other persons operating in the marketplace lends support to the argument that tough sanctions should be imposed on those who violate environmental obligations; the fact that law enforcement is usually reliant wholly on public authority supervision and action means that detection of environmental crime is made that much more challenging.[152] The imposition of a significant criminal

146 SEC(2007)160 at s 1.4.
147 ibid s 1.3.2.
148 Articles 2 and 174(2) EC.

149 ibid see tables pp 15–17.
150 F Comte 'Environmental Crime and the Police in Europe: a Panorama and Possible Paths for Future Action' [2006] European Environmental Law Review at p 195. He notes that the German Federal Environment Agency and Police have estimated that in the region of 80 per cent of environmental crime remains undetected in Germany.
151 Krämer (n 41) p 277.
152 See eg s 1.2.1 of the Commission's impact assessment (SEC(2007)160).

sanction such as imprisonment carries with it a social stigma of unacceptability and restriction of individual liberty that cannot be matched by any administrative sanction. Moreover, administrative penalties may be ill-suited to tackling impecunious offenders.[153]

However, a number of commentators have questioned the need for the EU to require specifically criminal sanctions for breaches of environmental legislation. Doubts have been raised as to whether the Commission gleaned sufficient evidence from its preparatory studies in support its legislative initiatives.[154] For the purposes of this article, only a summary of the sceptics' key arguments need be cited here. It has been commented that there are often practical advantages in using administrative over criminal legal sanctions for the purpose of law enforcement.[155] Administrative sanctions are usually speedier and less costly to obtain, while the law enforcement agency in charge of enforcing non-criminal sanctions typically has suitable expertise and substantial experience of investigating suspected breaches of environmental law. Procedural hurdles relating to the enforcement of environmental standards set down by administrative law are frequently much more straightforward to address from the law enforcer's perspective. For instance, the amount of evidence needed to secure an administrative sanction may be relatively simple to obtain in several instances, namely proof of a breach of an environmental standard committed by a particular person on the balance of probabilities.[156] Application of criminal penalties in respect of serious environmental crime may typically require a higher level of proof, namely beyond reasonable doubt, relating to specific mental culpability on the part of a particular person. Such evidence may be difficult to find, particularly in the case of corporate offenders where the precise source of illicit decision-making may be difficult to trace.[157] In addition, substantially greater rights are guaranteed to defendants faced with criminal as opposed to administrative proceedings. It has also been pointed out that there is a wide range of administrative sanctions that may compel cessation of criminal behaviour (eg a decision to close the operation of a plant) and achieve a result, environmentally speaking, which is often as, if not more, effective than that achievable by even the severest criminal penalty (imprisonment).[158]

Moreover, it is dangerous to draw conclusions that individual Member States have relatively weaker law enforcement regimes, simply because they apply relatively lighter criminal penalties than other countries. Each Member State has its own individual mix of criminal and non-criminal sanctions for environmentally offensive behaviour that should be considered in the round as to whether they are effective in addressing illicit conduct.[159] It is also evident that the application of criminal law in itself may not necessarily have the desired deterrent effect. For instance, where relatively low levels of criminal penalties are applied in practice on a strict liability basis as has been commonplace in the United Kingdom, the factors of adverse social stigma and deterrence may become seriously undermined.[160] Finally, there is a danger of placing too much hope in the deterrence value of criminal penalties, if in practice the resources to investigate, detect, and prosecute instances of suspected environmental crime are not provided by Member States. Environmental criminal law then risks becoming symbolic rather than effective.[161]

While it is no doubt true, as several commentators have pointed out in relation to the emergence of EU legislation on environmental crime, that criminal sanctions may at best constitute a partial solution to the broader issue of tackling serious breaches of environmental legislation, this is a point that the Commission does not in fact contradict. The Commission has been unjustly accused of appearing to wish to impose criminal liability at the expense of non-criminal sanctions. This is a fundamental misunderstanding of the purpose of the Commission's approach and the nature of its legislative initiatives, which are far less prescriptive. As discussed in section II, the prospective PECL Directive does not require mandatory application of criminal penalties on natural persons in breach of its environmental offences. Instead, it merely requires that Member States ensure that, as a minimum, the environmental offences it defines may attract effective, proportionate, and dissuasive criminal penalties. The decision as to which penalty to apply in any given case is left entirely to individual Member States, so long as the eventual sanction meets the tripartite test of effectiveness, proportionality, and dissuasiveness.

153 See Explanatory Memorandum to the First Draft PECL Directive: COM(2001)139 at p 2.
154 See eg Pagh (n 140) p 163.
155 See eg Faure (n 137) p 22.
156 See comments by Heine and Ringelmann 'Approximation of European Criminal Legislation' (n 140) p 201.
157 See comments by Hitchcock, Trounson 'Green Crimes' (n 140) p 121. The Commission's legislative proposals on environmental crime require proof of either intentional or seriously negligent conduct as a prerequisite for criminal liability of natural persons.
158 See eg Pereira (n 140) p 259.
159 See eg Faure (n 137) p 26 and Heine and Ringelmann (n 140) p 201.
160 See eg Watson 'The Use of Criminal and Civil Penalties' (n 140) pp 110–11.
161 See eg Herlin-Karnell *Commission v Council* (n 50) p 77.

It is arguable that the Commission could have chosen a different route to address the subject matter of sanctions for breaches of EU environmental law other than by proposing environmental criminal legislation. Specifically, the Commission could have undertaken a substantive review of each Member State to assess the relative effectiveness of their rules on imposing penalties, criminal and non-criminal, in respect of serious violations of environmental crime. Theoretically, it could have used the tool of enforcement proceedings under Articles 226 and 228 of the EC Treaty as a means of persuading those Member States with ineffective sanctioning systems to introduce legislative and other necessary reforms. As discussed earlier in section I, the ECJ has established that it is incumbent upon Member States under Article 10 EC to ensure that infringements of Community law committed within their territories are subject to effective sanctions. The author is aware of only one occasion where the Commission attempted to use Article 226 EC for this type of purpose.[162] It has been argued elsewhere that the Commission could have utilised enforcement proceedings to good effect in this regard.[163] The advantage of using such legal proceedings would have been to focus more on the practical effect of national sanctions, rather than seek to impose the establishment of a minimum core of criminal offences on a rather tenuous legal basis. In particular, they may be used to good effect in appraising the level of administrative resources devoted in practice to enforcing sanctions. There is no reason why the Commission may not use such proceedings in tandem with the development of EU legislation on environmental crime.

While the Commission could make greater use of enforcement proceedings against Member States under Articles 226 and 228 EC to some useful effect, this alone would most probably be insufficient as a means of enhancing the effectiveness of national sanctions. For such proceedings are inherently negative in nature, in the sense that they may ultimately only inform whether the state of national law implementing EC environmental legislation in a particular case is deficient. They are not capable of conferring a definitive positive legal obligation upon a Member State to impose criminal liability or a particular level of sanction. It is widely acknowledged that, for the most serious types of offences, application of stiff criminal penalties is warranted as a form of punishment and to act as a deterrent.[164] Moreover, as is well-documented, enforcement proceedings may often take a considerable period of time before the ECJ has an opportunity to pronounce judgment.[165]

V Some reflections

Notwithstanding the fact that there now appears to be agreement among the EU's political institutions on the need for the construction of a Community dimension to environmental criminal policy, the prospective formal adoption of an EC directive on environmental crime in 2008 remains a highly controversial step for the EU to take. The political as well as legal legitimacy of this first pillar instrument remains an issue, given that its legal base may be considered to be a tenuous foundation.

It is clear that the EU's efforts to develop a common policy on the subject of environmental crime over the last 10 years have been severely hampered by questions concerning the extent to which the regional international organisation has legal competence to take legislative action in this area. As is evident from the analysis in the preceding sections, the root of the problem lies with the lack of sufficient clarity in the texts of the founding treaties of the Union. Controversially, in its *Environmental Crimes* judgment in 2005 the ECJ took the view that there is implied power under the auspices of Title XIX of the EC Treaty on the Environment for the Community to adopt EC legislative measures on environmental crime, which includes the possibility of Member States being required to criminalise certain environmental offences where this is deemed essential by the Community legislature to achieve common policy objectives. This judicial interpretation is open to question, not least given the absence of express Community powers and the widely-held understanding among Member States that they never agreed by implication to such a conferral of competence to the Community. Indeed, the Member States have taken steps at various stages of the amendments to the EU's founding treaties to confirm that there is no Community competence to approximate national criminal rules.

However, since the *Environmental Crimes* judgment, Member State governments appear to have changed direction completely and reconciled themselves with the legal legitimacy of a first pillar legislative instrument

162 In 2003, the Commission reported commencing enforcement proceedings against Greece, Ireland and Spain over failings to provide information over penalties they are required to establish under art 21 of reg 2037/2000 on ozone-depleting substances (OJ 2000 L244/1): see Commission Press Release IP/03/1425.

163 Comte (n 140) p 225.

164 See eg Pereira (n 140) p 268; Heine and Ringelmann (n 140) p 203.

165 See eg M Hedemann-Robinson *Enforcement of EU Environmental Law* (Routledge-Cavendish 2007) esp chs 3–5.

addressing elements of a common environmental criminal policy. It is not clear why a majority of Member States did not force the Council of the EU to refuse to participate in political negotiations over the Second Draft PECL Directive of 2007, as happened in respect of the first legislative draft of 2001. There was good reason for the Council to delay its participation, given that the Lisbon Treaty 2007 envisaged for the first time an appropriately transparent legislative process for the adoption of EU measures envisaging inter alia harmonisation of aspects of national criminal law intended to assist in the fulfilment of particular EU common policy objectives. The Lisbon Treaty reflects a recognition on the part of Member States of the need, both politically and legally, for the conferral of express powers to be granted to the EU before the latter may legitimately enact measures to approximate aspects of national criminal law. Entry into force of the Lisbon Treaty is now in doubt as a result of the recent referendum on its ratification in Ireland. However, notwithstanding the strong case for the urgent development of cooperation among Member States in order to combat the real and serious threats that environmental crime poses for national authorities engaged in environmental protection, it is necessary that such action is taken on a constitutionally sound footing and there must be real doubt as to whether the EC Treaty provides the necessary legal reassurance. As a consequence, it remains open to question whether national courts such as the German Federal Constitutional Court will ultimately accept the prospective PECL Directive as being legally binding, namely as having been adopted within the scope of powers allocated to the Community.

SELECTED PUBLISHED WORK 3

Selected Journal Article

Hedemann-Robinson M, 'Enforcement of EU Environmental Law and the Role of Interim Relief Measures' (2010) 19(5) *European Energy and Environmental Law* 102-114. ISSN 0966-1646. (Approx. 20,000 words)

Enforcement of EU Environmental Law

Enforcement of EU Environmental Law and the Role of Interim Relief Measures

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I. Introduction

Until relatively recently, injunctions against Member States suspected of breaching European Union environmental law were considered to be a pretty rare phenomenon if not entirely extinct species of legal procedure. Prior to 2007, the European Commission (hereafter referred to as the "Commission") had only applied to the Court of Justice of the EU on one occasion[1] at the end of the 1980s for an interim relief measure in respect of a case involving a violation of Union environmental legislation, and that proved to be unsuccessful. For a considerable period of time subsequent to that defeat it appeared that the Commission had decided effectively to abandon any further attempts to seek injunctive relief in conjunction with any infringement casework it considered especially urgent. However, most recently the Commission has revitalised its interest in the interim relief provisions contained within the EU's treaty framework and has done so with considerable success. Specifically, since 2007 the Commission has successfully applied to the Court of Justice for interim orders requiring three Member States to secure the immediate suspension of activities considered by the Commission to be in breach of EU environmental law.[2] The interim orders were requested to take effect pending the outcome of legal proceedings having been brought against those States to determine definitively whether EU environmental law had been violated.

The principal aim of this article is to analyse the evolving relationship between the legal proceedings under EU law concerning interim relief and the proceedings relating to the prosecution of infringements of Union environmental law against EU Member States. As will be discussed in this article, the legal impact of a judicial interim relief on the effectiveness of infringement proceedings can be both immediate and profound. For the purpose of examining the significance of interim relief in the context of the Commission's environmental infringement casework, this article is divided into three principal parts. Section II provides an overview of the general legal framework under EU law concerning infringement proceedings taken against Member States by the Commission and the extent to which injunctive measures may be sought to accompany those proceedings. It considers, in particular, the role of the Court of Justice in developing possibilities for the Commission to request emergency judicial intervention. Section III analyses the extent to which interim relief has emerged as a legal tool for the benefit of the Commission when challenging Member States over alleged infringements of EU environmental law, with specific reference to the relevant case law of the Court of Justice. Section IV explores how the potential availability of interim measures has now become an integral element within current Commission strategy on enhancing the state of implementation of EU environmental legislation at national level. Finally, section V concludes the article with some reflections on the extent to which the law of the EU on interim relief is suitable to addressing environmental infringement cases in respect of which there may be an urgent need for intervention against a defendant Member State.

II. Interim Measures and Infringement Proceedings against Member States: The General Legal Framework

1.1. Infringement proceedings under Articles 258 and 260(2) TFEU

One of the fundamental and mandatory tasks vested in the Commission under the EU's constitutional structure[3] is to ensure that EU law is applied correctly applied across the Union.[4] For this purpose, the foundational treaties underpinning the Union provide the Commission with a variety of powers to be able to take a variety of measures and steps with a view to

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[1] The *Leybucht* case: Case C-57/89R *Commission v Germany* [1989] ECR 2849.

[2] Namely, the interim relief orders secured in the *Ligurian Bird Hunting* case (Case C-503/06R *Commission v Italy* [2006] ECR I-141 and [2007] ECR I-19), the *Rospuda River Valley* case (Case C-193/07R *Commission v Poland*, Court of Justice Presidential Orders of 18.4.2007 and 18.7.07 (not yet reported)) and the *Maltese Bird Hunting* case (Case C-76/08R *Commission v Malta* [2008] ECR I-64). The case proceedings are available for inspection on the Court's website: www.curia.eu.int.

[3] A consolidated version of the principal founding treaties of the Union, namely the Treaty on the Functioning of the European Union (TFEU) and Treaty on European Union (TEU), may be found in the Official Journal of the EU (OJ 2008 C115/1) and at the following EU website: http://eur-lex.europa.eu/en/treaties/index.htm.

[4] Article 17(1) of the Treaty on European Union (TEU), as amended by the Lisbon Treaty 2007 (OJ 2007 C306/1), states that the Commission "shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union." (This provision effectively succeeds Art. 211, first indent, of the former EC Treaty).

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enforcing EU legal obligations against Member States of the Union. In a narrow range of sectors, the Commission has been granted powers to take binding decisions against Member States or other persons it considers have breached EU norms requiring them to desist from illicit conduct in relation to certain EU policy sectors.[5] For the most part however, the approach adopted under the EU treaty framework has been to require the Commission ultimately to come before the Court of Justice when seeking to enforce legally binding commitments against Member States. Specifically, the Treaty of the Functioning of the European Union (TFEU) provides for a range of infringement proceedings that the Commission may take for the purpose. As far as the supervision of EU environmental law enforcement is concerned, the Commission has recourse to the standard set of infringement proceedings set out in Articles 258 and 260(2) TFEU.[6] These proceedings, which have been subject of considerable amendment since their inclusion within the Union's founding treaties, suffer from a number of long-standing and deep-rooted problems, notably the drawback in that they are frequently lengthy affairs[7] and are poorly structured for the purposes of addressing urgent cases, in particular. As widely noted, the legal framework underpinning these infringement proceedings do not empower the Commission to impose binding decisions on Member States, but instead require it to go though a set of often protracted administrative and judicial processes in order to be able to secure a legally authoritative ruling from Court of Justice on whether a State has infringed Union law.[8]

Infringement proceedings under Articles 258 and 260(2) TFEU may be divided into two distinct but also interconnected sets of legal action. Both sets of proceedings envisage a substantial preliminary administrative phase, namely they require the Commission to liaise with a defendant Member State with a view to securing a settlement where possible prior to any decision on the Commission's part to refer the dispute to the Court of Justice. Legal action brought under Art. 258 and 260(2) TFEU are commonly referred to as first and second round infringement proceedings respectively. Art. 258 proceedings are used where the Commission wishes to takes proceedings against a Member State to address the latter's non-compliance with Union law. Proceedings taken under the auspices of Art. 260(2) TFEU are "second round" in the sense that they are designed to be used in the event of a Member State failing to adhere to the terms of a (first round) judgment of the Court of Justice made under Art. 258 TFEU.

The primary treaty provision for the purposes of EU environmental law enforcement action taken by the Commission is Article 258 TFEU. Under Art. 258 TFEU, if the Commission considers an infringement of EU law exists, warranting in its view the commencement of legal proceedings, it issues the Member State concerned with a letter of formal notice (commonly known as a first written warning), requesting the latter to submit its observations. In the event of a failure to reply or unsatisfactory response, the Commission may then decide to issue the Member State with a reasoned opinion (known as a second or final written warning) which definitively details the infringement and calls upon the Member State to comply within a specified period. In the event of a failure to comply by the end of the deadline set by the Commission in the reasoned opinion, the Commission may at that stage decide to bring the case before the Court of Justice of the EU.[9] The Court of Justice is then required to issue a declaratory judgment as to whether a breach of EU law has been committed. As confirmed by Art. 278 TFEU,[10] the Court's judgment does not of itself have any suspensory effect. Accordingly, any national legislative measure or administrative decision

[5] Notably, in the competition sector. See Regulation 1/2003 on the implementation of Articles 81 and 82 of the EC Treaty (now Arts. 101 and 102 TFEU) (OJ 2003 L1/1), Regulation 139/2004 on the control of concentrations between undertakings (OJ 2004 L24/22). See also Art. 108 TFEU (ex Art. 88 EC) on state aids which provides the Commission with power to issue decisions against infracting Member States prior to referring them to the Court of Justice.

[6] By virtue of the entry into force of the Lisbon Treaty on 1 December 2009, these provisions have superseded Arts. 226 and 228(2) of the former EC Treaty.

[7] See J. Jans, H. Vedder *European Environmental Law* (3 ed., 2008) at p. 160 and L. Krämer *European Environmental Law Casebook* (1993) at p. 405.

[8] See eg. L. Neville Brown, T. Kennedy *The Court of Justice of the EC* (4 ed., 2000) at p. 117, L. Krämer, *EC Environmental Law* (5 ed. 2003) at p. 392 and R. Munoz, "The monitoring of the application of Community Law: a need to improve the current tools and an obligation to innovate" (2006) *Yearbook of European Law* 21 at p. 417.

[9] The TFEU does not specify a minimum time that should be allowed for Member States to be able to respond to the letter of formal notice and reasoned opinion, this being essentially a matter for the Commission to determine in the light of the particular circumstances attending the instant case (including weight of evidence, gravity of infringement and technical complexity involved). The Court of Justice has established that the Commission is obliged generally to set deadlines that are reasonable in the circumstances, so that defendant Member States have an adequate opportunity to respond to the Commission's legal claims against them even though a particular deadline may be relatively short for particularly urgent cases (eg. Case 293/85 *Commission v Belgium* [1988] ECR 305). The Commission has set down as a benchmark a period of no more than 12 months to elapse between letters of formal notice and decision to refer to the Court in non-communication cases, whilst allowing itself flexibility to decide what is appropriate for other types of cases: see COM(2007)502 Commission Communication *A Europe of Results – Applying Community Law* (5.9.2007) at 9.

[10] Replacing Art. 242 of the former EC Treaty.

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held to be in breach of EU law is not rendered automatically void by virtue of the Court's ruling under the auspices of Art. 258 TFEU. Instead, the EU treaty framework requires that Member States are invested with legal responsibility to take the necessary steps in order to secure adherence to the judgment.[11]

Cases taken under the auspices of Arts. 258 TFEU may be divided up into three broad categories, namely: non-communication, non-conformity and bad application cases. Non-communication cases concern infringements where a Member State has failed to adhere to a commitment to notify the Commission of national legislation intended to implement EU legislation, notably EU directives which inherently require transposition into national law through national implementing legislation. Non-conformity cases comprise situations in which national law fails to accord with the terms of EU law. Bad application cases involve scenarios where the Commission wishes to take legal action to address specific instances of misapplication of Union law at national level.

By virtue of an amendment introduced by the Lisbon Treaty 2007,[12] the Commission has now the power under Art. 260(3) TFEU to request the Court of Justice to impose a financial penalty on a defendant Member State in respect of non-communication breaches at "first round" stage. For all other types of breaches of EU law, the Court only has power under Art. 258 TFEU to issue a judicial declaration as to whether the defendant Member State has acted in compliance with Union law.

If, according to the opinion of the Commission, a Member State found guilty of a breach of EU law under Art. 258 TFEU fails to take the requisite measures needed to secure a state of compliance within a reasonable period, it is open to the Commission to pursue further litigation against the defendant under the auspices of Art. 260(2) TFEU. "Second round" infringement action taken under Art. 260(2) TFEU may ultimately lead to the imposition of one or more financial penalties being imposed on a defendant Member State by the Court of Justice, in the form of a single lump sum fine and/or a series of penalty payments.[13] As is the case with proceedings under Art. 258 TFEU, the Commission is first obliged to liaise with the Member State concerned before any move may be made to refer the matter to the EU judiciary. By virtue of the Lisbon Treaty the preliminary administrative phase of the second round infringement procedure has now been shortened to include a single written warning with accompanying compliance deadline from the Commission.[14]

For a variety of reasons, which have been the subject of long-standing appreciation and discussion by commentators, infringement proceedings brought under Arts.258 and 260(2) TFEU have been of limited assistance to the Commission in enabling it to fulfil its supervisory role, including in the environmental sector. A number of significant problems arise as a result of the way in which the relevant treaty provisions have been structured. Notably, the roles and powers accorded to Commission and Court thereunder do not provide an effective swift form of legal redress, in particular where it may be needed in the most urgent cases. The mandatory preliminary administrative phase foreseen in Art. 258 and 260 TFEU prevent the Commission from seeking judicial relief until this initial phase has been completed. The infringement procedure requires the Commission first to seek a friendly out of court settlement during this initial phase where possible. Whilst it may be laudable as a matter of general principle for an alternative dispute resolution approach to law enforcement to be fostered, it is important to note that there is a problem in that defendant Member States are under no legal obligation to ensure the cessation of conduct suspected of breaching EU law during this phase.[15] The absence of a power of the Commission to impose binding decisions on Member States under Art. 258 TFEU means that it is very difficult in practice for the Commission to be able to deal effectively with short-term breaches of Union law.[16] Moreover, under the current system of infringement proceedings it is only a Court of Justice judgment imposing financial penalties on a defendant Member State which is likely to provide a realistic prospect of the Commission being able to secure meaningful corrective action on the part of the defendant. A judicial declaration under Art. 258 TFEU may often be received by defendant Member States as a bark without much bite. Except for non-communication cases, the Commission will have to pursue second round proceedings in order to see the prospect of a financial sanction being imposed. The

[11] Art. 260(1) TFEU.

[12] OJ 2007 C306/1.

[13] The Court of Justice, which has sole jurisdiction to determine whether a financial sanction is to be imposed in any given case, has confirmed that it is possible for a lump sum and penalty payment to be required to be paid in an individual case where the Court considers this appropriate: Case C-304/02 *Commission v France* [2005] ECR I-6263. The Commission has published guidelines on the calculation of financial sanctions, which the Court (SEC(2005)1658 Commission Memorandum, 13.12.2005).

[14] See Art. 260(2) TFEU, which stipulates that the Commission is to give the defendant Member State a single opportunity to submit observations on its declared position that the State has failed to ensure compliance with the terms of the Court's judgment against it, before the Commission may then make a referral to the Court. Effectively, the Lisbon Treaty has abolished the need for a reasoned opinion from the Commission, which was a requirement until 1 December 2009 (see Art. 228(2) of the EC Treaty).

[15] See also J. Jans, H.Vedder, *supra* note 7 at p. 160.

[16] T. Hartley, *The Foundations of EC Law* (4 ed., 1998) at p. 315, L. Krämer, *supra* note 8 at p. 393 and H. Schermers, D. Waelbroeck, *Judicial Protection in the EC* (5 ed.,1992) at p. 280.

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time taken for Art. 258 and 260(2) TFEU proceedings to be completed may run into a number of years in practice,[17] by which point the object of litigation may have ceased to be of current value and become instead a means of censuring past conduct, whose effects may have become already irreparable.

The Commission is confronted with a number of significant challenges of this nature in particular when aiming to hold Member States accountable for instances of misapplication of EU environmental legislation within their respective territories, the so-called "bad application" cases.[18] These cases may typically involve situations where the Commission considers that national authorities and/or private persons are currently acting or about to act in breach of EU environmental law, with the consequence that actual potential irreversible ecological damage may be liable to be sustained. In such cases which come to the Commission's attention and which the Commission deems serious enough to warrant a commencement of legal proceedings, time is of the essence in securing an immediate cessation of activity liable to cause or continue to cause ecological damage. Cases of this type, to name a few, might typically involve development projects encroaching upon protected habitat sites, the authorisation of hunting of protected species or the authorisation of the dumping of hazardous waste or toxic chemicals into the environment in contravention of EU environmental legislative requirements. If the Commission is unable to require defendant Member States to secure the immediate suspension of such activity, then the point of it taking legal action may be considerably weakened, even effectively lost. Specifically, by the time a judgment is secured from the Court of Justice against the Member State concerned, it may well be too late at that stage to unravel the environmental consequences of the illicit activity being subject to scrutiny. In any case, a declaratory judgment and a judgment imposing financial sanctions are not suitable for securing and neither do they require remediation of past ecological damage. Infringement proceedings under Art. 258 and 260(2) TFEU are ill-suited to addressing bad application cases in other important ways. Notably, the Commission has no specific investigative powers to interview witnesses or access sites, and is accordingly in practice heavily dependent upon evidence being provided from third parties (notably from complainants) in order to be in a position to proceed with a legal case.[19] In addition, it has limited personnel to follow up infringement casework, typically two legal officers being assigned in the Environment Directorate-General's Legal Unit to supervise all infringement casework for each Member State.[20]

1.2 Interim measures at EU level

One important means of mitigating against the protracted nature of infringement proceedings is for the Commission to apply for emergency injunctive relief measures under the auspices of Arts. 278-279 TFEU[21] from the Court of Justice pending its judgment in a "first round" infringement action. These provisions have remained intact since the inception of the European Economic Community with the Treaty of Rome in 1957 (although their treaty numbering has changed). As will be discussed in section II.1.3 below, it is only relatively recently in EU legal history that the Commission started to make use of this facility in connection with its law enforcement role. Before examining the impact of the jurisprudence of the Court, it is useful first to consider the scope and nature of the various relevant normative provisions involved in relation to interim relief at EU level.

As has already been mentioned, it is important to note that the commencement of infringement proceedings under Articles 258 and 260(2) TFEU do not have suspensory effect,[22] as confirmed by Article 278(1) TFEU. This could be interpreted to mean that Member States facing infringement proceedings do not appear to be under any clearly defined legal obligation, pending the delivery of the declaratory judgment of the Court of Justice on the case, to take any steps to ensure the prevention and/or cessation of alleged illicit activity targeted by those proceedings. Arguably, the general legal obligations enshrined in the EU's treaty framework on EU Member States to act in good faith and in a spirit of co-operation in

[17] One commentator has assessed the average length of first round infringement proceedings from letter of formal notice to judgment to be 45 and 47 months in the periods 2002–3 and 2003–4 respectively: L.Krämer, "Statistics on environmental judgments by the EC Court of Justice (2006) *Journal of Environmental Law* 18(3), at p. 407. I have previously assessed that as at the end of 2006 the average length of second round proceedings under Art. 228(2) EC (the predecessor to Art. 260(2) TFEU) was approximately 13 years: see M. Hedemann-Robinson, "Article 228(2) EC and the enforcement of EC environmental law: a case of environmental justice delayed and denied? An analysis of recent legal developments" (2006) *European Environmental Law Review* 15(11) at p. 317.

[18] See eg. E. Hatton, "The implementation of EU environmental law" (2003) *Journal of Environmental Law* 15, at section 3.3, and M. Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (2005) at p. 51.

[19] See eg L. Krämer, *supra* note 7 at pp. 405–6, and M. Hedemann-Robinson, *Enforcement of EU Environmental Law: Legal Issues and Challenges* (2007) at pp. 161–4.

[20] See eg S. Grohs, "Commission Infringement Procedure in Environment Cases" (Ch2) in M. Onida (Ed.) *European and the Environment: Legal Essays in Honour of Ludwig Krämer* (2004) at p. 33.

[21] Formerly Arts. 242 and 243 EC respectively.

[22] See J. Jans, H.Vedder *supra* note 7 at p. 160.

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relation to the Union[23] could be interpreted as imposing such a duty on defendant Member States. However, the Court has not provided specific guidance on the impact of this general duty in relation to the conduct of parties prior to judgment.[24] In practice, the Commission appears to have taken the view shared by Member States that the launch of infringement proceedings does not *per se* impose any "cease and desist" type obligations on defendant parties.

The TFEU makes specific provision for the possibility of interim relief being applied for in conjunction with proceedings taken before the Court of Justice, namely in Articles 278 and 279 TFEU. Art. 278 TFEU states:

> "Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended."

Art. 279 TFEU states:

> "The Court of Justice of the European Union may in cases before it prescribe any necessary interim measures."

Both of these treaty provisions open up the possibility for the Commission to seek interim relief in the context of infringement proceedings. Specifically, both norms, which have remained essentially unchanged since the inception of the Union, enable the Commission to apply to the Court for interim orders to direct defendant Member States to suspend the application of national legislative or administrative measures, as well as to direct a defendant to take appropriate measures to ensure that current or imminent activity challenged by the Commission as being contrary to EU law is prevented from being allowed to continue or occur.[25] The aim of the treaty rules on interim measures is essentially conservatory in the sense of ensuring that the *status quo* is preserved pending the outcome of the main proceedings. A party who is subject to an interim measures order is normally specifically obliged to refrain from conduct that could serve to undermine the integrity or effect of the pending judgment in the main infringement action.[26] Both treaty provisions appear to confirm that applications for interim measures may only be filed at the stage where cases are filed before the Court of Justice. Consequently, proceedings for interim measure are ancillary to and contingent upon the pursuit of other legal proceedings undertaken at EU level;[27] they have no independent or autonomous status. In the context of EU environmental law enforcement action carried out by the Commission, this means that the Commission may only apply for interim relief at the stage when it refers an infringement case to the Court of Justice, namely after completion of the administrative phase of Art. 258 TFEU proceedings. There is still some debate as to whether the second sentence of Art. 278 TFEU is relevant to the operation of infringement proceedings, as some authors consider that it is essentially concerned with applications for the suspension of only Union "acts" and not national measures.[28] However, this limitation is not expressly stated in the relevant treaty provision itself and in practice the Commission has on various occasions relied upon both provisions for interim relief in infringement proceedings against Member States.[29]

In addition to the above-mentioned treaty rules, other legal instrumentation at EU level provides detailed implementing rules regarding the organisational, procedural and technical requirements pertaining to interim relief applications, specifically the Statute of the Court of Justice[30] (SCJ) and Rules of

[23] Art. 4(3) TEU (which has succeeded Art. 10 of the former EC Treaty) 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 the 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."

[24] This is a point worth clarifying with the Court by the Commission, given that the latter may only apply for interim measures after the administrative phase of infringement proceedings has been completed.

[25] As confirmed by the Court of Justice eg. in Case 42/82R *Commission v France* [1982] ECR 841 (a case on free movement of goods in conjunction with EU rules on the wine sector). See also F. Castillo de la Torre, "Interim measures in Community courts: recent trends" (2007) *Common Market Law Review* 44 at p. 338.

[26] See G. Borchardt, "The award of interim measures by the ECJ" (1985) *Common Market Law Review* 22 at p. 204; F. Castillo de la Torre, *op.cit.* at p. 273 and L. Krämer, *supra* note 7 at p. 404.

[27] See K. Lenaerts, D. Arts, I. Maselis, *Procedural Law of the EU* (2 ed., 2006) at p. 421.

[28] See eg. F. Castillo de la Torre, *supra* note 25 at p. 278. Art. 83(1) of the Court of Justice's Rules of Procedure might be said to lend support to this interpretation , in that it refers to Art. 278 TFEU concerning applications to suspend the operation of any measure "adopted by an institution".

[29] The Court of Justice does not appear not to have objected to the Commission referring to both treaty provisions when seeking interim relief in conjunction with Art. 258 TFEU infringement proceedings. The principal treaty provision on interim relief against Member States is, though, Art. 279 TFEU.

[30] Art. 281 TFEU stipulates that the Statute of the Court is to be set out in a separate protocol to the EU treaties. The current version is contained in Protocol (No 3) of the Statute of the Court of Justice of the European Union, which is annexed to the TEU and TFEU (OJ 2008 C115/210).

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Procedure of the Court of Justice (RP).[31] The SCJ confirms that the President of the Court has overall competence at judicial level to adjudicate upon interim relief applications made under Arts.278 and 279 TFEU in accordance with a summary procedure set out in the RP. The Court President's ruling is required to be provisional and in no way prejudice the decision of the Court on the substance of the case.[32] Chapter I of Title III of the RP contains detailed rules directing the procedural operation of interim relief applications as well as providing clarification on the essential requirements needed to be satisfied by applicants for a request for an interim judicial order to succeed.

In terms of procedure, it is foreseen under the RP that applications are normally required to be served on the opposing party (ie. Member States in the context of an infringement dispute) in order for that party to be able to submit observations to the Court's President prior to judicial decision.[33] However, it is also stipulated that the President may grant an application on an *ex parte* basis, without such observations being heard.[34] The latter option may be undertaken in extremely urgent cases, where even a slight delay in imposing an in interim order might imperil the integrity of a pending judgment in the main action. As will be seen in section II.1.3 below, the Commission has had some degree of success in persuading the Court's President to impose injunctions on defendant Member States in environmental disputes on an *ex parte* basis. Ultimately, this depends on the degree of urgency estimated to be involved by the Court President. Article 83 RP confirms that interim measure requests may only be filed in connection with legal proceedings "before the Court", which underlines the impossibility of the Commission to be able to apply to the Court for interim measures prior to the judicial phase of infringement proceedings under Art. 258 TFEU. The RP stipulate it is open to the Court President to refer the application to the Court for adjudication,[35] which in that instance is required to hear the opinion of an Advocate General prior to its decision.[36] Whilst it was fairly common in the early phases of the case law on interim measures for a reference to the Court to be made from the Court President, especially when the Court was in its formative stages of developing its case law on the scope and impact of interim relief, contemporary practice mostly sees the Court President determining individual requests for interim measures. The decision of the Court President or Court on the application is final, there being no possibility of an appeal.[37]

Art. 83(2) RP refers to certain requirements that an applicant needs to fulfil in requesting an interim measure from the Court of Justice. Specifically, the application must state the subject-matter of proceedings, the pleas of fact and law establishing a *prima facie* case for the interim relief requested and cite the circumstances giving rise to urgency.[38] This would suggest that there are essentially two key legal elements that the applicant needs to prove to the satisfaction of the Court: first, *prima facie* evidence to show that the Commission has a reasonable case on the legal merits and second that the situation is sufficiently urgent to warrant judicial intervention in advance of the definitive judgment of the Court on the substance in the main proceedings. Whilst the early case law appeared to reserve a good deal of discretion to the Court on adjudicating requests for interim relief, over time the Court has established a clearer line of jurisprudence on what is required to be presented by applicants. Specifically, case law indicates now quite clearly that applicants must demonstrate to the satisfaction of the Court that three elements[39] are present: namely (1) that there is a *prima facie* case in fact and in law of a breach of EU obligations (*fumus boni juris*); (2) that the situation is urgent in that serious and irreparable harm is likely to be sustained to the applicant's interests prior to the judgment in the main action; and (3) that on the balance of interests an interim order is warranted, namely that the applicant's interests are deemed to outweigh those of the opposing party. This triple test has caused some considerable debate, not least given that the latter element is not cited anywhere in the relevant rules of the RP.[40] Elsewhere it has been queried whether the RP are themselves in accordance with the relevant treaty provisions, which do not stipulate any particular requirements needing to be fulfilled by applicants.[41]

1.3 The seminal role of the Court of Justice in making interim measures available in infringement cases

It was not actually until the late 1970s that the Court of Justice clarified that it was possible for the Commission to apply for interim measures against

[31] Art. 253 TFEU stipulates that the Court of Justice is to establish its rules of procedure with approval from the Council of the EU. These are currently the Rules of Procedure of the Court of Justice of 1991, as amended (OJ 1991 L176/7 and subsequent amendments, most recently at the time of writing those made on on 13.4.2010 (OJ L 92/12)). A consolidated form of the RP is set out on the Court's website: www.curia.eu.int. (A distinct set of rules of procedure are provided for the General Court of the Court of Justice under the auspices of Art. 254 TFEU, which do not concern infringement proceedings under Arts.258 and 260(2) TFEU).

[32] Art. 39 SCJ.

[33] Art. 84(1) RP.

[34] Art. 84(2) RP, second subparagraph.

[35] Art. 85 RP, first sentence.

[36] Art. 85 RP, third sentence.

[37] Art. 86(1) RP.

[38] Art. 83(2) RP.

[39] See eg. K.Lenaerts *et al.*, *supra* note 27 at p. 433, and F. Castillo de la Torre, *supra* note 25 at p. 283.

[40] F. Castillo de la Torre, *supra* note 25 at p. 319.

[41] See eg. L. Krämer, *Casebook on EU Environmental Law* (2002) at p. 432.

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Member States in conjunction with infringement proceedings under the auspices of Article 258 TFEU. For several years it remained a moot point as to whether this would be possible, not least because infringement proceedings lead ultimately to a declaratory judgment of the Court as to whether a defendant Member State has breached the terms of EU law.[42] A judgment handed down under the auspices of Art. 258 TFEU does not involve the imposition of any specific penalty on the Member State concerned or require a particular course of corrective or remedial action to be taken, the Court having no powers of direction. Instead, the legal implications to be drawn from such a judicial declaration are less specific and stringent, as well as deferring a substantial degree of autonomy to the defendant Member State as to how to fulfil its general legal duty to adhere to the terms of the ruling. Art. 260(1) TFEU stipulates that it is the legal responsibility and duty of the Member State concerned to ensure compliance with any Court of Justice ruling made against it. If the Commission considers that the Member State has failed to take such measures within a reasonable amount of time, it is open to the Commission to launch a second round infringement action against the Member State with a view to securing compliance with the Court's ruling under Art. 260(2) TFEU.[43] One must also bear in mind that the enforcement procedure under Art. 258 TFEU has been geared throughout its long-standing history[44] to try wherever possible to secure a friendly out-of-court settlement with a Member State considered guilty of a breach of Union law.[45] Specifically, the procedure envisages an extensive primary administrative phase, involving a dialogue between Commission and Member State. Specifically, apart from non-communication cases, the Commission is obliged to send two written warnings to the Member State and consider its replies to these prior to requesting the involvement of the Court of Justice. Whereas therefore infringement proceedings under Articles 258-260 TFEU reflect a long-standing EU institutional and structural preference for securing patient negotiation of disputes with infracting Member States outside the courtroom where possible, the interim measure procedure represents an entirely different approach to casework. Specifically, the interim measures procedure constitutes a legal tool designed to secure immediate correction of a breach of EU law through the assistance of the judiciary.

The necessary clarification provided by the Court on the possibility of combining interim measures applications with infringement proceedings was made in two cases adjudicated by it in mid 1977, namely *Pig Producer Aid*[46] and *Irish Fisheries*.[47] In *Pig Producer Aid*, a state aid case, the Commission took action against the UK on account of its intention and eventual decision to provide temporary financial aid to pig farmers as a means of mitigating the effects of their exposure to greater competition as a result of the UK acceding to the EU and its common market system. Viewing the intended aid as incompatible with EU treaty rules on state aid, the Commission opened the special enforcement procedure in relation to illicit state aid measures.[48] Notwithstanding that the effect of opening the state aid procedure imposed a standstill obligation on the UK not to go ahead with its proposed measure,[49] the UK aid entered into force. Despite the Commission subsequently issuing the defendant Member State with a legally binding decision requiring it to terminate the aid, as foreseen under the special EU state aid rules procedures, the UK refused to comply. In the face of such intransigence, the Commission applied to the Court of Justice for an interim order under (the equivalent to) Art. 279 TFEU,[50] in order to require the UK to suspend operation of the farming aid forthwith before it would be capable of creating serious distortions to the operation of the common market affecting the pork meat sector. On the grounds that failure of the UK to adhere to the fundamental standstill obligation constituted a particularly serious interference with the proper operation of the machinery for reviewing state aids, the Court of Justice imposed an interim order against the UK requiring it immediately to cease payment of financial support to its pig farmers.[51] This judgment represented an important legal development, not least as Advocate General Mayras[52] had advised

[42] See eg. C. Gray, "Interim measures of protection in the European Court" (1977) *European Law Review* 4 at p. 85. See also M. Berri, "The special procedures before the Court of Justice of the EC" (1971) *Common Market Law Review* 8 at p. 5, who does not make any reference to any potential connection between interim relief and infringement proceedings.

[43] The second round infringement action, established since October 1993 when the Treaty on European Union (Maastricht Treaty) entered into force, may ultimately lead to the imposition of a financial penalty on the defendant Member State by the Court.

[44] The infringement procedure under Art. 258 TFEU has remained essentially intact since the original founding Treaty of Rome 1957.

[45] It is currently estimated that 68% of complaints sent to the Commission against Member States are resolved before the issue of a letter of formal notice and 84% prior to reasoned opinion stage: See Section 2.2 of COM(2009)675 Commission Report *–26th Annual Report on the Monitoring of Community Law (2008)*, of 15.12.2009.

[46] Case 31/77R *Commission v UK* [1977] ECR 921.

[47] Case 61/77R I *Commission v Ireland* [1977] ECR 937 and Case 61/77R II *Commission v Ireland* [1977] ECR 1411.

[48] Now regulated under Art. 108 TFEU (replacing Art. 93 of the former EC Treaty).

[49] See Art. 108(3) TFEU, final sentence.

[50] At the material time this was Art. 186 of the former EEC Treaty.

[51] Case 31/77R, at paras.20 and 24 of the judgment.

[52] Advocate General Mayras' Opinion in Case 31/77R *Commission v UK* [1977] ECR 921 esp. at section IV of his opinion on pp. 934–5.

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the Court it had no jurisdiction to impose an interim order on Member States.

Whilst *Pig Producer Aid* had clarified that it was possible for the Commission to rely on the interim measures procedure in conjunction with state aid law enforcement, it was not until a short while later in 1977 in *Irish Fisheries* that the Court had an opportunity to confirm that such measures could be requested in the context of general infringement proceedings pursued by the Commission under Article 258 TFEU. In *Irish Fisheries*, the Commission had taken exception to the Irish Government's decision to ban the entry of medium-sized and large merchant fishing vessels[53] in an area of the Irish Sea, ostensibly introduced on grounds of ensuring conservation of local fish stocks. Specifically, the Commission considered that the ban was indirectly discriminatory on grounds of national origin, contrary to the EU fisheries rules in force at the time which required Member States to grant EU fishing vessels equal access to fish within internal territorial waters. In practice, the Irish conservation rules affected far more vessels registered with countries other than Ireland. The Commission decided to apply for interim measures at the same time as referring its main infringement action to the Court of Justice, and ultimately succeeded in persuading the Court to order the Irish Government to suspend its ban pending the outcome of the main proceedings. Whilst initially the Court decided to defer its decision on interim relief order in order to allow the parties to agree to an alternative solution for Irish conservation plans compatible with EU obligations,[54] it subsequently determined that an order should be warranted in the light of the failure of the Commission and Ireland to agree to a resolution suitably swiftly.[55] In his advice to the Court and in contrast with the analysis expressed in the opinion of his colleague Advocate General Mayras in *Pig Producer Aid*, Advocate General Reischl opined that there was nothing in the wording of the relevant EU treaty provisions on interim measures which suggested that the Commission should not be entitled to request emergency measures from the Court in an infringement action against a Member State, in order to obtain a judicial order suspending the operation of national legislation.[56] The Court effectively endorsed the Advocate General's analysis, in holding that an interim order should be made against the Irish Government.

A number of commentators have noted that the Court's confirmation that applications for interim measure may be used in conjunction with infringement proceedings under Art. 258 TFEU has substantially strengthened the law enforcement powers of the Commission and Court *vis-à-vis* Member States. Notably, an interim measure order enables the Court to direct a defendant Member State to undertake specific corrective action. This contrasts with the declaratory judgment under Art. 258 TFEU, which devolves legal responsibility to the defendant Member State on determining how to achieve compliance with the Court's ruling.[57] The availability of emergency measures in the context of infringement proceedings means that the Commission has, potentially at least, the sharpest of legal tools at its disposal in the pursuit of public interest litigation. For instance, interim relief can be of potentially crucial importance in the context of certain environmental infringements, where any declaratory judgment from the Court might be too late to prevent irrevocable ecological damage arising from misapplication of EU environmental law.[58] It is also of potential benefit to members of the public reporting and providing evidence of misapplication of EU law to the Commission, sources of information who might not necessarily have the finances available to undertake legal action at national level. The case law on interim relief reveals that small and medium sized enterprises registering complaints about breaches of single market rules have benefited quite significantly from the Commission using the interim relief procedure.[59] More recently, as is discussed more fully in section III.2.2 below, it is apparent that environmental NGOs have begun to become aware of the possible opportunities of seeking urgent legal intervention from the Commission in order to prevent or minimise breaches of EU environmental legislation. However, it should also be recognised that the Commission retains ultimate power to select what it considers to be priority cases warranting intervention,[60] and the absence of investigative powers and law enforcement

[53] The ban applied to vessels over 33m in length or having an engine powered more than 1100hp.

[54] Case 61/77 *R Commission v Ireland* [1977] ECR 937.

[55] Case 61/77 R-II *Commission v Ireland* [1977] ECR 1411.

[56] Case 61/77 R *Commission v Ireland* [1977] ECR 937 at 954.

[57] See eg. F. Castillo de la Torre, *supra* note 25 at p. 342; P.Craig, G. De Burca, *EU Law: Text, Cases and Materials* (4 ed., 2007) at p. 457; L.Gormley (Ed.), *Kapteyn and Verloren van Themaat's Introduction to the Law of the EC* (3 ed., 1998)at p. 454; and R. Wainright, "Article 186 EEC: interim measures and Member States – a case note on Cases 31/77R and 53/77R *Commission v UK* and *UK v Commission* and Case 61/77R *Commission v Ireland*" (1977) *European Law Review* 2 at p. 354

[58] M. Hedemann-Robinson, *supra* note 19 at p. 105.

[59] See eg. the following examples where the Commission has taken action in response to complaints from commercial enterprises: Case 42/82R *Commission v France* [1982] ECR 841; Case 45/87R *Commission v Ireland* [1987] ECR 783; Case 154/85R *Commission v Italy* [1985] ECR 1753; Case C-246/89R *Commission v UK* [1989] ECR I-3125; Case C-195/90R *Commission v Germany* [1990] ECR I-2715; Case C-320/03R *Commission v Austria* [2003] ECR I-7929.

[60] The Court of Justice has confirmed that the Commission retains discretion over which infringement cases it decides to prosecute: see eg. Case 247/87 *Star Fruit v Commission* [1989] ECR 291.

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personnel have been important factors which have limited possibilities of such intervention in practice. Some commentators have considered that that the interim measures procedures may have a positive impact in terms of combating against foot-dragging on the part of Member States in complying with their Union obligations.[61] However, this proposition is questionable, given that interim relief is only available to the Commission in the context of infringement cases in a relatively limited set of circumstances which convince the Court of Justice that the situation is urgent from a legal perspective. A failure on the part of a Member State to comply with an EU norm, however strategically important in might be in terms of policy, may not readily translate itself into being a situation that is urgent for the purposes of interim relief in the light of the Court's case law. Following on from the early cases in *Irish Fisheries* and *Pig Producer Aid*, the Court of Justice has developed a fairly rich seam of jurisprudence on the nature and scope of interim measures applications. In particular, over time it has developed some important ground rules relating to the evidentiary requirements needed to be fulfilled by applicants when seeking emergency judicial relief from the Court. These judicial developments have had both negative as well as positive impacts on the ability of the Commission in practice to seek to underpin its infringement casework with urgent intervention when required.

In some respects, the Court of Justice's interpretation of the Union's legal framework on interim relief has benefited the Commission in general terms in its law enforcement capacity. Notably, the Court has confirmed that the Commission is not required to place a financial deposit with it when filing an application for an interim measure, notwithstanding that adverse economic losses might well be sustained by defendant Member States or third parties as a result of a suspension of particular activities pending final judgment in the main infringement action. In its view Art. 86(2) RP[62] is to be read as requiring a security to be lodged only by a party potentially liable for the sums the security is intended to cover and that there is a risk of insolvency of that party.[63] This approach of the Court of Justice stands in stark contrast to the legal position adopted by some national legal systems, such as that adopted in the UK, which require applicants for interim measures under national law to lodge financial guarantees with national courts in order to cover economic losses sustained by defendants in the event that the applicant ultimately loses the case. Just such a requirement constituted a major problem in the infamous *Lappel Bank* case,[64] where the environmental non-governmental organisation Royal Society for the Protection of Birds (RSPB) sought judicial review of a decision taken by the UK Government which failed to designate a particular coastal site as a special protection area (SPA) in accordance with the EU Wild Birds Directive.[65] The RSPB contended that the UK Government had contravened the EU Directive by assuming that it could exempt a site from SPA designation on economic grounds. Under English law, a cross-undertaking in damages would have been required to be paid by RSPB in support of any application of its part for injunctive relief against the commencement of development on the site. In the event, the RSPB was unable to afford the sum of money required for such a national judicial order and accordingly could not prevent development operations taking place prior the determination of the legal dispute. The Court of Justice, in a preliminary ruling[66] issued to the UK's Supreme Court (formerly House of Lords), held ultimately in agreement with RSPB that Member States were barred under Article 4 of the Directive from taking into account economic reasons for determining the designation and boundaries of an SPA. It decided not to comment on how the issue of interim relief was handled by the UK courts, notwithstanding an invitation to do so by RSPB, no doubt as a result of the omission by the House of Lords to request advice on any impact of EU environmental law might have on requirements under UK law to lodge financial security in connection with applications for interim relief.[67] The issue of legal costs imposed at national level for the purposes of securing urgent EU environmental law enforcement remains essentially unresolved.[68]

[61] T. Hartley, *The Foundations of European Community Law* (6 ed., 2007) at p. 311.

[62] Art. 86(2) RP states:

"The enforcement of the order may be made conditional on the lodging by the applicant on the lodging by the applicant of security, of an amount and nature to be fixed in the light of the circumstances"

[63] See eg. Case C-195/90R *Commission v Germany* [1990] ECR I-3351 at para. 48 of judgment. In that case, Germany pleaded unsuccessfully to the Court that the Commission should be required to lodge a deposit of the equivalent of £170m (DM 500m) pending final judgment to cover payments of lost tax revenue as a result of the Commission seeking to gain an injunction against the Member State from imposing a particular levy on heavy goods vehicles which the Commission considered to be discriminatory on grounds of nationality contrary to Art. 92 TFEU (ex Art. 72 EC).

[64] *R v The Secretary of State for the Environment, ex parte RSPB* [1997] Env L R 431.

[65] Directive 2009/147 on the conservation of wild birds (OJ 2010 L20/7) (codified version), replacing Directive 79/409 (OJ 1979 L103/1) as amended.

[66] Case C-44/95 *R v The Secretary of State for the Environment, ex parte RSPB* [1996] ECR I-3805.

[67] See J. Holder J, "Case note on Case C-44/95 *R v The Secretary of State for the Environment, ex parte RSPB* "(1997) *Common Market Law Review* 34 at p. 1469.

[68] Notably, the Council of the EU has refrained from considering the Commission's 2003 legislative initiative on access to environmental justice which, if promulgated,

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Of further benefit to the Commission has been the Court of Justice's preparedness to allow the Commission to set tight deadlines in the administrative phase of infringement proceedings prior to an application for interim relief.[69] Whilst Art. 258 TFEU does not stipulate any minimum periods to be granted to a defendant Member States to respond to the letter of formal notice and reasoned opinion, jurisprudence of the Court has confirmed that deadlines for responses must be reasonable, as appropriate to the particular circumstances of the case at hand.[70] Accordingly, where the Commission has considered a particular case has warranted especially urgent corrective on the part of the defendant Member State, the Court has confirmed that the Commission may require relatively very short response times from the defendant in relation to its letter of formal notice and reasoned opinion.[71] For instance, in the *Austrian Lorry Ban* litigation,[72] the Commission applied to the Court for an order suspending the application of national legislation authorising the introduction of a ban on certain heavy goods vehicles using the A12 international transit route motorway in the region of Tirol, having completed the entire administrative phase of infringement proceedings within under two months, much shorter than the usual practice of taking up to one year or more. The Commission considered on balance that the ban contravened the prohibition contained in Art. 34 TFEU on measures having equivalent effect to quantitative restrictions on the free movement of imports and could not be justified on environmental or public health grounds, notwithstanding that the action taken by the Tyrolean authorities was done in order to ensure compliance with EU air quality legislation. The Court of Justice dismissed the argument of the Austrian Government that the infringement action should be declared inadmissible, on grounds that the response times afforded to it had been unduly brief. It confirmed previous case law in holding that the Commission is entitled to fix deadlines for completion of the administrative phase that take account of the circumstances of the particular infringement case.[73] A note of caution should be added here. Determining what amounts to a reasonable amount of time for a defendant Member State to respond to the first and second warnings in the administrative phase of infringement proceedings under Art. 258 TFEU is not necessarily straightforward to determine, and the Court of Justice has indicated that it is prepared to hold infringement actions ultimately inadmissible if it considers unduly short timelines have been imposed on defendants in the circumstances.[74] This factor of uncertainty undoubtedly places pressure on the Commission to avoid setting very short time limits if at all possible, and makes its task of demonstrating urgency when applying for interim relief more challenging.

In a number of respects, though, the Court has interpreted the legal framework underpinning interim judicial relief at EU level in a manner that has significantly restricted the range of possibilities for the Commission to be able to use Arts. 278 and 279 TFEU in conjunction with its infringement casework. In particular, the Court has confirmed that interim measures may not be used to address instances of incorrect interpretation of EU law at national level, such as erroneous provisions contained in legislation

cont.
would stipulate that environmental proceedings are not to be "prohibitively expensive": (see Art. 10 of COM(2003) 624) Commission draft Directive on access to justice in environmental matters). Member States are obliged to ensure that unreasonable costs are not imposed on applicants seeking judicial review of decisions made at national level in contravention of the Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L175/40) (Art. 10a) or Directive 96/61 on Integrated Pollution Prevention and Control (OJ 1996 L257/26) (Art. 15a), both amended *inter alia* by Directive 2003/35 (OJ 2003 L156/17). In March 2010, the Commission issued a reasoned opinion against the UK on account of the latter failing to adhere to these commitments on costs (European Commission RAPID Press Release: IP/10/312, Brussels, 18 March 2010).

[69] D. Wyatt, A. Dashwood, *European Union Law* (5 ed., 2006) at section 13–013 at pp. 428–429. See eg. Case C-1/00 *Commission v France* [2001] ECR I-9989.

[70] See for example Case 293/85R *Commission v Belgium* [1985] ECR 3521.

[71] See eg. Case 74/82 *Commission v Ireland* [1984] ECR 317 (free movement of goods case) where the deadlines for responses to the letter of formal notice and reasoned opinion were 2 months and 5 days respectively; Case C-328/96 *Commission v Austria* [1999] ECR I-7479 (public procurement case) where the deadlines for responses to the letter of formal notice and reasoned opinion were 1 and 2 weeks respectively and Case C-1/00 *Commission v France* [2001] ECR I-9989 (free movement of goods case).

The short deadlines were all upheld by the Court of Justice.

[72] Cases C-320/03R *Commission v Austria* [2003] ECR I-7929 (of 30.7.2003), C-320/03R *Commission v Austria* [2003] ECR I-11665 (of 2.10.2003), C-320/03R *Commission v Austria* [2004] ECR I-3593 (of 27.4.2004) and C-320/03 *Commission v Austria* [2005] ECR I-9871.

[73] Case C-320/03 *Commission v Austria* [2005] ECR I-9871 at para. 34 of the judgment.

[74] See Case 293/85 *Commission v Belgium* [1988] ECR 305, a case involving discriminatory access to vocational training contrary to Art. 18 TFEU (ex Art. 12 EC). The Court held that the Commission had imposed unreasonably short deadlines for responses to the letter of formal notice and reasoned opinion of 8 and 15 days respectively. The Court had initially granted interim relief in 1985 (Case 293/85R *Commission v Belgium* [1985] ECR 3521). However, the particular legal issue of admissibility of infringement proceedings was reserved until the judgment in the main action, which was delivered only in 1988.

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intended to transpose EU directives into national law or erroneous legal opinions held by national authorities on the meaning of EU law.[75] The Court's reasoning appears to centre on the argument that if interim measures could be granted in these cases, this would prejudice the judicial decision in the main infringement action, a consequence that would run counter to the conservatory objectives of the interim relief legal framework. Although authoritative, such a view is not really that convincing given that interim relief applications inevitably require the Court to consider whether or not the applicant has a *prima facie* case, as mentioned earlier. The initial view of the Court's President on the merits of the applicant's case may in any case be overridden at the later stage of the main judgment. Accordingly, it is difficult to accept that an interim order may prejudice the main judgment in the sense of rendering it meaningless. A stronger argument against awarding interim measures in interpretation-related cases might be thought to lie in considering whether there is a sufficient degree of urgency at hand to warrant emergency judicial intervention. However, this is something to be considered as a factor in each individual case and not as something that would serve to rule out interim measures in all such cases. In the environmental sector, incorrect transposition of EU environmental legislation into national law has consistently been considered by the Commission to comprise amongst the most serious type of breach by Member States that may well serve to lead to a number of violations of key sources of EU environmental law across the defendant's national territory. Interim relief could theoretically serve as a useful and appropriate tool in order to prevent a series of potential or imminent serious breaches of EU environmental law on the ground resulting from a situation of non-conformity. However, the Court of Justice has not adopted such an expansive view of the criterion of urgency underpinning the legal framework for interim measures.

The Court of Justice has also appeared to rule out the possibility of the Commission bringing applications for interim relief in respect of second round infringement proceedings.[76] Accordingly, even where the Court has found that a Member State has violated a norm of EU law under Art. 258 TFEU, the Commission has no possibility of being able to request an interim relief order from the EU's judicial body in conjunction with any subsequent infringement legal proceedings under the auspices of Article 260(2) TFEU, irrespective of the degree of urgency of the situation required to take remedial action, such as from an environmental perspective. The Court has justified the exclusion of interim relief from second round proceedings on the grounds that a first round judgment issued under the auspices of Art. 258 TFEU has legal force as *res judicata*, so that Member States are bound by virtue of the judgment to take immediate steps to ensure that all of its conclusions that a breach of EU law has occurred are adhered to as swiftly as possible. That first round judgments have a legally binding effect is underpinned by Art. 260(1) TFEU, which requires Member States to take necessary measures to comply with the judgment. The Court has interpreted from this treaty provision that Member States are under a general duty to undertake steps to ensure that compliance is achieved with the minimum of delay as appropriate in the circumstances. However, as was indicated by the Court in the *Spanish Bathing Waters* litigation,[77] the Commission is obliged to ensure that sufficient time is allowed for a Member State to comply with EU legislative obligations. In that case, it rejected the Spanish Government's argument, supported by the Advocate General, that 31 months had been an unreasonably short time span set by the Commission in its letter of formal notice to Spain for compliance with an earlier judgment of the Court[78] holding the Member State had breached minimum water quality standards set by the EU Bathing Waters Directive.[79] However, the Court also made it clear that the test of reasonableness depended on assessing whether sufficient time is provided to a defendant in the particular circumstances of the case. In the instant case, it considered that sufficient time (three bathing seasons) had been granted by the Commission in order to allow for the requisite complex and long-term operations required for improving bathing water quality in order to adhere to the first judgment.[80]

One might think the fact that the second round infringement procedure under Art. 260(2) TFEU, in leading ultimately to the possibility of potentially severe financial sanctions being imposed by the Court, might serve to place pressure on defendant Member States to take steps to ensure swifter compliance with first round judgments. However, the available evidence[81] appears to be that Member States are frequently not significantly influenced by the onset of second round infringement proceedings under Art.

[75] See eg. Case 352/88 R *Commission v Italy* [1989] ECR 267, at para. 22 of judgment.
[76] Cases 24, 97/80R *Commission v France* [1980] ECR 1319.
[77] Case C-278/01 *Commission v Spain* [2003] ECR I-14141.
[78] Case C-92/96 *Commission v Spain* [1998] ECR I-505.
[79] Directive 76/160 concerning the quality of bathing water (OJ 1976 L31/1), as amended, revised and updated most notably and recently by Directive 2006/7 (OJ 2006 L64/37).
[80] The Commission considers that it may require at least 6 months to verify whether a Member State has complied with a first round judgment which involves the monitoring of compliance with technical EU environmental quality standards, such as those applicable in the field of EU water legislation: see section (iii) of the Environment Directorate-General's report on *Statistics on Environmental Infringements*, published online at: http://ec.europa.eu/environment/legal/law/statistics.htm (accessed 9.6.2010).
[81] See M. Hedemann-Robinson, *supra* note 17 at p. 318.

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260(2) TFEU until the relatively last minute, namely when the matter is finally referred to the Court of Justice. The recent shortening of the administrative phase in second round proceedings, by virtue of the Lisbon Treaty 2007 eliminating the need for a reasoned opinion, is likely to add some degree of pressure on defendant Member States to take steps to adhere to first round judgments more quickly, but it is questionable whether this will make a genuinely significant impact in practice. The Commission aspires to quickening the pace of the second round infringement action procedure,[82] but barring non-communication cases it is still likely to be several months, even years, between the Commission opening an infringement case and the Court of Justice handing down a judgment containing a financial penalty under Art. 260(2) TFEU. It has been thought that the Court's position against the use of interim measures as a means of enforcing its judgments is informed by a concern that such a move could serve to undermine respect amongst Member States for its judgments.[83] However, that argument is unconvincing, given that there has been over the years a steady and persistent increase in the number of second round infringement proceedings needed to be launched by the Commission as a result of failures on the part of Member States to attend to first round Court judgments against them. The Environment Directorate-General of the Commission has reported that, as at the end of 2009, it was pursuing no less than 61 second round infringement proceedings against defaulting Member States.[84] Arguably, the second round infringement procedure as currently constructed under Art. 260(2) TFEU, serves to underline a perception that first round judgments do not really count.

One other general judicial development that has served to render interim relief applications both challenging and somewhat unpredictable is the Court of Justice's insistence that the applicant show that on the balance of interests emergency judicial intervention is justified. The "balance of interests" has been noted in various quarters as a controversial judicial innovation. There are two principal problems involved with its inclusion in the Court's appraisal of a request for interim relief. First, the test is not expressly set down in the relevant EU provisions on interim relief.[85] Specifically, the relevant treaty rules are silent as to whether this is required,[86] whilst the more detailed procedural rules on interim relief refer only to an application needing to state the subject-matter of proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case.[87] Second, the test is inherently a subjective exercise and steers the Court rather dangerously close to weighing up policy preferences as opposed any objective legal interests of the respective parties.[88] This was illustrated most vividly in the series of interim measure decisions handed down in the above-mentioned *Austrian Lorry Ban litigation*.[89] In that case, the Commission intervened to prevent the operation of Austrian legislation which would have banned the movement of heavy goods lorries over 7.5t carrying certain types of cargo on a motorway section in Tirol as a means of complying with EU air quality objectives. In assessing the elements of urgency and balance of interests together, the Court President found that the economic interests of freight operators should be held to prevail over competing environmental concerns underpinning the national legislative intervention, in terms of assessing whether an interim measure was warranted in the case. Noting on the one hand that harm to environmental interests is to be viewed generally irreversible on account of the fact that ecological damage more often than not cannot be addressed retroactively, the Court President considered nevertheless that in this case the immediate adverse economic impacts resulting from the prospective ban on HGV movements outweighed environmental considerations.[90] Specifically, he reasoned that whilst the temporary suspension of the travel ban pending final judgment would not undermine the long-term environmental and health objectives underpinning EU air quality legislation in securing reductions in air pollution, the introduction of the travel ban would significantly affect the operation and financial stability of several commercial undertakings involved in road freight operations within the single market. The Court President's legal analysis is highly questionable, in that he appears to fall in to the trap of assuming that long-term policy objectives do not relate to interests of an urgent nature. The Commission

[82] The Commission has set a general target period of 12–24 months to cover the period between issuing a letter of formal notice and referral to the Court of Justice in second round infringement actions, "subject to the specific circumstances of exceptional cases": see p. 9 of COM(2007)502, Commission Communication: *A Europe of Results – Applying Community Law* (5.9.2007).

[83] See eg. L. Neville Brown *et al.*, *supra* note 8 at pp. 117 and 133.

[84] See section (iii) of the Environment Directorate-General's report on *Statistics on Environmental Infringements*, published online at: http://ec.europa.eu/environment/legal/law/statistics.htm (accessed 9.6.2010).

[85] Noted eg. by F. Castillo de la Torre, *supra* note 25 at p. 319.

[86] Namely, Arts.278–279 TFEU and Art. 39 SCJ (which is contained in a protocol to the TFEU and TEU).

[87] Art. 83(2) RP.

[88] See A. Schrauwen, "Case note on case C-320/03R(02) and (03) *Commission v Austria*" (2005) *Common Market Law Review* 42 at p. 857.

[89] Cases C-320/03R *Commission v Austria* [2003] ECR I-7929 (of 30.7.2003), C-320/03R *Commission v Austria* [2003] ECR I-11665 (of 2.10.2003) and C-320/03R *Commission v Austria* [2004] ECR I-3593 (of 27.4.2004).

[90] See para. 92 et seq of C-320/03R *Commission v Austria* [2003] ECR I-11665.

estimated in 2000 that a total of 348,000 premature deaths are being caused annually across Europe due to exposure to anthropogenic particulate matter (PM2.5), the transport sector being one of the key sources of particulate matter emissions.[91] The case also serves as a stark reminder of the fact that the Commission seeks to defend a number of policy objectives enshrined within EU law, including ones that may not infrequently conflict with environmental protection goals.[92]

III. Interim Measures and Environmental Infringement Cases

Having mapped out the general legal backdrop to the evolving relationship between interim measures and infringement actions, the second and main part of this article focuses specifically on the relevance and impact of interim measures in relation to the prosecution of breaches of EU environmental law by the Commission. Until 2007, the Commission has showed relatively little interest in using the interim measures legal procedures under the EU's treaty framework in environmental cases. Notwithstanding that the Court of Justice had already clarified by the late 1970s that it was, as a matter of general principle, possible for the Commission to apply for emergency judicial measures in the context of infringement proceedings, the Commission was relatively slow in taking advantage of this opportunity. The first occasion that the Commission sought to apply to the Court of Justice for such relief measures in an environmental suit was in the *Leybucht dyke*[93] case in 1989. As a result of the Commission being unsuccessful in that case, it appears that there was subsequently for a long period little if any faith attached by the legal services within that institution in applying for emergency relief in environmental cases.

3.1 The *Leybucht Dyke* case and the initial approach of the European Commission

The *Leybucht dyke* case was the first occasion in which the Commission decided in an environmental case to apply to the Court of Justice for interim measures. The case involved a dispute between the Commission and the German Government, concerning a decision by a local authority within the region of Lower Saxony to authorise the construction of certain coastal protection works located within a special protection area (SPA) known as Leybucht, a site falling under the auspices and protection[94] of the EU Wild Birds Directive. The Leybucht is a bay approximately 5km in diameter located within the Wattenmeer of East Friesland, and is host to a number of sedentary and migratory wild birds, in particular the avocet, using it for feeding, nesting and as a staging area. The coastal protection scheme involved *inter alia* the strengthening and extension of dyke installations and a series related projects affecting the Leybucht area in order to shore up shoreline defences against flooding from storm tides.[95] Approved in 1985, construction work on the scheme commenced in 1986. The Commission, alerted to the project by complaints from the general public, considered that completion of the coastal defence project could result in the disappearance of the habitats of various bird species as a result of disturbances caused by construction, contrary to the provisions of the Directive.[96] Specifically, the Commission assessed that some 10% of breeding pairs of birds would be affected, if the next stage of the development project (referred to as Stage IV) received the green light. In July 1989, the Commission applied to the Court of Justice for interim measures,[97] requesting that that the German Government be required to ensure the suspension of the commencement of Stage IV construction works pending the outcome of the main enforcement action in the case. Whilst in the Commission's view delayed completion of the construction project would not have any appreciable financial repercussions, a failure to secure interim protection for the SPA site would result in environmental damage being sustained by birds resident on the SPA which a declaratory judgment in the main action filed against Germany would not be able to remediate.

In assessing the Commission's application for interim relief, the President of the Court of Justice noted that the main legal problem concerning the Commission's request lay rooted in the element of

[91] See report of this in the European Environment Agency's *Europe's Environment – The Fourth Assessment* (2007, EEA Copenhagen) at p. 83.

[92] As illustrated by the following cases brought by the Commission: Case 302/86 *Commission v Denmark (Danish Bottles)*[1988] ECR 4607, Case C-463/01 *Commission v Germany (Beverage Container Recycling)* [2004] ECR I-11705.

[93] Case C-57/89R *Commission v Germany* [1989] ECR 2849 and Case C-57/89 *Commission v Germany* [1991] ECR I-883.

[94] The Commission was notified by Germany in 1988 that the Leybucht had been classified as an SPA, the area already having been subject to conservation protection under national legislation in December 1985.

[95] Storm tides were reported in proceedings to have breached the coastal defences on three previous occasions: 1953, 1962 and 1976.

[96] See Article4(4) of the Wild Birds Directive, which requires Member States to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting birds on protection areas, insofar as these would be significant having regard to the conservation objectives underpinning Article 4.

[97] Under the auspices of (the equivalent to) Article 279 TFEU. At the material time this was Art. 186 of the former EEC Treaty.

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urgency.[98] In taking on board the fact that the Commission had only sought an injunctive order after construction of the German regional authority's development project was well under way and a large part of the works had been completed, the Court's President considered that interim relief would only be appropriate if the Commission was able to show that the next stage of dyke development would cause serious harm to the protection of wild birds in the Leybucht site.[99] On the balance of evidence presented to him, the Court President was unable to accept that the Commission had shown that this would be likely to occur. Specifically, the work scheduled to take place in 1990 did not envisage reduction in the bay's area or involve a distance between the anticipated works and avocet breeding grounds closer than previously experienced in relation to previous works. In addition, data submitted by the German Land of Lower Saxony indicated that avocet numbers had fallen prior to the project, with a slight trend towards stabilising after 1986. Neither had the Commission been able to sustain its claim that the SPA would be undermined by an increase in tourism resulting from the development, given that pleasure-craft sailing in the bay had been specifically intended to be reduced by the project and concerns regarding a prospective rumoured construction of large car parks in the area were stated to be unfounded by the German Government. Accordingly, the Court President dismissed the application for interim measures, holding that the Commission had failed to establish an urgent need to interrupt the completion of the dyke project.[100]

The failure on the part of the Commission in *Leybucht* to secure injunctive relief against the German Government exposed some serious problems facing the Commission in terms of its approach and capacity to utilise the interim measure procedures. A particularly key aspect to this case was the temporal dimension, in that fact that the Commission had intervened belatedly and then proceeded rather slowly with legal action. It commenced the infringement action some two years after the project had received approval, namely in August 1987, with a letter of formal notice sent to the German Government setting out its objections. That was followed up only around a year later in July 1988 with a second formal warning communication in the form of a reasoned opinion. Finally, it was not until another year had passed in July 1989 that the Commission decided to apply to the Court of Justice for an emergency injunction against the German Government at the same time as it referred its infringement proceedings to the Court in the main action. It was evident that the Commission had failed to complete the administrative phase of the enforcement procedure in a sufficiently short timescale which would have been appropriate in light of the urgency required for an application for interim measures. The timing of the successive stages in its legal action suggested that the Commission had simply applied its standard approach at the time for dealing with infringement cases, namely providing a year for the defendant Member State to respond to each of its warnings in the administrative phase. The delays in processing the case were partly down to the ineffective practices of the Commission services involved in environmental casework. For instance, whilst Commission had built up a considerable amount of experience in handling interim measures applications swiftly in other sectors of policy by the time of the *Leybucht* interim measures application, this institutional knowledge and expertise had quite evidently and unforgivably not been applied to the environmental sector by the time of that case. Prior to *Leybucht*, the Commission had overseen rapid turnaround of the administrative phase of infringement proceedings in other non-environmental cases, so as to be able to apply to the Court for injunctive relief as rapidly as possible consonant with the requirement of urgency. However, as was witnessed in *Leybucht*, the Commission services handling that case waited almost two years before applying to the Court for an emergency injunction. It should also be pointed out that structural issues connected with the infringement proceedings procedure served to hamper processing of the case. In particular, as with all enforcement casework, it is a legal requirement that the administrative phase of delivering the letter of formal notice and reasoned opinion to defendant Member States as well as allowing sufficient time to receive and review their responses to them needs to be completed before the Commission is entitled to apply to the Court of Justice for interim relief. At the very least, depending on the complexity of the particular case, this may take some weeks to complete which prevents the Commission from being able to request interim relief from the Court at the earliest most suitable opportunity. It may even be the case that the time needed to complete the administrative phase may mean that the element of urgency in an environmental case is lost, if defendant Member States are able to authorise environmentally damaging activities which prove to be irremediable.

In addition to the temporal factor, it was also evident that the Commission services' overall approach to the possibility of utilising the potential of interim measures in environmental enforcement casework up until relatively recently has been sceptical to say the least. The standard practice of the Commission in following up suspected instances of incorrect application of EU environmental law has been to rely upon the standard law enforcement framework provided under Articles 258-260 TFEU without recourse to interim relief. Even where there

[98] Case C-57/89R *Commission v Germany* [1989] ECR 2849 at para. 16 of the judgment.
[99] *Op. cit.*, at para. 18 of the judgment.
[100] *Op. cit.*, paras. 19–22 of the judgment.

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have been instances of breaches of EU environmental law that the Commission could have taken assertively and rapidly with a view to applying for emergency measures from the Court of Justice, it has been evident for several years until most recently that there has been clear institutional reluctance on the part of the Commission to follow such a course of action. For example, it has been reported that in a case against Belgium[101] over an ongoing breach of EU water quality legislation which had actually led to fatalities, the Commission refrained from applying for interim measures on the grounds that the deaths had occurred some years previously.[102] The Commission decided to rely upon the standard infringement proceedings alone, which took practically 4 years to be completed from letter of formal notice to Court of Justice judgment.[103] Moreover, the long-standing cultural resistance to interim measures applications is borne out when one considers that until 2007 the Commission failed to apply in a single instance for injunctive relief from the Court of Justice in an environmental case since *Leybucht*, notwithstanding the fact that the number of cases involving instances of incorrect application of EU environmental law at national level has remained consistently high and have increased substantially in recent years relative to the total amount of environmental infringement casework. Notably, prior to 2005 around a third and since then over half of all ongoing infringement cases under (the equivalent of) Art. 258 TFEU have involved instances of bad application of EU environmental law.[104]

3.2. Recent developments since 2007: a change of approach by the European Commission

Relatively recently, the Commission has signalled a marked change in its approach towards the subject of interim relief measures in the context of infringement proceedings in the environmental sector. Specifically, in a number of cases since 2007 the Commission has, through the legal mechanism of interim relief, been successful in forcing Member States to halt the development of various construction projects considered by it to be in breach of EU environmental legislation. The Commission has been motivated to intervene in this manner, where it is convinced that the consequences of a particular project could prove to have permanent and irremediable damage to the environment. The utilisation of the interim relief procedure by the Commission has been pivotal in determining ultimately a successful outcome of its legal action taken against those Member States, in making sure that defendant Member States do not actively or passively permit illicit construction activity to go ahead prior to the date of the substantive judgment of the Court of Justice on the case as to whether a breach of EU environmental law has actually occurred.

Ligurian Bird Hunting case (Case C-503/06 Commission v Italy)

The first case that genuinely signalled an official revitalised interest on the part of the Commission in interim relief measures in the context of environmental casework was in *Ligurian Bird Hunting*.[105] In this case the Commission decided to take infringement proceedings against Italy on account of the Region of Liguria having passed local legislation which authorised the hunting of birds in contravention of the Wild Birds Directive 79/409/EEC. The origin of the problem dated back to 2001, when the Commission received a complaint that the Italian Region of Liguria adopted Law No34/2001, subsequently amended in 2002,[106] authorised the hunting of wild birds protected under the Directive, principally as a means of preventing damage to olive groves. The Commission took the view that the regional law, as amended, failed to comply with the provisions of the Wild Birds Directive, namely the conditions under Article 9 permitting a derogation from the basic prohibition stipulated in Article 5

[101] Case C-42/89 *Commission v Belgium* [1990] ECR I-2821.

[102] L. Krämer, *supra* note 41 at p. 432.

[103] The court report of the judgment states that the letter of formal notice was issued on 4 August 1986 and the Court judgment was declared on 5 July 1990.

[104] The annual surveys published by the Environment Directorate-General (DG ENV) of the Commission on the implementation and enforcement of EU environmental law have disclosed the following percentages for and numbers of bad application cases for environmental infringements dealt with under (the equivalent to) Art. 258 TFEU: 57% in 2005 (279 cases); 51.58% in 2004 (294 cases); 31.56% in 2003 (95 cases); 27.34% in 2002 (70 cases); 29.57% in 2001(89 cases). The annual surveys are available for inspection on the following DG ENV website: http://ec.europa.eu/environment/legal/law/implementation.htm.

The above data is extracted from the Third to Seventh Annual Surveys covering the years 2001–2005 respectively: SEC(2002)1219; SEC(2003)804; SEC(2004)1025; SEC(2005)1055 and SEC(2006)1055.

The most recent statistical data published on the DG ENV website reveals that the proportion of law enforcement work devoted to bad application cases in the environmental sector as at end 2009 remains the most prevalent form of infringement case comprising: 54.77% of all casework in 2009 (298 cases). There are at the moment relatively considerably fewer ongoing non-communication and non-conformity environmental cases: 13.78% and 27.02% respectively as at end 2009 (75 and 147 cases). See the Commission's online report of *Statistics on Environmental Infringements* which is to be found at the following DG ENV website: http://ec.europa.eu/environment/legal/law/statistics.htm (accessed on 9.6.2010).

[105] Case C-503/06R *Commission v Italy* [2006] ECR I-141; [2007] ECR I-19; Case C-503/06 *Commission v Italy* [2008] ECR I-74.

[106] By virtue of Regional Law No 31/2002 of 13.8.2002.

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against hunting of wild birds.[107] Specifically, the regional law failed to: require hunters to specify a reason under Article 9 for hunting, explain a reason justifying the need for a derogation from a hunting ban, to require checks be made to ensure that no other equally satisfactory solutions to meet the aim underpinning the law could be found, and to indicate the authority responsible for determining whether the requirements in Article 9 are satisfied. Accordingly, the Commission launched infringement proceedings against Italy under (the equivalent to) Art. 258 TFEU in order to secure an amendment to the national legislation. On 31 October 2006, after the expiry of the deadline prescribed in the reasoned opinion set by the Commission for compliance with the terms of the Wild Birds Directive, the Region of Liguria passed legislation (Regional Law No36/2006) which replaced the 2001 law. However, the 2006 regional legislation contained the same legal deficiencies as its 2001 predecessor, and authorised the hunting of wild bird species throughout the entire hunting season of 2006/7 to the end of January 2007. The 2006 Ligurian legislation authorised the hunting of starlings (*sturnus vulgaris*). Given that Italy was not provided with a specific dispensation under the terms of the Wild Birds Directive to hunt starlings,[108] it was required to meet the strict requirements set out under Article 9 in order to derogate from the hunting ban.

Mindful of the need to take action as swiftly as possible in order to prevent the Italian regional legislation having the effect of authorising hunting for the impending 2006/7 hunting season, on 13 December 2006 the Commission sought interim measures[109] from the Court of Justice against Italy, at the same time as referring the substantive infringement proceedings against the Member State to the Court. The Commission requested the Court to suspend the operation of the 2006 Lugurian law for the 2006/7 hunting season, and also requested that the Court's President ensure that an interim order was imposed for this purpose prior to hearing the defendant Member State's observations under Article 84(2) RP, presumably in order to ensure that a judicial decision on an interim measure was arrived at before the commencement of the 2006/7 hunting season in earnest.

The Court's reaction to the Commission's request was swift. Six days after the Commission's request for judicial support, the President of the Court of Justice on 19 December 2006 issued an interim order under Art. 84(2) RP, requiring the suspension of the 2006 Ligurian law until the Court delivered an order terminating the interim measure's effects.[110] The President held that the legal requirements for an interim measure had been fulfilled. As regards the criterion of urgency, he recognised that the 2006 regional law risked causing serious and irreparable harm to protected wild bird species, given that on previous occasions the Court had made it clear that bird hunting is being fully capable of disturbing wildlife and impacting upon species conservation adversely.[111] As regards the balance of interests in the case, the Court President considered that, whereas the risk of serious and irreparable harm had been proven, it did not appear that the suspension of the operation of the Italian legislation would seriously compromise or undermine its objects, which were to ensure that the requirements of Article 9 of the Wild Birds Directive were complied with. In particular, the 2006 law did not specify with sufficient precision the need for a derogation from the hunting ban, as required by the EU legislation.

The response of the Italian Government to the Court of Justice's interim order was equally rapid, indicating the seriousness with which the defendant Member State treated the EU judiciary's decision. In presenting its observations to the Court on 30 December 2006, Italy requested the Court to terminate the interim order, given that it had taken steps to overturn the contested regional law in Liguria. Specifically, it informed the EU's judicial institution that the Italian national legislature had adopted legislation on 22 December 2006 suspending the operation of the 2006 Ligurian law, with effect from 27 December. In addition, the Italian national government also notified the Court of its decision to take legal action to contest the legality of the regional

[107] Since 2001, the Commission has published guidance on the control of bird hunting under the auspices of the Wild Birds Directive, most recently in 2008 with its *Guide to Sustainable Hunting under the Birds Directive* (European Commission, 2008), available for inspection on the Commission's Environment Directorate-General's website: http://ec.europa.eu/environment/nature/legislation/birds/directive/index_en.htm

[108] Article 7(1) of the Wild Birds Directive provides for the possibility of wild bird species listed in Annex II to be hunted under national legislation owing to their population level, geographical distribution and reproductive rate throughout the EU. However, this derogation from the general hunting ban is subject to Article 7(2), which states that species referred to in Annex II Part B may only be hunted in the Member States in respect of which they are indicated. The relevant table in Annex II Part B does not indicate Italy as one of the Member States so authorised in respect of starlings. (The Member States so indicated are: Bulgaria, Greece, Spain, France, Cyprus, Hungary, Malta, Portugal and Romania).

[109] The Commission requested interim relief on the basis of both the equivalent provisions to Arts.278 and 279 TFEU (namely Arts. 242 and 243 of the former EC Treaty).

[110] Case C-503/06R *Commission v Italy* [2006] ECR I-141. The Court President is reported as having made the order after hearing an Advocate General (Kokott) in accordance with Art. 85 RP, whose opinion has not been not published.

[111] See Case C-60/05 *WWF Italia* [2006] ECR I-5083 and Case C-435/92 *Association pour la protection des animaux sauvages* [1994] ECR I-67, para 16.

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law, in light of its breach with EU environmental legislation. In the event, the Italian Government's request did not need to receive a substantive judicial appraisal. Given that the request only came to be considered by the Court of Justice on 27 February 2007, namely after the end of January 2007 when the Ligurian law would had ceased to have been operative, the Court's President ruled it to be now devoid of any object.[112]

Subsequent to the Court of Justice's interim order suspending the operation of the Ligurian legislation, the Commission proved to be successful also in its substantive infringement proceedings. Specifically, on 15 May 2008 the Court of Justice declared that Italy had breached Article 9 of the Wild Birds Directive with respect to the adoption of the 2006 Ligurian law.[113] Given that the definitive judgment in the main proceedings was made a significant amount of time after the Commission initially referred the matter to the Court of Justice, namely some 17 months later and over a year after the 2006/7 hunting season had ended, it was patently obvious that the Commission's strategy of seeking to secure an emergency interim injunction against the Italian State had proven to be a pivotal success. For, without the delivery of an interim order from the Court of Justice, no other step could have been taken in practice at European Union level to force the suspension of illicit bird hunting. It is quite probable that, in the absence of the emergency order obtained, the Italian national government would have refrained from intervening in the case in support of the Commission and waited instead until the outcome of the substantive infringement proceedings some time later. Indeed, this is all the more likely to have been the case, given that the Ligurian regional government evidently fiercely contested the Commission's legal action[114] and that five years had already elapsed since the Italian national government was sent a letter of formal notice concerning this matter. In any case, the common practice of defendant Member States in the context of infringement proceedings is not to defer to the legal opinion of the Commission ahead of final Court judgment. But for the interim order, the Commission would not have been able to prevent illicit bird hunting taking place in Liguria in the 2006/7 and 2007/8 seasons, with the consequence that serious and potentially irreparable damage would have been perpetrated on starling populations in Liguria. With an interim order in place, the Italian State was under a formal legal duty to take immediate action to secure the suspension of the operation of the regional law, pending the outcome of the substantive legal action against it. Without such an order in place, it is difficult to see how Italy otherwise was obliged under EU law to take any such action in the run up to the main judgment,[115] a factor which would have served to undermine the effectiveness of the infringement action.

Rospuda River Valley case (Case C-193/07 Commission v Poland)

Shortly after the Commission took action in relation to *Ligurian Bird Hunting*, it had a further opportunity in another environmental case to utilise the interim measure procedure to good effect. Specifically, in the *Rospuda River Valley* case,[116] the Commission decided to apply to the Court of Justice for injunctive relief against the Polish Government over the latter's failure to ensure that certain proposed road developments did not breach the Habitats Directive 92/43.[117] The dispute concerned a decision by the Polish Government to authorise construction of two road building projects along the E67 route known as the Via Baltica between Warsaw and Helsinki. This involved the projected completion of two road bypasses intended to circumvent the towns of Augustów and Wasilków. The proposed layout of the bypass routes traversed through areas within the Rospuda River Valley, a unique type of natural area in Europe containing primaeval forest and wetland. Both developments were projected to encroach upon a number of areas falling under the auspices of the Habitats Directive: two designated special protection areas (SPAs) (Puszcza Augustowska and Puszcza Knyszńska) as well as a potential Site of Community Importance (SCI) (Ostoja Augustowska[118] which lies within the

[112] Case C-503/06R *Commission v Italy*, 27.2.2007 (not yet reported). The Court President's decision is available for inspection on the Court of Justice's website: www.curia.eu.int.

[113] Case C-506/06 *Commission v Italy* [2008] ECR I-74.

[114] The Ligurian regional government sought to intervene in the substantive infringement proceedings on 22 May 2007. The Court of Justice's President ruled this request to be inadmissible under Art. 40 of the Court's Statute, which only allows EU institutions and Member States to make interventions in such legal proceedings: Order of the President of the Court of Justice in Case C-503/06 *Commission v Italy*, 19.6.2007 (not yet reported but available for inspection on the Court's website (www.curia.eu.int)).

[115] One might argue that such a duty might be construed as implicitly flowing from the general duty of co-operation enshrined in Art. 4(3) TEU. In the absence of clarification from the Court of Justice, this remains a moot point.

[116] Case C-193/07R *Commission v Poland*, Court of Justice Presidential Orders of 18.4.2007 and 18.7.07 (not yet reported); Case C-193/07 *Commission v Poland* (OJ 2010 C11/19). The case proceedings are available for inspection on the Court's website: www.curia.eu.int.

[117] Directive 92/43 (OJ 1992 L206/7), as amended. A consolidated version of the Directive is available for inspection on the European Union's EURLEX website: http://eur-lex.europa.eu/en/index.htm.

[118] The Commission considered that this particular site met all ecological criteria set out in Annex III of the Habitats Directive for it to be classified as a SCI. Article 4(2) of the Directive stipulates that the Commission, based on a site list notified to it by the EU Member States, is required to establish in agreement with Member States a draft list of sites of Community importance identifying those hosting one or more priority natural habitat types or priority species.

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Puszcza Augustowska SPA). In addition, a related afforestation project, intended as a measure to compensate for the interference with these SPAs, cut across ~~an~~ a potential SCI (Pojezierze Sejneńskie). The Commission originally sent Poland an initial letter of formal notice concerning the proposed developments in December 2006.

The Commission considered that both bypasses breached the terms of the Habitats Directive. As far as the 17.1km long Augustów bypass was concerned, the Commission assessed that Poland had violated Article 6(2) in conjunction with Article 7 of the EU Directive, in failing to take appropriate measures to avoid habitat deterioration and significant species disturbance of SPA Puszcza Augustowska lying southwest of the town. It considered that the bypass would affect some 41 wild bird species[119] lying within the Puszcza Augustowska SPA and 21 habitat types, 9 fauna (including a priority species of wolf) and 8 flora species protected under the Habitats Directive located within the potential SCI of Ostoja Augustowska. Given that the authorisation procedure for the Augustów bypass had preceded Poland's accession to the EU, the Commission took the view that this particular proposed development was not caught by certain procedural provisions of the Habitats Directive specifically regulating the management of plans and projects affecting special areas of conservation, namely Articles 6(3) and (4).[120] However, it considered that the bypass project nevertheless fell within the remit of the substantive provisions of the Directive, notably Article 6(2) in conjunction with Article 7 of the Directive, which require Member States to take appropriate steps to avoid the deterioration of natural habitats and habitats of species in special areas of conservation, as well as to avoid significant disturbance of the species for which the areas have been designated in relation to the EU Directive's objectives.[121] Specifically, the Commission assessed that the road scheme, by virtue of it damaging habitats and disturbing species for which the Puszcza Augustowska SPA was classified, would be liable to cause irreversible environmental harm and lead to the deterioration of the unique and exceptional ecosystem of Rospuda valley. It considered that the Polish authorities overseeing the particular bypass project had failed to take into account of alternative solutions, and therefore would not be able to rely on any defence based on an overriding public interest.[122] With regard to the project's negative impact on the potential SCI of Ostoja Augustowska, the Commission opined that the Habitats Directive was applicable and had been breached, in light of the case law of the Court of Justice relating to similar circumstances.[123]

As regards the intended 5.2km long Wasilków bypass, which would cut across the Puszcza Knyszńska SPA affecting 37 wild bird species covered under Annex I of the Wild Birds Directive, the particular legal objections of the Commission were different. It considered that the Polish authorities had breached Article 6(3) in conjunction with Article 7 of the Habitats Directive. Article 6(3) requires that Member States must subject any plan or project, not directly connected with or necessary to the management of a site of a special area of conservation likely to have a significant upon it, to a conservation impact assessment effect. In addition, national authorities are only entitled to agree to such a plan or project only after ascertaining that the integrity of the site will not be adversely affected and, where appropriate, having consulted public opinion. By virtue of Art. 6(4), such a plan or project may nevertheless be carried out in spite of a negative impact assessment for imperative reasons of overriding public interest reasons and in the absence of alternative solutions, subject to Member States taking all compensatory measures needed to ensure the coherence of the EU's Natura 2000 network. Special considerations apply to sites containing a priority habitat and/or priority species for the purposes of the Directive.[124] Presumably, the Commission considered that it was able to apply Arts.6(3)-(4) of the Directive to the Wasilków bypass, given that the authorisation procedure in respect of this particular project commenced after Poland's accession to the EU.[125] The Commission considered that Art. 6(3) had

[119] Covered by Annex I of the Wild Birds Directive.

[120] Case C-209/04 *Commission v Austria* [2006] ECR I-2755.

[121] The Habitat Directive's objectives are set out in fundamentally in Article 2. Art. 2(1) stipulates the aim of the EU legislative instrument shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the TFEU applies. Art. 2(2) specifies that measures taken pursuant to the Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest. They shall also, according to Art. 2(3) take account of economic, social and cultural requirements and regional and local characteristics.

[122] The Polish Government sought to justify the development on grounds of improvement to road safety (as reported in the Commission RAPID press release IP/07/263, Brussels, 28.2 2007).

[123] Specifically, the judgments in Cases C-117/03 *Dragaggi* [2005] ECR I-167and C-244/05 *Bund Naturschutz in Bayern* [2006] ECR I-8445.

[124] See Art. 6(4) final paragraph.

[125] The report of pleadings provided in the Court of Justice's information notice concerning the infringement proceedings indicated that the authorisation procedure relating to the bypass started prior to Polish accession to the EU on 1 May 2004, but the accuracy of this may be questioned given that Court's report also confirms that the Commission ruled out application of Arts.6(3) and (4) in respect of the Augustów bypass on grounds that the authorisation process regarding the latter project had commenced before Poland joining the EU.

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been breached on the grounds that the impact assessment carried out had been defective, the Polish authorities had failed to consider alternative solutions properly and they had not raised the issue of compensatory measures with respect to the area of land destroyed by the bypass.

An additional complaint filed by the Commission in this case was the fact the Polish authorities had failed to ensure that their intended measures to compensate for the incursions into the Puszcza Augustowska and Puszcza Knyszńska SPAs did not fall foul of EU nature protection law. Specifically, the Commission considered that a particular afforestation project earmarked to be carried out to account for the ecological losses sustained by the Augustów bypass scheme not only failed to compensate adequately for such losses but also encroached unlawfully on a potential SCI site (namely the site of Pojezierze Sejneńskie). It was of the view that the afforestation scheme would have led to a substantial part (17ha) of the potential SCI being deforested as part of the overall measures envisaged by the road project investor to compensate for habitat damage caused by construction of the Augustów bypass. As a consequence, the Commission concluded that the proposed compensatory measures had breached the provisions of the Habitats Directive, on a footing similar to that of the Augustów bypass scheme.[126]

The initial letter of formal notice sent by the Commission against Poland in December 2006 under (then equivalent to) Art. 258 TFEU appeared to have little in the way of deterrent effect. On 28 February 2007 the Commission subsequently issued a reasoned opinion[127] against the Member State, by way of response to information it had received that the national authorities had provided development contractors with permission to commence works on the road projects earlier in February 2007. Tree-felling had actually commenced on the Wasilków bypass on 15 February. In its press release[128] about its reasoned opinion, the Commission made clear that it considered the possibility of resorting to emergency relief measures if necessary, as it did in the *Ligurian Bird Hunting* case. As a consequence of the Polish authorities' unsatisfactory response to the Commission's two warnings, in particular by virtue of a definitive decision on 9 March 2007 by the Polish Environment Ministry to permit the commencement works on the sites, the Commission then decided to refer Poland to the Court of Justice. At the same time it sought interim measures from the Court with a view to securing immediate suspension of the afforestation project which the Polish authorities had confirmed that they wish to have seen completed by end of June 2007.[129] The Polish authorities apparently, though, were prepared unilaterally to suspend commencement of the construction works relating to the bypasses pending final judgment of the Court of Justice on the legality of the bypass schemes.

The Commission's decision to apply for interim measures ultimately had the desired effect and ultimately led to the settlement of litigation in the Commission's favour. On 18 April 2007, the President of the Court of Justice issued an interim order[130] requiring Poland to desist from and suspend works immediately relating to the afforestation scheme until it had an opportunity to declare a definitive judgment on whether the Habitats Directive had been breached in this case. The interim order was subsequently withdrawn in July 2007 when the Polish Government confirmed that the afforestation project would not be started pending final adjudication of the legal dispute by the Court.[131] During the early summer period of 2007, contradictory messages appeared to be coming from Polish sources as to whether road construction works would be allowed by the Polish authorities to be continued after the ending of the breeding season on 31 July 2007. Ultimately, though, the matter was cleared up by the Court of Justice, which obtained official confirmation from the Polish Government on 2 and 31 August 2007 that works would not commence prior to the Court issuing its definitive judgment on the case. By virtue of these assurances from the defendant Member State, the Commission informed the Court[132] that it would desist from continuing to request for the imposition of interim measures. As a result, the Court's President subsequently ordered removal of the interim proceedings from the Court's

[126] The Commission considered that there had been a breach of the Habitats Directive, in light of the Court of Justice judgments in Cases C-117/03 *Dragaggi* [2005] ECR I-167and C-244/05 *Bund Naturschutz in Bayern* [2006] ECR I-8445.

[127] European Commission RAPID Press Release IP/07/263, Brussels, 28.2.2007 "Poland: Commission takes urgent action to protect threatened wildlife habitats".

[128] IP/07/263, Brussels, 28.2.2007, p. 1.

[129] Case C-193/07 *Commission v Poland*, reported pleadings of 5.4.2007. See also European Commission RAPID press release IP/07/369, Brussels, 21 March 2007 "European Commission takes Poland to court to protect threatened wildlife habitats". It appears that the Polish authorities unilaterally agreed to suspend works on the bypass projects pending delivery of the Court's definitive judgment on the legality of the road schemes.

[130] Case C-193/07R *Commission v Poland*, interim order of 18.4.2007 (not yet reported). Decision available for inspection on the Court of Justice's website: www.curia.eu.int. As was the case with *Ligurian Bird Hunting*, the Court President is reported to have heard an Advocate General (Kokott) in accordance with Art. 85 RP prior to his decision on interim measures, whose opinion has not been published.

[131] Case C-193/07R *Commission v Poland*, removal from register, 18.7.2007 (not yet reported). Decision available for inspection on the Court of Justice's website: www.curia.eu.int.

[132] In accordance with Article 78 RP.

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register in January 2008.[133] Notwithstanding its initial strong stance in defending its position in favour of the bypass projects[134] and receipt of official support from certain other Member States,[135] by the beginning of 2008 it appeared that Poland had begun to reconsider matters. First, the Polish Environment Ministry opened a series of meetings with stakeholders in the spring of 2008 to assist in the process of finding alternative road routes which would avoid encroaching on protected nature sites. The Polish Government then decided in the spring of 2009 to abandon the two original bypass schemes and opt for an alternative new route for the E67 (called the "Raczki variant") located outside any Natura 2000 sites, which led to the Commission announcing on 14 April 2009 that it would withdraw all legal proceedings in the case.[136]

Maltese Bird Hunting case (Case C-76/08 Commission v Malta)

The Commission has subsequently consolidated its experience and success in utilising the interim measures procedure most recently in the *Maltese bird hunting* litigation,[137] in which it sought to tackle once more an incidence of illicit bird hunting. Subsequent to Malta joining the EU, the Commission had commenced infringement proceedings against the Member State on account of the latter's authorisation of hunting of quail (*coturnix coturnix*) and turtle dove (*streptopelia turtur*) contrary to EU nature protection law. Specifically, whilst Malta had secured a special concession during accession negotiations that allowed it to hunt both wild bird species under the auspices of Article 7 of the Wild Birds Directive,[138] this particular derogation from the general bird hunting ban contained in Article 5 did not permit it to authorise hunting during the breeding season.[139] Malta had neither supplied the Commission with any information that might justify the hunting of the species during the breeding season under Article 9 of the Directive, the other gateway permitting a derogation from the hunting ban. As a result the Commission opened an infringement case, and issued a final warning to Malta in the form of a reasoned opinion in October 2007 that it was in breach of Article 9 of the EU Directive. By way of response, in January 2008 the Maltese Government failed to commit itself to guaranteeing the prohibition of hunting during the breeding season 2007/8.

The Commission was mindful of the need to act swiftly as it had done so previously in *Ligurian Bird Hunting*, in order to pre-empt any attempt on the part of the Maltese authorities to authorise spring hunting of quail and turtle dove. On 21 February 2008 the Commission applied under Article 84(2) RP to the Court of Justice for interim measures, requesting that the defendant Member State be directed not allow hunting during the 2008 and 2009 breeding seasons. This request for filed at the same time as the Commission's referral of its main infringement action to the Court, similar to its practice in previous cases. The President of the Court issued his decision on the request for interim measures on 24 April 2008[140] after gleaning Malta's observations, in which the defendant Member State confirmed that no measure would be taken to authorise hunting prior to the Court's decision on interim measures. In finding for the Commission and issuing an interim order against Malta, the Court's President provided a fully reasoned decision which provides an excellent overview of the key legal issues to be weighed regarding applications for emergency relief in infringement cases concerning breaches of EU environmental law.

Malta submitted a number of procedural as well as substantive grounds in support of its case for dismissing the Commission's request for interim measures. First, it put forward three reasons supporting its view that that the Commission's request was inadmissible. All three grounds were dismissed by the Court's President. Specifically, Malta argued that the Commission would have to await the national reports

[133] Case C-193/07R-2 *Commission v Poland*, removal from register, 25.1.2008 (not yet reported). Decision available for inspection on the Court of Justice's website: www.curia.eu.int.

[134] On 25 May 2007, the Polish Government sought to apply for an accelerated procedure in relation to the case under Art. 62a RP, a request which was rejected as unfounded by the Court on 18 July 2007: see Case C-193/07 *Commission v Poland*, order on a accelerated procedure request, 18.7.2007 (not yet reported). The Court President's decision is available for inspection on the Court of Justice's website: www.curia.eu.int.

[135] The Lithuanian, Slovak and Estonian Governments applied to the Court of Justice in the autumn of 2007 to intervene in the case in order to be able to issue observations in support of Poland. See Case C-193/07 *Commission v Poland*, Court decisions on intervention applications of 7.12.2007 and 30.1.2008 (not yet reported). The Court's decisions are available for inspection on the Court of Justice's website: www.curia.eu.int.

[136] European Commission RAPID Press Release IP/09/566, Brussels, 14.4.2009 "Environment: Commission closes two nature cases against Poland". See also Case C-193/07 *Commission v Poland*, removal of case from register, 25.8.2009 (OJ 2010 C11/19).

[137] Case C-76/08R *Commission v Malta* [2008] ECR I-64; Case C-76/08 *Commission v Malta*, judgment of 10.9.2009 (not yet reported), judgment available on the Court of Justice website: www.curia.eu.int

[138] Namely, Art. 7(3) in conjunction with Annex II/2 of the Directive.

[139] As is proscribed by Article 7(4) of the Directive.

[140] European Commission RAPID Press Release IP/08/647, Brussels, 25.4.2008 "Court orders ban on spring hunting in Malta". Case C-76/08R *Commission v Malta* [2008] ECR I-64. As was the case with *Ligurian Bird Hunting* and *Rospuda River Valley* ,the Court President is reported to have heard an Advocate General (Maduro) in accordance with Art. 85 RP prior to his decision on interim measures, whose opinion has not been published.

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on implementation, required to be notified to it under Article 9(3) of the Directive, and take it into account under Article 9(4), which requires the Commission to assess whether derogations utilised by Member States on the basis of Article 9(1) are in conformity with its requirements. The Court President, in dismissing this ground, held that such a complaint questioned the admissibility of the main enforcement action and should therefore examined at that stage, as opposed to the stage of interim proceedings which must not prejudge the outcome of the main infringement action.[141] Malta also argued that the interim measure request was inadmissible in that it sought to prejudge the outcome of the main infringement action, which would determine the legal merits of the Commission's claim that the Wild Birds Directive had been breached. In dismissing this particular argument, the Court's President noted that request for interim relief had simply sought to guard against the deterioration of the conservation status of the wild bird species in question during the breeding seasons pending outcome of the main legal proceedings.[142] Finally, the Maltese Government submitted that the request for interim measures should be declared inadmissible on grounds that it was premature, given that there was, at the material time, no national measure capable of being suspended.[143] In dismissing this particular objection, the Court's President set out the distinct purposes of the principal relevant EU treaty provisions on interim relief, namely (the then equivalent to) Arts.278 and 279 TFEU, both of which had been relied upon by the Commission. Whereas the President confirmed that Art. 278 TFEU provides the Court with power to suspend any measure contested in the main action, he also underlined that art.279 TFEU enables the Court to issue other types of interim measures, such as issuing directions to a party on a provisional basis (eg. to desist from taking specified action).[144]

As regards the substantive elements needing to be fulfilled in order to justify the imposition of an interim measure, the Court's President provided a detailed legal analysis of the relevant requirements and found in favour of the Commission in respect of the immediate 2008 hunting season. With reference to Court of Justice jurisprudence,[145] the Court's President confirmed that three essential cumulative key requirements needed to be proven by the applicant to the satisfaction of the Court for the issuance of interim measure, namely; that such a judicial measure is justified prima facie in fact and in law, that the situation requires urgent action in order to avoid serious and irreparable harm to the applicant's interests that would otherwise prior to judgment in the main legal proceedings, and that a weighing up of the interests involved is adjudged to balance in the applicant's favour.[146] Turning to the individual criteria in turn, the Court President first held that the Commission had established a *prima facie* case of a breach of Article 9 of the Wild Birds Directive. Specifically, Maltese legislation had authorised the possibility for spring hunting between the period 2004-2007, there being nothing to indicate that a similar measure might not also be adopted with respect to 2008. The Maltese authorities had neither shown the absence of alternative measures to spring hunting as required by Article 9.[147] Even if, as Malta contended, insufficient numbers of the bird species were present during the autumn period,[148] this Court President considered this factor irrelevant having regard to the protective framework of the EU Directive,[149] and given that hunting during this alternative period would be possible. In addition, the Court President noted that Malta had failed to demonstrate why and with regard to what needs the autumn take of birds should be deemed to be insufficient.[150]

As far as the element of urgency was concerned, the Court President affirmed it was fulfilled in the light of existing precedent. He identified that the alleged presence of urgency had to be appraised in the light

[141] Case C-76/08R *Commission v Malta* [2008] ECR I-64, para. 15 of the Court order. For a fuller discussion about the impact of claims of inadmissibility of main actions in relation to the outcome of interim proceedings, see eg. K. Lenaerts *et al.*, *supra* note 27 at pp. 428 et seq.

[142] *Op. cit.*, at para 17 of the Court order. At the same time, the Court President also acknowledged that, as a matter of general principle as well-established in case law (eg Case C-393/96) P R *Antonissen* [1997] ECR I-441), that interim measures must not prejudge points of law or fact or otherwise neutralize the ruling to be given in the main proceedings, something that was not relevant to the proceedings against Malta.

[143] In its written observations to the Court of Justice on 7 March 2008 (as confirmed in the reports of the Court of Justice's proceedings in case C-76/08R), the Maltese Government clarified that authorization over hunting could only take place after submission of a recommendation made by a particular designated national committee (Ornis Committee), this being at least four weeks prior to the date envisaged by the committee for the start of the hunting season.

[144] As confirmed by case law, eg. Case 118/83R *CMC v Commission* [1983] ECR 2583, in particular at para. 53 of the judgment.

[145] Case C-404/04P R *Technische Glaswerke v Commission* [2005] ECR I-3539, para. 10 of judgment

[146] Case C-76/08R *Commission v Malta* [2008] ECR I-64, paras. 21–22 of the Court order.

[147] The Commission had consistently encouraged Malta to consider the possibility of earmarking the autumn instead of spring period for hunting, with a view to avoiding the breeding season.

[148] Malta submitted that only 11% of turtle doves and 24.6% of quails taken in 2006 were caught in the autumn period.

[149] See Case C-507/04 *Commission v Austria* [2007] ECR I-5939, para. 203 of judgment.

[150] Case C-76/08R *Commission v Malta* [2008] ECR I-64, paras. 28–29 of the Court order.

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of the need of an interim order being able to prevent the occurrence of serious and irreparable harm to the party seeking emergency judicial relief, as well as taking into account the purpose of interlocutory proceedings to guarantee maximum effectiveness of the definitive judicial ruling in the main action.[151] In having the onus of demonstrating the element of urgency, the applicant had to show that such damage was likely to occur with a sufficient degree of probability (as opposed to being an absolute certainty).[152] The Court President proceeded to consider the opposing arguments of the parties regarding this factor. On the one hand the Commission submitted that spring hunting would have a devastating impact on bird populations suffering from unfavourable conservation status, and that the fact that a certain amount of bird fatalities would arise as a result would be sufficient to prove irreparable damage. On the other hand, the Maltese Government contended that the Commission's claims of potential adverse impact were vague, general and even contradictory. It submitted that the onus was on the Commission to provide clear proof that spring hunting would create a devastating impact on the species concerned.

Before assessing the criterion of urgency in detail, the Court President made a couple of important general points concerning the way in the question of assessing evidence in the context of interim proceedings should be approached. He was mindful of the fact that the parties had interpreted the question of proof of adverse impact in diverse ways, beneficial to their respective causes. On the one hand, he commented that the Commission had effectively submitted that a low threshold of factual evidence was required to prove devastating impact, an approach that the Court President adjudged was too lenient in being liable to be fulfilled in all cases. On the other hand, he also acknowledged difficulty with the Maltese Government's position on testing urgency, which appeared in his view to be "very difficult, if not in practice impossible" to fulfil by an applicant for interim relief.[153] The Court President indicated that it was necessary to steer a course between the parties" polarised positions, laying down a couple of general points of guidance to assist in the appraisal of factual submission and counter-submission by the parties. First, he confirmed that the purpose of the interim procedure was not to engage in establishing the veracity of detailed and contested facts presented to the Court, given the limited means and time at the disposal of the Court to carry out such an examination. Second, the affirmed, in accordance with judicial precedent,[154] that EU legislation on wild birds is required to be interpreted in accordance with the precautionary principle, one of the foundations of EU environmental policy under Art. 191 TFEU.[155] The Court President, in light of the above general points, then took into account a number of specific factors to consider whether the element of urgency had been satisfied in the present proceedings.[156] In acknowledging that the system of wild bird protection under the EU legislation required individual Member States to oversee its implementation, he underlined that any hunting activity is liable to disturb wild fauna and may affect its conservation status, irrespective of the extent to which it reduces species" populations.[157] He took into account that it had not been disputed by Malta that the turtle dove and quail are assessed as having unfavourable conservation status in Europe. In addition, with a view to the broader context of the case, he noted the fact that the Maltese Government had submitted that the Wilds Bird Directive accommodated the possibility of spring hunting, a practice which the Commission disputed as undermining basic principles of bird conservation policy. Finally, the Court President indicated that the cumulative effect of turtle dove and quail spring hunting in Malta in previous years would be take into account as well as the fact that the national Ornis Committee responsible for making hunting recommendations to the Maltese Government had decided to suspend its decision pending a decision by the Court of Justice. In light of the above factors, the Court President held that the Commission's application for emergency judicial relief measures could not be dismissed for want of urgency as regards the current bird hunting season (2008), although considered the Commission's claim for the subsequent 2009 season as not made out. His reasoning revealed a relatively close affinity with the Commission's approach to the issue of urgency, in line with previous case law. In particular, it was highly relevant that the Court President emphasised that conservation status could be seriously jeopardised, even where species numbers are not depleted in large numbers.

The Court President then turned to consider the third and final key element needed to be satisfied by the Commission in order to justify the imposition of interim judicial relief measures, namely whether that the balance of interests weighed in the applicant's favour. Taking account of the need to ensure that interlocutory proceedings must not prejudice the

[151] *Op. cit.*(Case C-76/08R), at para 31 of judgment, citing Case C-7/04P *Commission v AKZO* [2004] ECR I-8739 (para. 36 of the judgment) in support.

[152] *Op. cit.*(Case C-76/08R), at para. 32 of judgment, citing Case C-156/03 P-R *Commission v Laboratoires Servier* [2003] ECR I-6575 (para. 36 of judgment) in support.

[153] *Op. cit.* (Case C-76/08R) at para. 35 of judgment.

[154] Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging ("Waddenzee" case)* [2004] ECR I-7405.

[155] Case C-76/08R, at para. 36–37 of judgment.

[156] *Op. cit.*, paras. 38–42 of judgment.

[157] Case C-435/92 *Association pour la protection des animaux sauvages et al* [1994] ECR I-67, para. 16 of judgment and case C-503/06R *Commission v Italy* [2006] ECR I-141, at para. 17 of judgment.

resolution of the dispute in the main action, he compared the ecological interests of the Commission alongside the hunting priorities expressed by the Maltese Government. In finding that the Commission's interest in upholding the observance of the Wild Birds Directive outweighed the Maltese Government's interests in supporting its hunting lobby, the Court President noted that a ban on spring hunting would not have conflicted with any acquired rights of hunters or even a legitimate expectation of engaging in hunting in 2008, an activity he defined as being more aptly categorised as a leisure activity as opposed to a type of occupation.[158]

Just as in *Ligurian Bird Hunting*, subsequent to the Court of Justice's interim order suspending the operation of the Maltese hunting legislation, the Commission proved to be successful in the main action. On 10 September 2009, the Court of Justice[159] declared that Malta had infringed the Wild Birds Directive in providing for the possibility of permitting the spring hunting of turtle doves and quails. The provisions in the EU nature legislation enabling limited derogations from a hunting ban had not been complied with in this case. Notably, the Court underlined that that the fact that only relatively few bird numbers could be captured in the autumn season, this did not justify the legitimation of spring hunting without qualification. The significance of the Commission's application for interim relief cannot be underestimated. For had the Commission simply relied upon the standard format of the infringement proceedings under (the equivalent of) Art. 258 TFEU, it would not have been able to prevent Malta licensing the hunting of the wild bird species in the 2008 and 2009[160] breeding seasons, in having to await the outcome of its pending litigation before the Court of Justice. The fact that infringement proceedings may be filed by the Commission with the Court, subsequent to two warnings sent to a defendant Member State, does not trigger any obligation on the parties involved in the dispute to suspend activities that may jeopardise or otherwise undermine the effect or impact of the Court's ultimate judgment on the merits of the case.

All three cases outlined above illustrate not only the Commission's approach to the question of interim relief has changed quite radically in recent years, but also that its change of stance has yielded concrete results in terms of promoting the safeguarding of environmental assets protected under EU environmental law.

IV. Interim Measures and the Commission's Environmental Law Enforcement Strategy

The renewed interest of the Commission in utilising interim relief in the context of infringements in the environmental policy sector ties in with recent development of its long-term strategy in promoting more effective implementation and enforcement of EU environmental law. The EU's Sixth Environmental Action Programme 2001-2010 has emphasised with renewed vigour the importance of the EU securing a better strategy to achieve more effective implementation of EU environmental legislation.[161] An integral part of this review process has led to an increased scrutiny and re-evaluation of the way in which the Commission has traditionally handled cases involving suspected breaches of EU environmental law by Member States. Whilst, on the one hand, this strategy has desired to employ a more selective approach on the part of the Commission services in addressing casework, on the other hand it has also strengthened the EU institution's official commitment in tackling under the auspices of Art. 258 TFEU what it perceives to be the most serious types of breaches of EU environmental legislation. This commitment covers cases coming to the Commission's attention requiring urgent intervention in order to prevent or minimise actual or potential irreparable ecological damage.

For a considerable number of years now the Commission has sought to reorganise its environmental infringement casework, with a view to homing in on certain types that it considers need to be prioritised. In a 1996 Communication,[162] it reflected openly for the first time on the limited role and impact that infringement proceedings could have in relation to the enforcement of EU environmental law. Noting its limited resources in terms of investigative powers, personnel and the lengthy nature of infringement proceedings, the Commission chose to emphasise that it should prioritise its focus on infringements of long-term strategic importance, namely non-communication and non-conformity cases. It accepted that it simply was not feasible to perpetuate a "come one, come all" type approach to infringement casework, in which the Commission could take on all complaints of

[158] Case C-78/06R, at para 48 of judgment.

[159] Case C-76/08 *Commision v Malta*, 10.9.2009 (not yet reported). The Court's ruling is available for inspection on its website: www.curia.eu.int.

[160] Although in April 2008 the Commission officially lost its application for interim relief in respect of the 2009 breeding season, there is little doubt that the Commission would have been successful had it found it necessary to return to the Court President for an extension of the interim order to cover 2009 nearer the material time. It was apparent from the Court's interim order issued in 2008 that it considered the 2009 season too remote temporally to be regarded as an urgent consideration.

[161] See Arts.3.1–3.2 of Decision 1600/2002/EC laying down the Sixth Community Environment Action Programme (OJ 2002 L242/1).

[162] COM(1996)500 *Commission Communication on Implementing Environmental Law*.

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alleged misapplication of EU environmental law. Consequently, it promoted a far more decentralised approach to addressing other types of breaches of EU environmental legislation, encouraging the development of various means by which action could be taken at national level to address instances of misapplication of Union environmental law. One might think that this would be likely to have had a direct negative impact on the prospects of the Commission being in the future either able or willing to apply for interim relief in environmental infringement casework, given that the Court is unlikely to accept that the requirement of urgency is satisfied in either a non-communication or non-conformity case. However, as has been noted elsewhere, the 1996 strategy did not lead to a significant decrease in the number of bad application infringement cases that the Commission was willing to pursue.[163] In practice the Commission, on advice from its Environment Directorate-General, has been willing to continue to challenge Member States over a wide variety of what it considers to be serious instances of misapplication of Union environmental law. To date, the majority of environment infringement proceeding pursued by the Commission constitute bad application cases.[164]

At the turn of the millennium the Commission decided to launch a broader, wholesale review of its approach to utilising infringement proceedings across all policy sectors. Specifically, within the context of reviewing the political institutional decision-making process at EU level in 2001, the Commission in its White Paper on European Governance[165] decided to set out a core list of priorities for infringement casework carried out under the auspices of (the then equivalent to) Art. 258 TFEU. It determined that it would focus its casework on the following areas: effectiveness and quality of transposition of EU directives; situations involving the compatibility of national law with fundamental EU principles; cases seriously affecting the Union's interests or interest intended to be protected by EU legislation; cases of systemic breaches of EU legislation within a particular Member State, and cases involving EU finance.[166] Notably, the document signalled a limiting of Commission intervention in alleged instances of misapplication of Union law. By way of follow up, two Commission Communications published in 2002 and 2007 subsequently provided further and more detailed guidance on how it would implement its new prioritisation agenda set out in the White Paper. This ultimately led to a further review and refinement of Commission priorities regarding infringement proceedings affecting the also the enforcement of EU environmental legislation at Union level.

In the 2002 Communication[167] the Commission identified in broad terms the criteria that would be used for prioritising the investigation of possible breaches of EU law reflecting the seriousness of the potential or known failure to comply with EU law. It outlined three types of infringements to be regarded as serious for the purposes of Commission investigation, namely: cases involving instances where the foundations of the rule of EU law is undermined (including violations of human rights or fundamental freedoms, encompassing threats to human health and/or the environment), cases undermining the smooth functioning of the EU legal system and cases involving non-transposition or non-conformity of national law with EU law. Other cases would be expected to be addressed by using complementary mechanisms that would not involve infringement litigation at EU level. The 2007 Communication,[168] a far more detailed document, fleshes out further the Commission's general strategy of prioritisation of its law enforcement work. It underlines that the Commission should concentrate on policing on cases presenting the greatest risks and most widespread impact for citizens and businesses, as well as those involving the most persistent infringements. It specifies that such cases comprise the following: non-communication cases, failures to respect Court of Justice judgments as well as cases involving breaches of EU law raising issues of principle or having a particularly far-reaching impact on citizens. The Commission hopes that this prioritisation strategy will result in a more immediate and intensive treatment of casework. It reflects the Commission's long-standing awareness that a lack of formal prioritisation of casework has not assisted the Commission legal services in addressing the worst kind of infringements as vigorously as it might wish, bearing in mind the substantial amount of time taken up on average for resolving cases.[169] By way of complement to its reprioritisation agenda, the Commission has also

[163] See E. Hatton, *supra* note 18 at section 3.3.

[164] The Commission's most recent information reveal that, as at the end of 2009, over half of all environmental infringement cases were bad application cases (298 (54.77%)), with far fewer cases concerning instances of either non-communication (75 (13.78%)) or non-conformity (147 (27.024%)): see section (ii) of the Environment Directorate-General's report on *Statistics on Environmental Infringements*, published online at: http://ec.europa.eu/environment/legal/law/statistics.htm (accessed 9.6.2010).

[165] COM(2001)428 *White Paper on European Governance*, 25.7.2001.

[166] *Op. cit.*, at pp. 25–26.

[167] COM(2002)725 final/4, Commission Communication: *Better monitoring of the application of Community Law*, 16.5.2003.

[168] COM(2007)502, Commission Communication: *A Europe of Results – Applying Community Law*, 5.9.2007.

[169] The average time taken by the Commission to process infringements over the period 1999–2007, from opening of a file to applying to the Court under Art. 258 TFEU was 24 months (COM(2009)675, *26th Annual Report of the Commission on Monitoring the Application of Community Law* (2008), 15.12.2009, at p. 2).

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sought to use other types of strategies to assist in the resolution of non-priority cases, including referral of complainants to dispute resolution alternatives at national level, engaging pro-actively with Member States to promote better implementation practices (eg. publication of compliance and/or best practice guidance, and fostering enhanced dialogue with Member States such as through bilateral package meetings).

Subsequent to establishing sector-wide general guidance and benchmarks for the prosecution of infringement casework, the Commission published in a 2008 Communication on implementation of EU environmental law[170] further information on how this prioritisation framework is to be applied specifically in relation to the environmental sector. The document details the sorts of environmental cases that are to be prioritised for law enforcement purposes under Articles 258 and 260(2) TFEU, namely those involving non-communication, failure to adhere to Court of Justice judgments as well as breaches of EU environmental legislation that are considered by the Commission services to raise either issues of principle or having a particularly far-reaching negative impact for citizens. As far as the latter category of casework is concerned; the Communication specifies that it includes situations where, on a significant scale or repeatedly, people are exposed or may in the future become exposed to direct harm or serious detriment to their quality of life as a result of non-compliance with EU environmental legislative requirements.[171] Any harm sustained that might be classified as irreversible is to be considered as a factor favouring the prioritization of a case.

For the purposes of identifying the most important types of breaches of EU environmental law falling within this third category of casework, the Commission document refers to four types of infraction: (1) non-conformity of key legislation presenting a significant risk for correct implementation of EU environmental rules; (2) systemic breaches of environmental quality norms or other requirements presenting serious adverse consequences or risks for human health and well-being or for aspects of nature that have a high ecological value; (3) breaches of core strategic obligations upon which fulfilment of other EU environmental obligations depends; and (4) breaches concerning big infrastructure projects or interventions involving EU funding and/or significant adverse impacts.[172] What is especially interesting in relation to the above-mentioned fourth case type is the fact that the Commission openly refers to the possibility of utilizing the interim measures procedure. It is evident that the Commission considers this particular legal procedure to be a useful instrument in its law enforcement toolbox where such cases raise serious prospects of irreparable impact. Specifically, it states:

> "The Commission will take into account such considerations as irreversible ecological damage, and, where appropriate seek interim measures from the [Court of Justice]. While likely to be sought only exceptionally, interim measures represent a potentially important safeguard for ensuring that infringements do not present seriously damaging *faits accomplis*."[173]

Whilst the 2008 Communication makes this comment specifically in relation to fourth type of case, it would seem appropriate to consider it equally relevant to all types of "bad application" environmental cases, whenever the prospect of imminent irrevocable ecological damage is an issue. The recent practice of the Commission in applying for interim relief in environmental cases, as outlined in section III above, appears to bear this out. Specifically, these cases have demonstrated that the Commission is fully prepared to seek recourse to injunctive relief from the Court in cases where intervention against a Member States is urgently required, in order to snuff out the possibility of a key environmentally protected interest being irreversibly damaged before the Court has had time to provide its judgment on the merits of the case in the main infringement action.

V. Some Brief Reflections

This article has highlighted an increasingly relevant, albeit relatively limited, role that is played by the interim measures procedures in relation to environmental infringement actions brought under the auspices of Art. 258 TFEU. On the one hand, the Commission's strategy on enhancing the implementation of EU legislative commitments by Member States has clearly signalled that the availability of interim relief should be utilised where possible in relation to those cases requiring the most urgent intervention in order to prevent instigation or exacerbation of actual or potential irremediable environmental harm. On the other hand, it should be noted as well that, notwithstanding the increase in Commission interest, the potential utility of the interim measures procedures in environmental infringements remains limited from both legal as well as practical perspectives. In one sense this is not surprising, not least given that it is well understood that the infringement action itself can only ever be hoped to be able to address but a fraction of all violations of EU environmental law. For a number of years now the Commission has taken this on board in

[170] COM(2008)773 final. *Commission Communication on Implementing European Community Environmental Law*, 18.11.08. The 2008 Communication represents to date the most important source of information concerning the Commission's approach to improving upon EU Member States' implementation of EU environmental legislative commitments.

[171] *Op. cit.*, section 3.3 at p. 8.

[172] *Ibid.*

[173] *Op. cit.*, p. 9.

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promoting a range of initiatives, complementary to the classic law enforcement mechanisms of Arts. 258 and 260(2) TFEU, intended to assist Member States in enhancing the state of correct implementation of Union environmental legislation.[174] Nevertheless, there is little doubt that there is considerable room for improving upon the degree to which interim measures are currently available to the Commission in assisting its management of environmental infringement casework.

As discussed in section II above, the legal structure of infringement proceedings under Arts. 258 and 260(2) TFEU makes it challenging for the Commission to apply for emergency relief in individual cases, taking into account in particular that the legal framework underpinning infringement actions has been designed with a view principally to addressing shortcomings in the way in which Member States attune their national legislation in order to comply with Union law. The absence of powers of the Commission to investigate environmental cases or issue binding decisions in relation to them are notable checks on the effectiveness of the infringement procedure. In addition, the Commission has constantly to contend with the limits of its own budgetary resources in fulfilling its role of monitoring national compliance with Union law. Moreover, the case law of the Court of Justice has made it clear that interim measures procedures may only be applied for in relation to infringement cases involving the prospect of imminent harm that would be likely to undermine the integrity of its judgment in main (infringement) action. This judicial interpretation of the issue of "urgency" for the purposes of interim relief effectively excludes the availability of interim measures in cases which may be considered to be extremely serious from an environmental policy perspective but not urgent from a purely temporal perspective.

It is highly questionable whether the current legal framework at the disposal of the Commission for pursuing infringements of EU environmental law is justified, given that it provides such a limited opportunity for the Commission to have recourse of interim relief. Far more scope should be allowed for the Commission to intervene more immediately and effectively where necessary in order to require Member States to adhere to their EU environmental legislative commitments. Ideally, the Commission as well as national environmental protection authorities should be provided with the powers to investigate alleged breaches of EU environmental law and require Member States and private operators where needed by decision to desist from conduct that is liable to breach Union environmental law. The Union has chosen to use such a legal framework in other policy fields, such as in the area of competition law.[175] It should not be forgotten that the adverse consequences flowing from breaches of EU environmental law are frequently likely to be far more profound and long-term in terms of their impact than breaches of EU law relating to the operation of the single market, thereby adding strength to the case for a more hawkish attitude to compliance in environmental cases. In any case, given that Member States are usually provided with a number of years grace before they are expected to have ensured transposition of EU environmental legislation into national law, there is no excuse for accepting any undue delay in compliance beyond the set and agreed transposition deadline.

As a second-best alternative, the current infringement procedures under Arts.258 and 260(2) TFEU should be amended so as to permit the Commission to be able to apply to the Court much earlier for interim relief, with the Court of Justice having powers to fine any defendant Member State failing to adhere to an interim measures order. In addition, the current requirements for interim relief applications should be amended so as to accord with environmental policy requirements befitting an individual case. Specifically, this would mean amending the current triple test applied by the Court when appraising interim relief requests, so as to abolish the current "balance of interests" test and expand the criterion of "urgency" to cover cases in which there is *prima facie* evidence of a breach of any substantive requirement of EU environmental legislation. These amendments would serve to realign the interim relief procedure to be in better accordance with the constitutional requirements of the EU to ensure, in particular, that the Union secures a high level of environmental protection[176] and that environmental protection requirements are integrated into the definition and implementation of Union policies and activities.[177] It is apparent that the recent amendments made to the EU treaty framework by virtue of the Lisbon Treaty have but scratched the surface in terms of addressing the need to enhance the effectiveness of enforcement of EU environmental law at Union level.

[174] See for instance the Commission's recent Communication COM(2008) 773 *Implementing EC Environmental Law*, which promotes the use of tools to assist in the prevention of breaches by Member States (eg. distribution of guidance documents, structured dialogue with national authorities) as well as piloting a problem-solving initiatives with 15 Member States in which citizen complaints concerning environmental cases are transmitted to the participant Member States. Already in 1996 the Commission had made it clear that it wished to encourage a substantial reduction in the reliance placed on the infringements mechanism, in recognition of its limitations in being able to address environmental cases (COM(96)500 *Commission Communication Implementing Community Environmental Law*, especially at 5).

[175] See Regulation 1/2003 on the implementation of Articles 81 and 82 of the EC Treaty (now Arts. 101 and 102 TFEU) (OJ 2003 L1/1), Regulation 139/2004 on the control of concentrations between undertakings (OJ 2004 L24/22)which empower the Commission to impose financial penalties on undertakings acting in breach of Union competition rules.

[176] Art. 191(2) TFEU (ex Art. 174(2) EC).

[177] Art. 11 TFEU (ex Art. 6 EC).

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EU Enforcement of International Environmental Agreements: The Role of the European Commission

*Martin Hedemann-Robinson**

I. Introduction

Over the course of several years now the European Union (EU) has developed for itself an increasingly significant role on the international scene in terms of contributing towards the progressive development of international rules on protection of the environment.[1] Since the establishment of an environmental political dimension to its activities in the early 1970s, the EU has acceded to several multilateral international environmental agreements (IEAs),[2] global as well as regional.[3] These agreements spread across a wide and diverse range of environmental policy sectors and contain a substantial number of environmental protection obligations. Typically, the majority of IEAs are usually constructed with a view to facilitating the future adoption of common binding environmental protection standards in specific areas through the use of ancillary protocols. Accordingly, in providing for the progressive development of co-operation on specific environmental issues over time, notably to take account of developments in scientific understanding of the degree of hazardousness associated with a particular activity, IEAs may acquire over time a substantial body of environmental protection obligations for their contracting parties (CPs).

As the EU continues to develop a strong external dimension to its common environmental policy and in so doing signs up to an increasing body of international environmental treaty obligations, the Union also needs to ensure that it delivers on its international commitments. An important challenge that faces the Union is for it to supervise the implementation of those commitments across the territories of its constituent Member States. As each IEA is adopted and ratified by the Union, their individual terms become an integral part of EU law, binding on both EU institutions and Member States.[4] The European Commission, one of the key political institutions of the Union, is charged with the responsibility to ensure that the EU's founding treaties and measures adopted

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[1] See e.g. Inglis K, "EU environmental law and its green footprints in the world", Ch. 16 in Dashwood, A., Maresceau, M., (eds.) *Law and Practice of EU External Relations* (2008 Cambridge); Durán, G., Morgera, E., "Towards environmental integration in EC external relations? A comparative analysis of selected association agreements" (2006) 6 *Yearbook of European Environmental Law* 179; Thieme, D., EC external relations in the field of the environment (2001) *European Environmental Law Review* 252; Vogler J, "The external environmental policy of the EU" in Stokke, O., Thommessen, O., (eds.), *Yearbook of International Co-operation on Environment and Development 2003/4* (2003, Earthscan); For a critical view of the level of international presence of the EU in relation to environmental policy see Krämer, L., *EU Environmental Law* 7th Ed. (2011 Sweet & Maxwell) at pp. 442-444.

[2] Notable multilateral IEAs of actual or potential global significance to which the EU is a CP include: 1979 Geneva UNECE Convention on long-range transboundary air pollution (18 *ILM* 1442) (acceded by the EU virtue of Decision 81/462 (OJ 1981 L171/11)); 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals (19 *ILM* 15) (acceded by the EU virtue of Decision 82/461 (OJ 1982 L210/10); 1982 Montego Bay UN Convention on the Law of the Sea (UNCLOS) (21 *ILM* 1261) (acceded by the EU virtue of Decision 98/392 (OJ 1998 L189/14)); 1985 Vienna Convention on the protection of the ozone layer (26 *ILM* 1529) (acceded by the EU virtue of Decision 88/540 (OJ 1998 L297/8)); 1989 Basel Convention on the transboundary movement of hazardous waste (28 *ILM* 657) (acceded by the EU virtue of Decision 93/98 (OJ 1993 L39/1)); 1991 Espoo Convention on environmental impact assessment in an international context layer (30 *ILM* 802) (acceded by the EU virtue of unreported Decision of 15.10.1996); 1992 New York UN Framework Convention on Climate Change (31 *ILM* 851) (acceded by the EU virtue of Decision 94/69 (OJ 1994 L33/11)); 1992 Rio Convention on Biological Diversity (31 *ILM* 818) (acceded by the EU virtue of Decision 93/96 (OJ 1993 L309/1)); 1994 Geneva International Agreement on Tropic Timber (33 *ILM* 1014) (acceded by the EU virtue of Decision 96/493 (OJ 1996 L208/1)); 1994 Paris Convention on combating desertification (33 *ILM* 1016) (acceded by the EU virtue of Decision 98/216 (OJ 1998 L83/1)); 1998 Århus UNECE Convention on access to information, public participation and access to justice in environmental matters 38 *ILM* 517) (acceded by the EU virtue of Decision 2005/370 (OJ 2005 L124/1)); 1998 Rotterdam Convention on the procedure relating to export and import of chemicals (38 *ILM* 1) (acceded by the EU virtue of Decision 2003/106 (OJ 2003 L63/27)); 2001 Stockholm Convention on persistent organic pollutants (acceded by the EU virtue of Decision 2006/507 (40 *ILM* 532) (OJ 2006 L209/1)). Several of the above IEAs, of course, are framework agreements in respect of which a number of additional protocols have been added and acceded to by the EU. There is insufficient space here to recite these or the several other regional IEAs acceded to by the EU.

[3] A list of multilateral IEAs to which the EU is a contracting party or signatory is provided on the European Commission's Environment Directorate-General's website: http://ec.europa.eu/environment/international_issues/agreements_en.htm.

[4] Art. 216(2) of the Treaty on the Functioning of the EU (TFEU).

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pursuant to term are applied. It has a duty to oversee the application of EU law under the control of the Court of justice of the European Union (CoJ).[5] The Commission has, under the EU's founding treaty framework, power to take legal action against Member States and bring them before the CoJ if they breach the rules of Union law.[6] The power to take infringement proceedings against Member States also includes the possibility of the Commission taking action over failures on their part to implement IEA obligations to which the EU has signed up to. To date, this power has been used but once[7] by the Commission to enforce the requirements set down in an IEA.

This article explores the extent to which the European Commission may have recourse under Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU) to infringement proceedings against EU Member States which fail to comply with the obligations contained in IEAs to which the Union is a CP. It is an area of European Union environmental law enforcement that has to date received relatively little in the way of in-depth attention either amongst legal commentaries or in terms of EU institutional law and practice. The article is divided into three main sections. The first part provides an overview of the evolving EU legal framework underpinning the participation of the EU in IEAs. The second part considers the general legal issues involved in the employment of infringement proceedings with regard to EU external relations law enforcement. The third part considers a specific case example of where infringement proceedings might be particularly relevant currently. The example selected focuses on the UK's shortcomings in implementing the access to environmental justice provisions of the 1998 UNECE Convention on access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Finally, the article concludes with some reflections and suggestions for future European Commission law enforcement practice in relation to the EU's international environmental treaty obligations.

II. EU External Relations in Environmental Matters: The General Legal Framework

Particularly since the Union was endowed formally by virtue of the Single European Act (SEA) 1986[8] with an express mandate and responsibility in its constitutional framework[9] to develop a common environmental policy, the supranational regional organisation has been involved at the forefront of a number of multilateral negotiations[10] that have led to the crafting of several international environmental agreements (IEAs). The SEA provided the then European Economic Community with an express legal basis for it to be able to co-operate with third countries and international organisations in relation to environmental protection matters.[11] Subsequently, the Treaty on European Union (TEU) 1992[12] enhanced the capability of the European Community[13] to be able to develop an international dimension to its environmental policy, by establishing the basic principle that the Council of the EU, on deciding whether to approve the Community's ratification of an IEA, should do so in principle on the basis of a qualified majority as opposed to unanimity, subject to exceptions.[14]

With the recent entry into force of the Treaty of Lisbon 2007[15] in December 2009, the external dimension to the Union's common environmental policy has been subject to further consolidation and amend-

[5] Art. 17 of the Treaty on European Union (TEU).
[6] Arts.258 and 260 TFEU.
[7] Case C-293/00 *Commission v France (Etang de Berre)* [2004] ECR I-9323.
[8] OJ 1987 L169/1.
[9] The SEA inserted a new section in the former Treaty of Rome 1957 (originally entitled European Economic Community Treaty) on the environment (Title XVI: Arts.130r-t EEC).
[10] Whilst it is now accepted as standard practice that the EU (and other regional supranational organisations) should be expected to be allowed the possibility to be able to accede as full CPs to IEAs on the same basis as nation states, this has only been a relatively recent development. Regrettably, there are a few important IEAs dating before the 1980s that have still not been amended to facilitate EU membership, including notably the 1973 London Convention for the Prevention of Pollution of Ships (MARPOL) (12 *ILM* 1319) and 1973 Washington Convention on International Trade in Endangered Species (CITES) (12 *ILM* 1085). This has made the task of co-ordination of a common external EU position in these areas unnecessarily complicated and challenging. Even though the European Commission would normally have the responsibility for representing the Union in negotiations *vis-a-vis* the international community on environmental matters addressed by these IEAs, the Union's position within the business of these IEAs is formally required to be delivered collectively by those Union's Member States that have acceded to the agreements.
[11] Art. 130r(4) EEC.
[12] OJ 1992 C191/1.
[13] The TEU amended the Treaty of Rome so that its references to "EEC" would be replaced by "EC", with the result that the latter treaty became known henceforth as the "EC Treaty".
[14] Under Art. 300(2) EC the Council decided on the basis of unanimity whether to approve international agreement on matters covering fields for which Council unanimity was foreseen for the adoption of internal rules. In the environmental policy sphere, a list of such policy areas was provided in Art. 175(2)(a)-(c) EC.
[15] OJ 2010 C83/10.

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ment.[16] The complex tripartite pillar system[17] of governance of Union affairs that formerly existed has been terminated by Lisbon, so that the competences and activities of the regional international organisation are no longer divided on a supranational and intergovernmental basis between the European Community and the European Union respectively. Specifically, the Lisbon Treaty has reconstructed the legal foundations of the Union, so that its constitutional framework now rests on two principal treaties: an amended TEU and the new Treaty on the Functioning of the Union (TFEU),[18] which has replaced the former Treaty of Rome 1957 (EC Treaty)[19] and which now houses the Union's framework treaty provisions for its common environmental policy.[20] The international regional organisation is now founded upon a single legal entity known as the EU,[21] with the exception of regulation of the civil nuclear energy sector which is still governed by a specific European Community treaty.[22] Accordingly, it is now the European *Union* instead of the *Community* which has legal capacity to conclude treaties with third countries and international organisations in relation to the environmental sphere, with the exception of the civil nuclear sector. In addition, the European Parliament's assent is now required for the Union to be able to enter into agreement at international level on most environmental protection matters.[23]

The legal framework underpinning the external relations of the EU has been and remains a complex and evolving one.[24] Its complexity is attributable largely to the fact that under auspices of the EU's founding treaties both the Union and Member States are allocated varying degrees of legal and political control in relation to the conduct of relations with non-EU countries and international organisations, depending upon the particular policy matter involved. The EU does not follow the classic federal statist model of allocating exclusive powers to the federal level to conduct international diplomacy.[25] From its inception in the 1950s, the founding treaty framework of the EU has always made it clear that international agreements acceded to by the Union are to be treated as binding sources of law. Specifically, the original EEC Treaty specified that agreements concluded between the Community and third countries or international organisations were to be treated as binding on the Community's institutions and on Member States.[26] This stipulation has remained essentially intact throughout in the founding treaty framework, and is currently[27] housed in Article 216(2) TFEU which states:

[16] The Lisbon Treaty 2007 establishes two treaties for the purposes of constituting the constitutional foundations of the EU: an amended Treaty on European Union (TEU) and the Treaty on the Functioning of the Union (TFEU). The TFEU has replaced the Treaty of Rome.

[17] Prior to entry into force of the Lisbon Treaty, the EU's constitutional framework was constructed on the basis of a strong demarcation between so-called "Community" and "Union" spheres of governance. The former EC Treaty (Treaty of Rome) constituted the basis for the adoption and development of Community measures, decided upon according to supranational institutional decision-making processes and adopted and subject to the rules of a supranational legal order of Community law developed by the Court of Justice of the EU. All the rules of law and policy falling under the auspices of the EC Treaty was known collectively as comprising the Community "pillar" of the Union. In 1992, the TEU introduced a legal framework for the development of two additional spheres of activity for the regional organisation, namely the development of a common foreign and security policy (CFSP) and a common justice and home affairs policy (CJHA). Both branches of policy were envisaged to be developed on a predominantly intergovernmental as opposed to supranational basis, namely subject to consensual agreement between Member States and with heavily restricted involvement of supranational political and judicial institutional involvement. The CFSP and CJHA were commonly referred to as the second and third pillars of the Union's constitutional framework. In 1997, the Treaty of Amsterdam amended the third pillar so that it would focus exclusively on interstate co-operation in the area of criminal policy, the framework treaty provisions on immigration and asylum matters being re-housed within the EC Treaty framework.

[18] OJ 2010 C83/10.

[19] A consolidated version of the EC Treaty prior to its replacement by the TFEU is provided in the Official Journal of the EU: OJ 2002 C325.

[20] Arts.191-193 TFEU.

[21] See Art. 1 TEU, as amended, and Art. 1 TFEU.

[22] Specific rules on the civil atomic energy sector are still governed under the auspices of the European Atomic Energy Community Treaty 1957 (298 *UNTS* 167), which was unaffected by the 2007 Lisbon Treaty.

[23] Art. 218(6)(a)(v) TFEU. For certain limited areas set out in Art. 192(2)(a)-(c) TFEU, the EP has only consultation rights namely over measures concerning: fiscal matters; matters affecting town and country planning, quantitative management or availability of water resources, or land use (not involving waste management); or Member States' choices over energy sources and general structure of energy supply. Prior to the TFEU, the European Parliament had essentially only consultative rights over the accession of IEAs by the EU. (See Art. 300(3) EC).

[24] See e.g. Dashwood, A., Maresceau, M. (eds) *Law and Practice of EC External Relations* (2008 Cambridge); Dashwood, A., Hillion, C. (eds) *The General Law of EC External Relations* (2000 Sweet & Maxwell); Eeckhout, P., *External Relations of the EU: legal and constitutional foundations* (2004 OUP);Holdgaard, R., *External Relations of the EC: Legal Reasoning and Legal Discourses* (2007 Kluwer); McGoldrick D, *International relations of the EU* (1997 Longman).

[25] Weiler, J., "The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle", Ch. 4 in *The Constitution of Europe: 'Do the new clothes have an emperor?' and other essays on European Integration* (1999 Cambridge).

[26] Art. 228(7) EEC.

[27] Prior to the Lisbon Treaty, this founding EU treaty provision was located in Art. 300(7) of the EC Treaty (and in Art. 228(7) of the original version of the Treaty of Rome).

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"Agreements concluded by the Union are binding upon the institutions of the Union and on the Member States."

Accordingly, it is important to note that as a matter of EU law, the provisions of those IEAs which have been concluded by the Union are to be considered as legally binding upon the Member States of the Union as well as the EU's supranational institutions. The legal picture, though, is more nuanced and qualified than might appear at first sight. Specifically, whether or not a particular IEA provision is binding on the Union institutions and its Member States under *EU* law is dependent upon the Union having been endowed with sufficient legal authority (ie. competence) within the Union's constitutional framework to be able to contract to the particular IEA. This can be a difficult issue to resolve, not least for those policy areas under the Union's constitutional framework, including in relation the environment, in which the Union shares competence with Member States.

As is well known, the question of the scope of the Union's powers to take action in a given policy area has been a perennially significant political and legal issue. Over the last decade, in particular, Member States have been keen to clarify the boundaries to the Union's internal and external political role, namely in terms of the development of EU integration between the constituent Member States of the Union as well as the development of the Union's relations with third countries and international organisations respectively.[28] The Lisbon Treaty, through its incorporation of the TFEU[29] into the constitutional framework of the Union, has sought to provide greater clarification on the various limits of legal competence enjoyed by the Union.[30] The TFEU specifies a range of different types of competence for the Union to act, including notably competence that is exclusive, shared (or mixed) or essentially complementary in nature. Where it enjoys exclusive competence, the Member States have pooled all their political sovereignty to the Union level. In terms of external relations, this means that the Union has exclusive authority to conclude international agreements with the Member States having no independent authority to act. Article 3(1) TFEU provides a list[31] of common policy areas for which the Union is automatically ascribed to have exclusive competence; the environment is not included in this list. Article 3(2) TFEU also confirms that the Union enjoys exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. This provision appears to seek codify prior jurisprudence of the CoJ on implied exclusive competence.[32] Article 4(2)(e) TFEU specifies the environment as an area in which the Union shares competence with the Member States.[33] In most areas of shared or joint competence, also commonly referred to as "mixity", Member States retain powers to exercise their competence in the particular field to the extent that the Union has not exercised its competence.[34] Accordingly, once the Union has exercised its competence in a particular policy field shared with Member States, its competence becomes exclusive in nature for most cases,[35] including with respect to the environmental policy sector. This may be contrasted with the more limited range of powers for the Union to act in relation to other policy areas cited as being relevant to Union involvement, whereby the role of the Union is fundamentally restricted to being complementary or ancillary to political action taken by Member States, the latter always retaining competence to act irrespective of whether the Union has adopted any

[28] Member states set in train a formal track of engaging in constitutional reform on this issue in 2001, the issue having been the subject of substantial political discussion during the 1990s. See notably: Declaration 23 of the Treaty of Nice 2001 (OJ 2001 C80) and the European Council Laeken Declaration December 2001. For an incisive historical overview, see e.g. Craig, P., De Burca, G., *EU Law: Text Cases and Materials* 4th Ed (2007 Oxford) Chs. 3-4.

[29] Title I TFEU (Categories and Areas of Union Competence): Arts.2-6 TFEU.

[30] Title III of the 2004 Treaty establishing a Constitution for Europe (OJ 2004 C316/1), which never entered into force on account of French and Dutch rejections, also included similar provision to clarify the issue of Union competences.

[31] Art. 3(1)(a)-(g) TFEU includes the following areas of automatic exclusive competence: the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and common commercial policy.

[32] See in particular Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263, *Opinion 1/76 (draft Agreement establishing a European laying-up fund for inland waterway vessels)* [1977] ECR 741 and Opinion 2/91 *(ILO Convention 170)* [1993] ECR I-1061 and Opinion 1/94 *(WTO)* [1994] ECR I-5267.

[33] The other areas of shared competence identified in Art. 4 TFEU are: the internal market; social policy (for aspects defined in the treaty); economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; and common safety concerns in public health matters (for aspects defined in the treaty).

[34] As confirmed by Art. 2(2) TFEU.

[35] Member State competence is always retained though under the TFEU for certain areas of shared competence: research, technological development and space (Art. 4(3) TFEU) and development cooperation and humanitarian aid (Art. 4(4) TFEU).

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measures in relation to a particular matter.[36] The fractured and complex nature of the state of the Union rules on the issue of competence reflects the varied extent to which EU Member States wish to subject policy development to supranational relative to individual national sovereign decision-making.

Over the course of the Union's history, the CoJ has played a major role in clarifying the legal status and significance of international agreements concluded by the Union from the perspective of EU law.[37] Relatively early on its jurisprudence, the Court confirmed that international agreements concluded by Union institutions under the auspices of the Union's exclusive powers constitute integral parts of Union law.[38] Far more challenging has been the task of clarifying the legal status of mixed agreements in EU law, namely those adopted by both the Union and Member States on the basis of shared or joint competence, which in practice constitute the vast majority of international agreements addressing environmental matters that are approved by the EU.[39] The legal status and impact of mixed agreements has been the subject of considerable discussion in legal academic and professional circles.[40] As already noted above, the general provisions in the TFEU on categories of Union competence specify that EU's common environmental policy is founded upon the principle of shared or mixed competence.[41] Title XX to the TFEU, which sets out the legal framework for the Union's common environmental policy, implicitly affirms that the principle of joint competence applies in relation to the Union's external relations with regard to the environment. Specifically, Art. 191(4) TFEU states:

> "Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.
>
> The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."

Over the years, the CoJ has had occasion to clarify to a certain, albeit relatively limited, extent the legal effects of mixed agreements within the EU legal order. A series of judgments from the CoJ has confirmed that mixed international agreements form an integral part of the EU legal order.[42] It has also clarified that in the absence of specific derogations expressly set out in an IEA, the Union and Member States assume joint liability to other CPs for the fulfilment of obligations undertaken.[43] Moreover, the Court has also clarified that both the Union institutions and Member States are obliged under EU law to ensure that they engage in close co-operation with one another in relation to the negotiation, conclusion and fulfilment of international agreements falling partly within the competence of the Union and partly within that enjoyed by the Member States.[44] The CoJ has affirmed also that it has jurisdiction to provide interpretation of provisions of a mixed agreements which relate to specific areas of policy that, whilst falling within the ambit of Union competence, may not yet have been the subject of internal EU legislative measures.[45]

Notwithstanding that the CoJ has indicated that mixed agreements constitute sources of EU law, a number of challenging legal questions remain. In particular, it has not been entirely clear either from the EU's treaty framework or the CoJ jurisprudence to

[36] See Art. 2(5) in conjunction with Art. 6 TFEU. The policy areas identified by Art. 6 TFEU as falling under this category include: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; and administrative cooperation. In addition, by virtue of Art. 5 TFEU limited powers of co-ordination are also conferred to the Union in relation to economic, employment and social policy spheres.

[37] For an overview of its role see Montini M, "The EC's external competence and the protection of the environment", Ch. 5 in Jans, J. (ed.) *The European Convention and the Future of European Environmental Law* (2003, Europa Publishing).

[38] See e.g. Case 181/73 *Haegemann v Belgian State* [1974] ECR 449.

[39] It should be noted that special considerations apply in respect of international agreements that address matters affecting the operation of the EU's common commercial policy (CCP). The EU's customs union and CCP are areas in respect of which the EU has exclusive competence (Art. 3(a) and (e) TFEU). The CoJ has confirmed that international agreements whose purpose is principally to regulate trade but which have an ancillary environmental protection dimension fall within the exclusive competence of the EU (see Case C-281/03 *Commission v Council (Energy Star Agreement)* [2002] ECR I-12049. Conversely, where the predominant or equally paramount aim of the international agreement is to address environmental matters, then competence is shared jointly between the Union and Member States (see Opinion 2/00 *(Cartagena Protocol)* [2001] ECR I-9713 and Case C-94/03 *Commission v Council (Rotterdam Convention)* [2006] ECR I-1.

[40] See e.g. O'Keeffe, D., Schermers, H. (eds) *Mixed agreements* (1983 Kluwer); Hillion, C., Koutrakos, P. (eds), *Mixed agreements revisited: the EU and its Member States in the World* (2010 Hart).

[41] Art. 4(2)(e) TFEU.

[42] See e.g. Case 12/86 *Demirel v Stadt Schwaebisch Gmuend* [1987] ECR 3719; Case C-13/00 *Commission v Ireland (Berne Convention)* [2002] ECR I-2943.

[43] See e.g. Case C-316/91 *European Parliament v Council (ACP Financial Regulation)* [1994] ECR I-625.

[44] See e.g. Case C-246/07 *Commission v Sweden (Stockholm POPs Convention)* [2010], judgment of 20.4.2010 (not yet reported). The judgment is available for inspection on the CoJ website: www.curia.eu.int.

[45] See Case 12/86 *Demirel, op. cit.* n. 42; Case C-392/98 *Dior* [2000] ECR I-11137 and Case C-431/05 *Merck* [2007] ECR I-7001.

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what extent Member States may be said to be bound by the provisions of mixed agreements which cover areas in respect of which the EU has not (yet) adopted internal legislative instruments. Only through very recent CoJ rulings is it beginning to become somewhat clearer to what extent Member States are bound under EU law to adhere to the provisions of IEAs concluded jointly by the Union and Member States under the auspices of the TFEU.[46] Although it is clear that IEAs acceded to by the Union constitute sources European Union law, the European Commission as principal EU institution in charge of supervising the adherence of EU law by Member States,[47] has so far failed to show a significant degree of commitment to seek to ensure that the EU's international environmental treaty obligations are adhered to at national level across the geographical territory of the Union.[48] There are only a very few instances of cases reported to date in which the Commission has taken legal action through the mechanism of infringement proceedings under Arts.258 and 260 TFEU in order to enforce IEA provisions against Member States before the CoJ. Overwhelmingly, the Commission has focused on ensuring that Member States have correctly implemented EU environmental legislation, namely internal legislative requirements as opposed to external environmental protection obligations. It is to this recent CoJ jurisprudence that this article now turns.

III. The Use of Infringement Proceedings by the European Commission to enforce International Environmental Agreements

Whilst it has been recognised amongst some commentators for a considerable period of time that the European Commission may use the infringement action procedures under the EU treaty framework as a means of assisting in securing the implementation by international obligations entered into by the EU,[49] the practice of the European Commission itself has been relatively muted and mixed in this regard. It is only relatively recently, basically within the last decade, that the Commission appears to have taken any notable steps in seeking recourse to law enforcement procedures in order to hold Member States to account over shortcomings in complying with Union mixed agreements, including those within the environmental sector. The relatively few reported instances of Commission-led litigation, which has sought to enforce provisions of mixed agreements adopted by the EU through the mechanism of infringement proceedings under Art. 258 TFEU, have often proved to be successful before the CoJ. The CoJ's case law has revealed quite clearly that the Commission is entitled to have recourse to infringement proceedings where it deems this necessary, in particular when faced with manifestly serious or persistent recalcitrance by national governments to fulfil their international environmental obligations.[50] It would, though, be premature if not incorrect to assert that any recent developments have led to the Commission adopting any definitive changes in terms of recalibrating its approach to supervising the state of Member State compliance with Union agreements on environmental protection.

3.1 Early case law outlining foundational principles for infringement proceedings

It may be fairly stated that the *Berne Convention* case,[51] decided in 2002 against Ireland, constitutes an important milestone in the development of EU law enforcement in respect of Union mixed agreements. Prior to this case, a number of foundational issues regarding the use of infringement proceedings in this area of EU law remained unclear and highly contentious. In particular, the CoJ had not had an opportunity to adjudicate over the extent to which provisions of a mixed agreement could be enforced against a Member State via the infringement procedure, where the matters addressed by the specific provisions of an international agreement in question had not already been subject to internal EU legislative coverage.[52] In *Berne Convention* the Commission had taken legal action against Ireland over its failure to adhere to terms of an international agreement addressing copyright matters, the 1971 Berne Convention for the protection of literary and artistic works. Under the terms of the 1991 European Economic Area (EEA) Agreement, Ireland was required to comply with the 1971 convention.[53] Ireland, supported by the UK, submitted that the legal action was inadmissible on the

[46] Specifically Art. 192 TFEU.
[47] Art. 17(1) TEU.
[48] Krämer, L., *EU Environmental Law* (2011 Sweet & Maxwell) at p. 431.
[49] For an overview, see Mendez, M., "The enforcement of EU agreements: bolstering the effectiveness of Treaty law?" (2010) 47 *Common Market Law Review* 1737.
[50] See e.g. Holdgaard, R., *External Relations of the EC: Legal Reasoning and Legal Discourses* (2007 Kluwer) at pp. 158-164.
[51] Case C-13/00 *Commission v Ireland (Berne Convention)* [2002] ECR I-2943.
[52] The CoJ had previously had opportunity to confirm that Member States could be held to account over failures to comply with Union agreements in areas in which the (then) European Community had exclusive competence, e.g. trade -related agreements such as in Case 241/85 *Commission v Greece (Lomé Agreement)* [1988] ECR 1037 and Case C-61/94 *Commission v Germany (International Dairy Agreement)* [1996] ECR I-3989.
[53] As required by Article 5 and Protocol 28 of the EEA Agreement. See Decision 94/1/EC, ECSC of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the EEA Agreement (OJ 1994 L1/1).

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grounds that the CoJ would only have jurisdiction to rule on EEA Agreement matters that had been already subject to harmonisation at EU level, this being not the case with respect to the domain of intellectual property rights. In a ground-breaking judgment, the CoJ dismissed the Irish Government's arguments. It recognised that, for the infringement action to succeed, it was necessary to determine whether the breach in question fell within the scope of EU (at the material time European Community) law. The jurisdiction of the Court would ultimately be determined as to whether the dispute involved matters falling within the remit of the Union as opposed to solely national legal orders of the Member States. Building upon its previous jurisprudence, notably including the *Demirel*[54] case, the CoJ confirmed that, as a matter of general regard, mixed agreements (i.e. those signed up to by the Union and its Member States) have the same legal status within the Union legal order as those international agreements falling within the exclusive competence of the Union. Accordingly, Member States' adherence to the provisions of mixed agreements were held by the CoJ to constitute fulfilment of an obligation owed to the *Union* as much as to other CPs.[55]

The CoJ in *Berne Convention* also adopted a broad expansive approach to determining the scope of Union competence. Notwithstanding that the international agreement addressed several issues not covered by internal EU legislation at the time, the CoJ affirmed that its provisions fell within the scope of Union competence. Specifically, the CoJ considered that the matter fell within EU competence given that, in its view, the convention's provisions related "to an area covered in large measure"[56] by the Union's founding supranational treaty (namely the EC treaty). The protection of literary and artistic works had in the words of the Court "to a very great extent"[57] been governed by Union legislation in a range of applications, including computer programs, television broadcasting, databases and copyright. The CoJ considered that a Union interest arose in ensuring EEA parties complied with the terms of the Berne Convention, given that the latter created rights and obligations in areas covered by Union law[58] and concluded that the Commission had legal authority to pursue infringement action in order to secure the due implementation of this EU obligation. The CoJ adjudged that Ireland had breached the terms of Art. 228(7) of the EC Treaty, now superseded by Art. 216(2) TFEU. The *Berne Convention* judgment accordingly made a legal clarification with potentially far-reaching consequences, namely that the Commission could take action to enforce provisions of Union mixed agreements that have not been necessarily subject to internal legislative harmonisation, so long as those provisions fall within the purview of EU competence. Where this is the case, it is irrelevant that a particular provision in the agreement does not have counterpart internal EU legislative coverage. This judicial decision extends the scope of external Union competence even beyond the broad boundaries appeared to be set previously by the CoJ in trail-blazing cases on implied external competence such as *ERTA*[59] and *Inland Waterway Vessels*.[60]

Relatively soon after *Berne Convention*, the CoJ delivered its first ruling on an infringement action taken in respect of an IEA adopted by the Union. In its 2004 decision in *Etang de Berre*[61] the CoJ applied and developed the principles it set out in the *Berne Convention* case in the context of the 1976 Barcelona Convention and accompanying 1980 Protocol[62] addressing pollution of the Mediterranean Sea. Both international instruments had been adopted by the EU (then European Community)[63] and Member States as mixed agreements under the auspices of the environmental provisions of the relevant EU treaty framework. The European Commission had brought an infringement action against France on account of particular breaches of both international instruments,[64] specifically over failures by French authorities to prevent the eutrophic pollution of a saltwater marsh through the discharge of freshwater and alluvia into the marsh as a result of operations of an upstream hydroelectric plant. Whereas the two international instruments outlawed this form of aquatic pollution, EU environmental legislation did not specifically regulate this form of pollution. The French Government submitted a defence similar to that employed by the Irish Government in *Berne Convention*, by claiming that the CoJ lacked jurisdiction to adjudicate the case on the grounds that the material provisions of the two international instruments fell outside the scope of Union competence, in that no internal EU environmental

[54] Case 12/86 *Demirel*, *op. cit.* n. 42.
[55] See paras. 14-15 of CoJ judgment in Case C-13/00 *Commission v Ireland*, *op. cit.* n. 51.
[56] See paras. 16 and 20 of CoJ judgment in Case C-13/00, *op. cit.* n. 51.
[57] Para. 17 of CoJ judgment in Case C-13/00, *op. cit.* n. 51.
[58] Para. 19 of judgment in case C-13/00, *op. cit.* n. 51.
[59] Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.
[60] Opinion 1/76 *(Draft agreement establishing European laying-up fund for inland waterway vessels* [1977] ECR 741.
[61] Case C-293/00 *Commission v France (Etang de Berre)* [2004] ECR I-9323.
[62] 1976 Convention for the protection of the Mediterranean Sea against pollution and 1980 Protocol for the protection of the Mediterranean Sea against pollution from land-based sources. (Both instruments may be accessed on the Ecolex website: http://www.ecolex.org/ecolex/ledge/view/SimpleSearch).
[63] Council Decisions 77/585 (OJ 1977 L240/1) and 83/101 (OJ 1983 L67/1).
[64] Specifically, Articles 4(1) and 8 of the Barcelona Convention and Article 8 of the 1980 Protocol.

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legislation existed which addressed such type of discharges. The CoJ dismissed the French government's defence, by applying the test used by it in the *Berne Convention* case for determining the scope of Union competence in relation to mixed agreements. Whilst acknowledging the non-existence of internal EU legislative rules on the specific matter of pollution of saltwater systems through freshwater discharges, the CoJ held that this did not affect its conclusion that the dispute fell within the scope of Union competence. In its view, the subject matter of the two international instruments, namely environmental protection (including with regard to the protection of aquatic areas), was within "large measure" subject to EU internal regulation.[65] At paragraphs 29-30 in its judgment, the CoJ summarised its analysis accordingly:

> "(29) Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments. (30) The fact that discharges of fresh water and alluvia into the marine environment, which are at issue in the present action, have not yet been the subject of Community legislation is not capable of calling that finding into question."

The CoJ went onto find that France, in having failed to ensure compliance with the Barcelona Convention and accompanying Protocol, had committed a breach of *EU* law. Specifically, the Court confirmed that a breach of a primary rule of EU law had been thereby perpetrated, namely the treaty provision in the EU's constitutional framework which stipulates the legally binding nature of Union agreements, now contained in Art. 216(2) TFEU.

The approach of the CoJ's analysis in the above two cases underscores the jurisdiction of the EU, principally through the institutions of the Commission and CoJ, to have legitimate authority to supervise Member State compliance with their obligations contained in Union agreements. In addition to citing Art. 216(2) TFEU, the CoJ has also referred to the decisions taken by the Council of the EU to approve Union conclusion and ratification of Union agreements as sources of EU legally binding commitments on Member States to ensure compliance with Union mixed agreements.[66] These EU legal sources are important in affirming a genuine Union interest in the use of infringement proceedings, as opposed to there being solely interests of CPs under the auspices of international law to seek redress for breaches of an international accord. Whilst it is has been argued that the CoJ has adopted a "generous"[67] interpretation of the scope of Union competence in the context of mixed agreements and doubts have been expressed as to the legal legitimacy of using infringement proceedings to address failure to comply with non-EU provisions,[68] the result of the Court's interpretation of Union competence in *Berne Convention* and *Etang de Berre* has avoided a situation of the EU finding itself in the position of being legally responsible to non-EU CPs for the failings of a Member State without having an effective legal means (at EU level) to address the problem.[69] The CoJ has accordingly established a means of reaffirming and entrenching a fundamental general principle it has established in the context of EU external relations that both EU institutions and Member States are obliged to work and co-operate to ensure that unity of representation is maintained *vis-à-vis* the international community in the context of EU-agreed positions, from negotiation of through to implementation of international obligations.[70]

It has been submitted that a weakness of the CoJ's approach to determining scope of Union competence lies in the difficulty of identifying with sufficient certainty in any given case whether the Union has adopted internal legislative measures in the relevant policy area addressed by the mixed agreement.[71] However, in practice this issue is unlikely to arise given the very broad approach established by the CoJ in the case law to ascertain the parameters of Union competence. The jurisprudence of the Court has

[65] See paras. 25-28 of CoJ judgment in C-293/00 *(Etang de Berre)*, *op. cit.* n. 61. In this context the CoJ made reference to a number of key internal EU environmental legislative measures focusing on water pollution, including the Urban Waste Water Directive 91/271 (OJ 1991 L135/40), Nitrates Directive 91/676 (OJ 1991 L375/1) and Water Framework Directive 2000/60 (OJ 2000 L327/1).

[66] Significantly, in the concluding operative part of its judgment in the *Etang* case the CoJ made a direct reference to the Council decisions approving Union ratification of the 1976 Convention and 1980 Protocol when confirming breaches of EU law had been committed by France.

[67] See Kuijper, P-J., Case Note on Case C-239/03 (2005) 42 *Common Market Law Review* 1491 at 1496.

[68] See e.g. Koutrakos, P., Interpretation of mixed agreements Ch. 6 at pp. 124-8 and Hillion, C., Mixity and coherence in EU external relations: the significance of the "duty of co-operation" Ch. 5 at p. 111 in Hillion, C., Koutrakos, P. (eds). *Mixed agreements revisited: the EU and its Member States in the World* (2010 Hart) at pp. 124-8.

[69] See e.g. Hoffmeister, F., Curse or blessing? Mixed agreements in the recent practice of the EU and its Member States, Ch. 12 in Hillion, C., Koutrakos, P. (eds), *Mixed agreements revisited: the EU and its Member States in the World* (2010 Hart) at p. 264 and Thieme, D., EC external relations in the field of the environment (2001) *European Environmental Law Review* at 252.

[70] See Ruling 1/78 *(EAEC)* [1978] ECR 2151 at paras 34-6 of judgment, Opinion 2/91 *(ILO Convention)* [1993] ECR I-1061 at para. 36 of judgment, Opinion 2/00 *(Cartagena Protocol on Biosafety)* [2001] ECR I-9713 at para. 18 of judgment and Case 246/07 Commission v Sweden *(Stockholm Convention)*, 20.4.2010 (no yet reported) at para. 73 of judgment.

[71] See Koutrakos, P., *op. cit.* n. 68 at 131.

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indicated that the Union may not necessarily have to have already adopted any internal measures regulating the specific subject matter covered by the international agreement, but that it must only be demonstrated that the Union has chosen to exercise its competence in the area concerned which may be, for instance, by deciding to approve its conclusion of the agreement on the basis of its implied external shared competence in environmental matters[72] or by showing that the relevant provisions of the international agreement fall within or in some direct or indirect way cut across aspects of current internal EU environmental policy.[73]

Whereas the judgments of the CoJ in *Berne Convention* and *Etang de Berre* set out some important foundational principles regarding the question of Member State liability in relation to mixed agreements under EU law, it is important to underscore that they do not address the full spectrum of legal issues involved. In particular, they do not address the consequences that arise where, as appears now to be standard practice with respect to the adoption of most mixed agreements, the EU seeks to specify and delimit the respective range of competences of itself and the EU Member States. This aspect is discussed in the next section.

3.2 The impact of EU Declarations of Competence attached to international agreements

An increasingly common practice of the EU in the context of negotiating and concluding international mixed agreements, including in the environmental policy sector, is for it to seek to declare to the other CPs the ambit of its legal competence to be a party to the agreement to which the EU's Member States are also signatories. Underpinning such notifications lies the intention to clarify the extent of the EU's legal responsibility in ensuring that its Member States comply with the terms of the mixed agreement at hand. In particular, such declarations are clearly designed with the intention of excluding the Union's international responsibility in respect of provisions of an international accord that fall within the sole legal competence of the EU's Member States. The founding treaties of the Union have from their inception remained silent[74] on the question of whether declarations of competence should be integrated within mixed agreements. In the absence of EU treaty clarification, a rather unclear and inconsistent practice has evolved on the part of the Union on the use of declarations.

It appears, though, that there is an increasing trend for mixed agreements to incorporate declarations of competence from the EU, and this has garnered over time a significant degree of support from both within the Union institutional set up,[75] EU Member States as well as from third country CPs. From an EU perspective, it appears at first sight readily straightforward to identify why there might be a need to clarify the scope of Union competence. Without any specific provision incorporated in a mixed agreement demarcating the respective responsibilities between Union and EU Member States in a mixed agreement, it may be implied that both Union and EU Member States assume joint and several responsibility under international law *vis-s-vis* other CPs for the due performance of obligations undertaken by them under the international agreement.[76] The international legal position becomes uncertain and problematic for the Union, however, where an EU Member State falls short of its obligations under the mixed agreement in an area of policy that currently lies outside the sphere of competence of the Union. In such a scenario, it is conceivable that the Union might be viewed responsible by third country CPs for the compliance shortcomings of the individual EU Member State concerned, when at the same time the Union may consider that it does not have legal competence and requisite powers under EU law to be able to remediate the State's non-compliance, notwithstanding the CoJ's broad interpretation of EU law in cases such as *Etang de Berre* regarding possibilities for the European Commission to institute enforcement proceedings under Art. 258 TFEU against EU Member States in respect of non-compliance with terms of mixed agreements.[77] Similar problems might also conceivably arise where the Union is deemed by non-EU CPs to be responsible for implementation of a mixed agreement in the territory of a non-signatory EU Member State. The view that clear limits regarding the scope of responsibility of the Union in international treaties should be set also appears to be widely shared amongst EU Member State governments. In particular,

[72] See Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635, especially paras. 95-97 of judgment.

[73] See Case C-240/09 *Lesoochranárske zoskupenie VLK (WOLF Forest Protection Movement) v Slovakian Environment Ministry* 8.3.2011 (not yet reported), especially paras. 35-38 of judgment. The judgment is available for inspection on the CoJ website: www.curia.eu.int.

[74] As noted by Smyth, I., "Mixity in practice – a Member State practitioner's perspective" Ch. 15 in Hillion, C., Koutrakos, P. (eds), *Mixed agreements revisited: the EU and its Member States in the World* (2010 Hart) at p. 317.

[75] The European Commission has not always supported the inclusion of declarations in mixed agreements, indeed in the earliest phases of EU development it took the view that they were not necessary: see e.g. Ruling 1/78 *On a Draft Convention of the IAEC on the physical protection of nuclear materials, facilities and transports* [1978] ECR 2151 at para. 35.

[76] See e.g. Hillion, *op. cit.* n. 68 at p. 110; Hoffmeister *op. cit.* n. 69 at p. 263, Kuijper, P., "International responsibility for EU mixed agreements" Ch. 10 in Hillion, C., Koutrakos, P. (eds), *Mixed agreements revisited: the EU and its Member States in the World* (2010 Hart) at p. 209 and Eeckhout, P., *op. cit.* n. 24 at p. 263. See also para. 69 of Advocate General Jacobs' Opinion in Case C-316/91 *European Parliament v Council (ACP financial regulation)* [1994] ECR I-625.

[77] See Hillion, *op. cit.* n. 68 at p. 111.

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individual governments are wary of the Union potentially or actually acquiring competence over new areas of policy through the mechanism of the mixed agreement, in which the Union as well as EU Member States conclude international commitments in their entirety. Finally, it has been noted[78] that third countries are increasingly expecting or requiring that greater clarity be instituted within mixed agreements over the division of competence shared between Union and EU Member States, with a view to being more secure over the nature and parameters of Union and EU Member State responsibility.

Over time, a standard process has arisen by which declarations of competence are now typically woven into the legal fabric of mixed agreements, including those concerning environmental protection issues. Usually, a clause will be situated amongst the boiler plate provisions on ratification contained within an IEA that stipulate special treatment for regional economic integration organisations, with a view to clarifying the responsibilities and voting rights of the organisation and its member countries as CPs. The 1982 UN Convention on Law of the Sea (UNCLOS) constitutes the first[79] notable instance of a mixed environmental agreement that specifically addressed the position of participating international organisations, containing requirements on the disclosure of the nature and extent of competence transferred to them from their member countries.[80] Subsequent to the relatively detailed provisions of UNCLOS, treaty practice appears to have refined down reference to the participation of regional international organisations to a few standard provisions. The 2001 Stockholm Convention on Persistent Organic Pollutants (POPs) provides a typical example of this, whose clauses on regional international organisations are replicated across the vast majority of most recent major multilateral environmental agreements involving the EU as a CP.[81] Article 25(2)-(3) of the POPs Convention state:

> "2. Any regional economic integration organisation that becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organisations, one or more of whose member States is a party to this Convention, the organisation and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organisation and the Member State shall not be entitled to exercise rights under the Convention concurrently.
>
> 3. In its instrument of ratification, acceptance, approval or accession, a regional economic integration organisation shall declare the extent of its competence in respect of matters governed by this Convention. Any such organisation shall also inform the depositary, who shall in turn inform the Parties, of any relevant modification in the extent of its competence."

The practice evolved by the EU in responding to such requirements is to submit a declaration of competence upon the Union's ratification of the mixed agreement by way of a decision of the Council of the EU. The declaration of competence is normally annexed to the Council decision.[82]

The stance of the CoJ on the practice of integrating declarations of competence within the legal fabric of the EU's ratification of a mixed agreement appears to have evolved in recent years. Specifically, CoJ jurisprudence seems to have moved from a position of distanced neutrality to one that is increasingly acknowledging their significance in terms of shaping the contours of EU responsibility with respect to the terms of international instruments concluded jointly by Union and EU Member States. The early case law of the CoJ appeared to indicate that declarations of

[78] See e.g. Govaere, I., "Beware the Trojan Horse: dispute settlement in (mixed) agreements and the autonomy of the EU legal order" Ch. 9 in Hillion, C., Koutrakos, P. (eds), *Mixed agreements revisited: the EU and its Member States in the World* (2010 Hart) at p. 193.

[79] International environmental agreements involving the EU as a party concluded prior to UNCLOS did not make specific provision for such declarations of competence: e.g. 1979 Convention on Long-range Transboundary Air Pollution, 1978 Barcelona Convention and 1980 Protocol on Pollution of the Mediterranean.

[80] See Art. 305 in conjunction with Annex IX (Participation by International Organisations) of UNCLOS, in particular Arts. 5-6 of Annex IX.

[81] See eg.1989 Basel Convention on Transboundary Movements of Hazardous Waste (see Arts 2(20) and 22); 1991 Espoo Convention (see Art. 17) and Kiev 2003 Protocol; 1992 UN Framework Convention on Climate Change (see Arts.1(6), 18, 21-23) and 1997 Kyoto Protocol (see Art. 1(1)) and 1998 Rotterdam Convention (see Art. 25(3)). For a rare example, though, of a mixed environmental agreement concluded after UNCLOS without provision for a declaration of competence see the 1992 OSPAR Convention. It should also be noted that there exist a number of existing international environmental agreements which do not include participation of international organisations such as the EU owing to resistance from third country parties, e.g. 1973 Washington Convention on International Trade in Endangered Species (CITES) and maritime-related agreements struck under the auspices of the International Maritime Organisation (such as the 1972 London Dumping Convention and accompanying 1996 Protocol, 1973 London Convention for the Prevention of Pollution of Ships (MARPOL) and 2010 Hong Kong Ship Recycling Convention). Considerable political and legal issues and challenges may arise concerning the EU's degree of influence over EU Member State participation and adherence to those agreements, see Opinion 2/91 *(ILO Convention 170)* [1993] ECR I-1061 and Case C-308/*06 Intertanko v Secretary of State for Transport* [2008] ECR I-4057.

[82] So for example, the EU's declaration of competence is annexed to the Council's decision adopting the 2001 Stockholm Convention in Council Dec.2006/507 (OJ 2006 L209/1).

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competence were not to be viewed as necessary components of mixed agreements as far as the question of assisting in clarifying the relations between the Union and third country CPs. Specifically, in *Ruling 1/78* the CoJ considered that, in the context of the conclusion of an international agreement on protection of nuclear materials, facilities and transport systems falling within the joint competence of the European Atomic Energy Community as well as individual EAEC Member States, the question of demarcating jurisdictional boundaries between Community and Member States was a matter for the EAEC to determine internally without the need to appraise third country CPs:

> "It is further important to state, as was correctly pointed out by the Commission, that it is not necessary to set out and determine, as regards other parties to the Convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other CPs that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of the division is a domestic question in which third parties have no need to intervene. In the present instance the important thing is that the implementation of the Convention should not be incomplete."[83]

This initial sceptical approach of the CoJ towards the utility of declarations of competence is in a number of respects well-founded. First, whilst on the surface the concept of a disclosure of information on the state of transfer of competence from EU Member States to Union may appear attractive to third country parties, the reality is somewhat different. The effect of a declaration effectively places the onus on third countries to be on their guard to determine whether it is the Union or EU Member States who are responsible for due performance of particular obligations underpinning the international accord. This is not a straightforward task for a number of reasons. Third country (i.e. non-EU) CPs to an IEA may well be confronted with a complex document from the EU side that lists a raft of internal EU legislation, intended to indicate which specific environmental areas are covered by Union competence. Not only will third country CPs have to pick their way through the legislation to gain an understanding of the internal legislative reach of the Union, they will also have to take into account the case law of the CoJ on the question of external competence of the Union.[84] The CoJ has confirmed that, as a matter of EU law, it is incumbent on the Council of the EU to ensure that a declaration of Union competence accurately reflects the division of competence between Union and EU Member States at the time of submission of the declaration.[85] However, neither the Council of the EU nor the European Commission appear to have followed up and internalised this legal obligation assiduously and systematically so as to ensure that declarations in mixed environmental agreements are updated so as to remain an accurate reflection of the position on scope of Union competence. For instance, Olson comments that it is most likely that the initial declaration of competence submitted by the Union immediately subsequent to its ratification of a mixed agreement is not subsequently updated to reflect changes in EU law affecting the scope of its competence.[86] Perusal of official websites of key IEAs as well as the EU's Official Journal bear witness to the fact that it is very rare, if at all, that the EU provides third country CPs with regular updates of the state of Union competence in relation to a particular mixed environmental agreement. Instead, EU declarations usually simply place third country parties on notice that the state of transfers of competence between EU Member States and Union may change over time. In addition, EU declarations have varied considerably in terms of the amount of detailed information provided concerning EU competence. Whilst some declarations are relatively brief, some run to a number of pages. Most simply provide general comments about the competence of the Union to enter into IEAs under the EU's founding treaty framework together with a list (or a promise to provide one) of internal EU environmental legislative instruments addressing or matters covered in the agreement. No attempt is usually made to provide written summary of the extent of current Union competence relative to the specific international agreement's obligations; this task is left for third country parties to find out themselves. As a result, declarations of competence are of limited assistance in themselves for third countries in understanding the current ambit of Union competence, and therefore liability, in relation to participation in IEAs.

In practice, though, questions over the impact of Union declarations of competence in respect of IEAs have not so much arisen between the EU and third country CPs but instead between the EU and EU Member States. Even though it may be the case that such declarations do not offer third country parties precise information about the state of the division of competence between the Union and its constituent Member States, it is evident that third country parties rarely if ever seek to raise the question of EU responsibility in respect of an international environmental accord. State parties to such agreements rarely,

[83] Para. 35 of Ruling 1/78 *On a Draft Convention of the IAEC on the physical protection of nuclear materials, facilities and transports* [1978] ECR 2151 at para. 35.
[84] Koutrakos, *op. cit.* n. 68 at p. 131.
[85] Case C-29/99 *Commission v Council* [2002] ECR I-11221.
[86] Olson P, "Mixity from the outside: the perspective of a treaty partner" Ch. 15 in Hillion, C., Koutrakos, P. (eds), *Mixed agreements revisited: the EU and its Member States in the World* (2010 Hart) at p. 344.

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if ever, consider it to be in their interests to take formal steps to seek to enforce such agreements against other CPs unless perceiving that their own immediate national economic or territorial interests are at stake. Moreover, in the rare event such an accord provides for an international institution to intervene in order to investigate and assess allegations of non-compliance, this legal channel is usually preferred over other possibilities for State parties to intervene. Instead of third countries it has been EU Member States as well as its EU institutional representative, the Council of the EU, that have come into periodic conflict with the European Commission over the legal significance of declarations of competence.

The CoJ's case law subsequent to *Ruling 1/78* has reflected an ongoing tension that exists between the European Commission and EU Member States over the role and impact of Union declarations of competence. In the *Nuclear Safety Convention* case[87] the European Commission brought legal proceedings[88] against the Council over the latter's failure to record fully in the declaration of competence annexed to the Council decision approving accession to the Convention on Nuclear Safety the extent of the European Atomic Energy Community's competence in relation to matters of nuclear installation safety addressed by the international accord.[89] The CoJ, in finding that the declaration was inaccurate, held that the general duty of sincere co-operation in EU law requires any Council decision approving accession to an international convention must enable the Commission to comply with international law, in this instance the implied obligation in the convention that a declaration must be complete.[90] In essence, though, this case was more about a struggle between the European Commission and EU Member States over the extent of powers of the EAEC in relation to international regulation of management of civil nuclear installations, as opposed to concern that clarity be afforded to third countries over division of competence between EAEC and EU Member States. The Commission's option to litigate in this instance appears to reflect more of a strategic concern of asserting as well as ascertaining the reach of EAEC political power *vis-a-vis* the national interests of nuclear EU Member States in developing and shaping policy in this particular sector. This is underlined by the fact that there is no evidence to suggest that the European Commission has used this judgment as a means of improving current EU institutional practice with respect to updating Union declarations of competence in mixed agreements.

By far the most important case to have so far emerged in relation to the legal significance of declarations of competence from the perspective of the EU legal order has arisen in the context of infringement proceedings taken by the European Commission against the Republic of Ireland in the *MOX Plant* dispute.[91] In *MOX Plant*, the European Commission took legal action against Ireland on account of the Member State having, contrary to EU law, filed an arbitral claim under the auspices of UNCLOS against the UK. Ireland considered that the UK's decision to authorise British Nuclear Fuel plc's Sellafield nuclear plant operations on the coast of the Irish Sea to be able to reprocess spent nuclear fuel had breached a series of UNCLOS provisions, including a number contained Part XII of the Convention entitled "Protection and Preservation of the Marine Environment.[92] Ireland decided to institute arbitral proceedings against the UK under Art. 287 UNCLOS, a method of dispute resolution foreseen under the Convention to resolve conflicts between CPs. As part of its complaint, Ireland submitted that UNCLOS provisions on marine environmental protection should, under Art. 293 of the convention,[93] be construed in line with a number of EU environmental legislative instruments[94] which it alleged had been breached by the UK. The European Commission considered that Ireland had breached obligations under EU law contained in Art. 344 TFEU[95] and Art. 193 EAEC, both of which prohibit EU Member States from submitting a dispute concerning the interpretation of application of the EU founding treaties to any method of settlement other than those provided in the EU treaties. This would mean that the appropriate channels for Ireland to pursue would have been, under the auspices of the founding EU treaties, either to bring enforcement proceedings itself[96] against the UK or request the Commission to take legal action.[97]

In its defence to the EU enforcement proceedings, Ireland submitted that the CoJ had no jurisdiction to

[87] Case C-29/99 *Commission v Council* [2002] ECR I-11221.
[88] An action for annulment under Art. 146 EAEC.
[89] In external relations matters relating to the EAEC, competence is shared between the Community and Member States. See Art. 101 EAEC.
[90] Para. 69 of judgment in case C-29/99 *Commission v Council* [2002] ECR I-11221.
[91] Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.
[92] Specifically, Arts.192-4, 206-7, 197, 211, 213 of Part XII of UNCLOS. Ireland also alleged that the UK had failed to honour the obligations to co-operate with it under Art. 123 (in conjunction with Art. 197) UNCLOS in refusing to share information relating to the impacts of the MOX plant.
[93] Art. 293 UNCLOS stipulates that a court or tribunal referred to under Art. 287 is to apply the convention "and other rules of international law not incompatible with this Convention".
[94] Specifically Directives 85/337/EC (OJ 1985 L175/40), 80/836/EAEC (OJ 1980 L246/1) and 96/29/EAEC(OJ 1996 L159/1).
[95] At the time Art. 292 EC.
[96] Through Art. 227 EC (now succeeded by Art. 259 TFEU) and Art. 142 EAEC.
[97] Through Art. 226 EC (now succeeded by Art. 258 TFEU) and Art. 141 EAEC.

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hear the action, and relied in part upon the Union's declaration of competence[98] when ratifying UNCLOS in order to substantiate its case. Ireland contended that, as far as the particular marine pollution matters disputed before the Arbitral Tribunal were concerned, these were not issues that concerned any transfer of competence to the EU from its Member States and therefore fell outside the scope of Union competence. Ireland submitted that, in order to establish that the Union's external competence had been asserted in relation to these matters (and therefore had become exclusively within the domain of the Union) in the context of a mixed agreement, it was necessary for the Commission to prove that measures of EU law are affected by the international agreement in question.[99] In Ireland's view, as the dispute with the UK concerned areas of environmental and nuclear policy in which the EU had adopted rules setting only minimum standards, this meant that in line with CoJ jurisprudence[100] the areas of policy concerned had not been transferred from national level to the Union and remained within the exclusive control of EU Member States. Ireland referred to the EU's declaration of competence submitted for the purposes of UNCLOS in support of its arguments, which provides the following statement[101] with regard to matters of marine pollution covered by the international convention in respect of which Union and the EU Member States share competence:

> "With regard to the provisions on [..] the prevention of marine pollution contained inter alia in [..] the Convention, the Community[102] has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice of the Community to act in this field. Otherwise competence rests with the Member States."

Significantly, the CoJ rejected Ireland's analysis of how Union competence may be acquired in mixed agreement contexts. Specifically, the Court dismissed the argument that the Union may only claim external competence to act in cases where its existing internal measures are liable to be affected. The Court held that the question as to whether a provision of a mixed agreement falls within the Union's competence is one relating to the attribution of competence, and not as to its exclusive or shared nature.[103] Bearing in mind that the EU treaty framework specifically provides for Union competence to enter into international agreements on environmental protection issues (Art. 191(4) TFEU), the CoJ held that the existence of the EU's external competence regarding protection of the marine environment was not dependent upon the existence of internal EU measures covering the area in question being liable to be affected in the sense described in its *ERTA* judgment.[104] Instead, following on from its decision in *Etang de Berre* the CoJ confirmed that the EU may enter into an IEA even if the specific matters covered by the agreement is not yet or only partially the subject of rules at EU level which are unlikely to be affected.[105] In assessing whether, in this particular instance, the EU had asserted its external competence in the environmental sector the CoJ took in to account that the Union had approved the international convention on the basis of the relevant EU treaty provision required for adopting environmental measures, namely Art. 192(1) TFEU.[106] For the Court, this was an important indication that the Union had decided to elect its exercise its competence in matters of environmental protection.[107] The CoJ also adjudged that the specific terms of the declaration of competence made the transfer to the Union of matters of shared competence contingent upon the existence of EU rules within the areas covered by the UNCLOS provisions in issue, even though it was not necessary that those EU rules be affected.[108] The list of EU measures referred to in the appendix of the EU's declaration's relating to matters addressed by UNCLOS was found by the CoJ to be a "useful" if not "exhaustive"

[98] European Community Declaration made pursuant to Art. 5(1) of Annex IX of UNCLOS and Art4(4) of the Agreement relating to the implementation of Part XI of UNCLOS, referred to in Art. 1(3) of Council Dec.98/392 (OJ 1998 L179/1) approving Community accession to UNCLOS.

[99] Case 22/70 *Commission v Council (ERTA), op. cit.* n. 32.

[100] Opinion 2/91 *(ILO Convention 170), op. cit.* n. 32.

[101] Point 2, second indent of the EU's Declaration made pursuant to Art. 5(1) of Annex IX of UNCLOS and Art4(4) of the Agreement relating to the implementation of Part XI of UNCLOS.

[102] Prior to the entry into force of the Treaty of Lisbon 1997, all mixed (environmental) agreements were concluded on the EU's part by the European Community.

[103] See para. 93 of CoJ judgment in Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.

[104] Case 22/70 *Commission v Council (ERTA), op. cit.* n. 32.

[105] See paras. 93-95 of CoJ judgment in Case C-459/03 *op. cit.* n. 103.

[106] At the material time this was Art. 175(1) EC.

[107] See paras. 97-98, *ibid.*

[108] See paras. 104-106, *ibid.* In this respect, the CoJ's analysis differs from the opinion of the Advocate General (see paras. 34-37 of Advocate General Maduro's Opinion in Case C-459/03 *MOX Plant* [2006] ECR I-4635) and submissions of the European Commission, who considered that the declaration did not so affect the Union's ability to exercise its competence. The inclusion of the rider "without prejudice to the competence of the Community to act in this field" in the declaration of competence would appear to lend support to their analysis that the terms of the declaration did not stipulate this contingency.

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reference base.[109] It concluded that several matters covered by the Convention and taken up in the Irish complaint against the UK were subject to substantial regulation at Union level, including in respect of environmental impact assessment of installations such as those operating at the Sellafield site addressed by EU's Environmental Impact Assessment (EIA) Directive 85/337,[110] as amended, as well as in respect of access to environmental information[111] and carriage of dangerous goods at sea.[112] Accordingly, the CoJ held that the UNCLOS provisions on marine pollution relied on by Ireland fell within the scope of EU competence,[113] it being immaterial whether the EU rules were affected by the convention's provisions.

The approach taken by the CoJ in *MOX Plant* with regard to interpreting the terms and legal impact of the EU declaration of competence has potentially a very significant bearing on the future prospect and possibilities for the European Commission to be able to bring enforcement proceedings under Art. 258 TFEU against Member States for failing to adhere to the obligations of IEAs ratified by the EU. Specifically, it appears clear that the Court is most reluctant to construe declarations of Union competence in a manner that serves to clarify that Union competence is excluded (and consequently European Commission and CoJ jurisdiction) from entering into international environmental treaty obligations, on the basis that the Union has not already adopted specific EU environmental measures directly concerning the same subject matter as the specific IEA provisions. On the face of things, it appeared that the declaration used for UNCLOS was intended to indicate that the EU was not to be regarded as having competence in a policy domain unless this was deemed to be exclusive in nature, either by virtue of an express indication in the EU founding treaties or implicitly by virtue of the case law of the CoJ, stemming from its *ERTA* ruling,[114] on pre-emptive consequences of the Union having adopted certain internal measures that would be considered to be affected by the Union acceding to the particular international agreement in question. Nevertheless, the CoJ in *MOX Plant* construed the declaration restrictively so as not to so limit the scope of EU competence in this way, with the consequence that the principles determining a broad scope of Union competence in mixed agreement contexts elaborated by its earlier rulings in *Berne Convention* and *Etang de Berre* would remain essentially intact. Although not specifically clarified in the *MOX Plant* judgment, it appears that the rider contained in the EU declaration of competence "without prejudice to the competence of the Community to act in this field" was material to the Court being able to ensure that Union competence was not limited according to the interpretation of the declaration proffered by Ireland. It remains to be seen whether the Council of the EU might at some point seek to tighten further the wording contained in competence declarations in future mixed agreements with a view to excluding Union competence in areas which it has not adopted any internal measures. Irrespective of whether this may happen in the future, it is clear that EU Member States will not be able to exclude European Commission and CoJ supervision and scrutiny of compliance with the substantial range of existing IEAs acceded to by the Union through the mechanism of the declaration of Union competence.

3.3 General EU legal duty of co-operation between the Union and its Member States

Underpinning much of the emergent case law of the CoJ on the ability of the European Commission to be able to take, where necessary, infringement proceedings against EU Member States over failures to implement mixed agreements, including those in the environmental sector, is the general duty of co-operation enshrined in EU law. The duty, established amongst the general fundamental provisions of the EU founding treaties since the inception of the Union, is now crystallised in Art. 4(3) TEU in the wake of changes effected by the 2007 Lisbon Treaty (replacing and building upon Art. 10[115] of the former EC Treaty). The treaty provision imposes fundamental general responsibilities on the Union's institutions and notably the Member States to ensure that they assist in the fulfilment of objectives and requirements set out under the founding EU treaties. 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 the institutions of the Union.

[109] See para. 109 of CoJ judgment in Case C-459/03 *MOX Plant*, *op. cit.* n. 98.

[110] OJ 1985 L175/40.

[111] At the material time covered by Directive 90/313/EEC on the freedom of access to environmental information (OJ 1990 L158/56), now succeeded by EU Directive 2003/4 (OJ 2003 L41/26).

[112] Directive 93/75 concerning minimum requirements for vessels bound for leaving Community ports and carrying dangerous or polluting goods (OJ 1993 L247/19).

[113] See paras. 110-120 of CoJ judgment in Case C-459/03 *MOX Plant*, *op. cit.* n. 103.

[114] Case 22/70 *Commission v Council (ERTA)*, *op. cit.* n. 32.

[115] Former Art. 10 EC(ex Art. 5 EEC) stipulated:

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall refrain from any measure which could jeopardise the attainment of the objectives under this Treaty.".

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> 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."

Over the course of its history, the CoJ has referred continually to the duty of co-operation in the context of the evolution of EU law in order to assist it in clarifying the respective roles of supranational and national authority in developing European integration under the auspices of the EU founding treaties. In particular, it has emphasised the responsibilities of the EU Member States to ensure that they respect the boundaries of competence capable of being exercised by the Union in developing its relations with the international community, whether this be on the legal basis of exclusive or mixed competence.[116]

The duty of co-operation has also been a particularly important legal tool used by the CoJ in order to ensure that Union institutions and Member States collaborate effectively to ensure unity of representation of the EU on the international scene when they are obliged to act on the complex basis of mixity. For instance, this has been demonstrated in the context of the process of the EU negotiating terms of mixed agreements, in respect of which the EU treaty and legislative framework has provided little in the way of express detailed guidance as to how the Union and EU Member States are to co-ordinate their roles in areas of policy that fall partially within the domain of either the Union or the Member States. A relatively recent dispute between the Commission and Sweden[117] over the latter's unilateral decision to propose additions to the list of substances banned under the POPs Convention provides a good illustration as to how the Court has relied upon to the general duty of co-operation under EU law in order to restrain EU Member States from disregarding the need to co-ordinate amongst themselves and with the European Commission, as external representative for the Union, a collective response to issues arising under mixed agreements. In that case the CoJ criticised Sweden for having made a unilateral decision to propose additions to the list of substances banned under the POPs Convention. The Court stated:

> "[W]here it is apparent that the subject-matter of an international agreement falls in part within the competence of the [Union][118] and in part within that of the Member States, it is important to ensure close co-operation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to co-operate flows from the requirement of unity in the international representation of the [Union]."[119]

The CoJ has also made it clear that the duty of co-operation, as set out in the EU founding treaty framework, goes beyond the question of taking positions *vis-a-vis* third countries over policy issues and crafting terms within mixed international agreements. Notably, the Court has underlined that the duty covers all aspects of the Union's engagement with or influence on the international community in matters of shared competence, including as regards the conclusion as well as implementation of mixed agreements. In the *MOX Plant* case[120] the CoJ specifically underlined that both EU Member States and Union institutions are bound by the "obligation of close co-operation"[121] in fulfilling international commitments undertaken by them under the auspices of joint competence. In that case the Court found that Ireland had breached the EU foundational treaty provision on co-operation, at the time contained in the then Art. 10 EC, in having submitted its dispute with the UK over the question of compliance with marine environmental protection obligations under UNCLOS that cut across areas of EU policy, to the Arbitral Tribunal rather than through the dispute resolution channels available under EU law.

The fact that the duty of co-operation covers the aspect of fulfilment of obligations contained in mixed agreements means that the Commission's supervisory role *vis-a-vis* EU Member States is strengthened. Specifically, the duty addresses potentially a wide range of scenarios involving shortcomings on the part of a EU Member State with respect to the due implementation of a mixed agreement. For instance, a failure by a EU Member State to take appropriate steps to ensure that its national law complies with one or more of particular terms of an IEA, of which it and the Union are CPs, may be viewed as a breach of the

[116] See e.g. Case C-266/03 *Commission v Luxembourg (Inland waterway agreement)* [2005] ECR I-4805 at paras. 58 of judgment and C-433/03 *Commission v Germany (Inland waterway agreement)* [2005] ECR-6985 at paras. 63-4 of judgment. See also Helikoski, "Adoption of positions under Mixed Agreements (Implementation)", Ch. 7 in Hillion, C., Koutrakos, P. (eds). *Mixed agreements revisited: the EU and its Member States in the World* (2010 Hart) at p. 158 and Hillion, *op. cit.* n. 68 at pp. 107 and 111.

[117] Case C-246/07 *Commission v Sweden (Stockholm Convention)*, *op. cit.* n. 44.

[118] The original text of the court's judgment refers to the former "Community", now replaced by the Union as a result of the 2007 Lisbon Treaty.

[119] Case C-246/07 *Commission v Sweden (Stockholm Convention)*, *op. cit.* n. 44 at para. 73 of judgment. See also e.g. Ruling 1/78 *(EAEC)* [1978] ECR 2151 at paras 34-6 of judgment; Opinion 2/91 *(ILO Convention 170)* [1993] ECR I-1061, para. 36 of ruling; Opinion 1/94 *(WTO)* [1994] ECR I-5267 at para. 108 of judgment; Case C-25/94 *Commission v Council* [1996] ECR I-1469 at para. 48 of judgment; Opinion 2/00 *(Cartegena Protocol on Biosafety)* [2001] ECR I-9713 at para. 18 of judgment and Case C-45/07 *Commission v Greece (SOLAS Convention)* [2009] ECR I-701.

[120] Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.

[121] Para. 175 of judgment in Case C-459/03.

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duty under Art. 4(3) TEU and accordingly capable of being pursued by the Commission via infringement proceedings under Art. 258 TFEU.[122]

3.4 Problems of partial EU participation in mixed agreements

Amongst the several notable challenges and complexities that may arise in connection with the question of enforcement of mixed environmental agreements under the aegis of EU law is the problem where the EU is only partially represented for the purposes of membership of an agreement. Two types of scenario lead to this situation arising. The first is where the CPs to an international treaty fail to agree to allow the Union to become a CP and insist upon only States being able to ratify, a situation which has been referred to as "reverse mixity".[123] The second is where the Union is a party a mixed agreement but not all the EU Member States are CPs, a situation described as "partial mixity".[124] Both of these scenarios are considered briefly in turn below.

Reverse mixity raises profound problems for the Union, in terms of it being able to supervise effectively Member States' compliance with their international treaty obligations that cut across areas of EU competence. Whilst in the main, the international community appears in recent years to be increasingly willing to facilitate regional international organisations like the Union to become a CP to the most recent generation of IEAs, some areas of international relations affecting environmental policy such as maritime transport and trade in endangered species have remained stubbornly wedded to the classical international relations model of exclusive state membership of international treaties.[125] The exclusion of the Union from participation in such accords makes it nigh on impossible for undertakings entered into by EU Member States to be enforced through the medium of EU law, either by individuals or by the European Commission. For instance, in the *Intertanko* case,[126] the CoJ excluded outright the possibility of provisions of MARPOL having direct effect under EU law on the grounds that the EU was not bound by the IEA, given that the Union is not a CP and that, in the Court's view, the material provisions of the agreement did not reflect customary international law.[127] Moreover, it is evident that it would be essentially legally impossible for the European Commission to use infringement proceedings against EU Member States under Art. 258 TFEU to uphold undertakings of an international agreement to which it is not party to, notwithstanding that the agreement might cut across areas of policy already subject to internal EU regulation.[128]

By way of contrast, a scenario of partial mixity arguably does not present any notable legal problems for the Union to be able to take steps to ensure that all EU Member States comply with the obligations contained in IEAs.[129] It appears fairly clear from both the terms of the EU's founding treaty provisions as well as CoJ case law that the European Commission is entitled to bring infringement proceedings under Art. 258 TFEU against a EU Member State over failures to ensure the full implementation of a mixed agreement, to which the Union is a CP. For by virtue of Art. 216(2) TFEU international agreements entered into by the Union are binding on EU Member States as a matter of EU law, irrespective of whether themselves are CPs. The Court has confirmed as a matter of general principle that the EU Member States, in ensuring the fulfilment of commitments arising from agreements concluded by Union institutions, carry out an obligation in relation to the Union under Union law.[130] As discussed earlier the CoJ has clarified that, in relation to an agreement where competence is shared between the Union and EU Member States, whether the CoJ has jurisdiction to adjudicate over EU Member State compliance with particular terms of the agreement will depend on whether the relevant terms fall within the sphere of the Union's competence. The Court has defined the boundaries of Union competence very broadly, so as to hold that the Union's competence extends to an area which is "in large measure" subject to existing internal EU regulation, irrespective of whether the subject-matter of specific international obligations contained in the agreement alleged to be breached by a defendant Member State has been addressed by internal EU

[122] A breach of Art. 4(3) TEU would have been committed in addition to breaches of the specific terms of the international agreement, rendered integral parts of Union law by virtue of the Council decision that approved the EU's conclusion of the agreement and Art. 216(2) TFEU (ex Art. 300(7) EC). See the operative part of the CoJ's judgments in Case C-13/00 *Commission Ireland (Berne Convention)* [2002] ECR I-2943 and Case C-293/00 *Commission v France (Etang de Berre)* [2004] ECR I-9323.

[123] See Hoffmeister, *op. cit.* n. 69 at p. 266.

[124] See Eeckhout, *op. cit.* n. 24 at p. 219.

[125] 1973 London Convention for the Prevention of Pollution of Ships (MARPOL) and 1973 Washington Convention on International Trade in Endangered Species (CITES).

[126] Case C-308/06 *The Queen on the application of: International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057.

[127] See paras 42-52 of judgment in Case C-308/06 *Intertanko*.

[128] The use of infringement proceedings might well be possible if the international treaty reflected customary international law, which the CoJ has confirmed is a source of law binding on the EU: see e.g. Case C-286/90 *Poulsen* [1992] ECR I-6019 and Case C-162/96 *Racke* [1998] ECR I-3655.

[129] For an opinion that considers the position ambiguous, see e.g. Olson, *op. cit.* n. 81 at p. 342.

[130] Case 12/86 *Demirel* [1987] ECR 3719 at para. 11 of judgment and Case C-13/00 *Commission Ireland (Berne Convention)* [2002] ECR I-2943 at para. 15 of judgment.

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legislation.[131] Accordingly, there is no sound reason to consider that the legal duty of EU Member States under Union law to ensure the implementation, within their respective territories, of a mixed agreement entered into by the Union is contingent on whether they are a CP to the agreement.[132]

The European Commission may well also be able to bring in the EU duty of co-operation into play in partial mixity situations when bringing infringement proceedings against EU member States. Specifically, the duty may be viewed as being breached by a Member State where it fails to ensure that it ratifies an IEA at least within a reasonable period after the Union has completed ratification. For it is evident that a Member State's failure to complete its ratification of an IEA entered into by the Union on the joint competence basis of Art. 192 TFEU will normally render the fulfilment of the latter's obligations under the agreement far more difficult. This will be so, bearing in mind that the Union contracts with third country parties typically on the basis that it promises that the entire geographical area comprising the combined European territories of the EU Member States will conform with the IEA's requirements.[133] Accordingly, if a EU Member State fails to ratify, the EU will nevertheless accordingly be responsible under the agreement for any compliance shortcomings arising in that particular Member State. Yet the EU has no really effective power or resources to ensure compliance on the ground in a non-ratifying EU Member State.[134] What amounts to a reasonable period is, of course, open to debate but greater legal certainty may be injected into this issue where the EU Member States either agree to or are otherwise put on formal notice prior to or by the time of Union concluding to joining the mixed agreement of a deadline to arrange for national ratification.[135]

Having considered in general the legal issues pertinent to the question of the European Commission's capability of using infringement proceedings as means of assisting in the implementation of international environmental obligations undertaken by the EU, the next section of this article focuses on a specific example of an IEA where this might occur in the future. The example chosen is with respect to the state of UK compliance with the 1998 UNECE Convention on access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Before considering the UK's situation.

IV. EU Enforcement of the 1998 Århus Convention with respect to Access to Environmental Justice

4.1 General implications of EU adoption of the 1998 Århus Convention

One of the most interesting and significant areas for the European Commission to develop its remit for ensuring that IEAs concluded by the Union are duly ratified and implemented by EU Member States is with respect to the 1998 UNECE Convention on access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[136] (hereafter referred to as the "Århus Convention").[137] Entering into force in 2001, the Århus Convention has quickly established itself

[131] See Case C-13/00 *Commission Ireland (Berne Convention)* [2002] ECR I-2943 and Case C-239/03 *Commission v France (Etang de Berre)* [2004] ECR I-9325.

[132] This is supported by the fact that the CoJ did not indicate in the leading case in this area, Case C-239/03 *Commission v France (Etang de Berre)* [2004] ECR I-9325, that France's membership of the 1976 Barcelona Convention and accompanying 1980 Protocol was a material consideration regarding the question of whether it had jurisdiction to adjudicate on the infringement proceedings.

[133] This is underpinned by the fact that the EU's founding treaties confirm that they apply to the combined territories of the EU Member States (Art. 52 TEU in conjunction with Art. 355 TFEU).It is conceivable that a clause might be inserted into an agreement to limit the geographical scope of Union responsibility, e.g. by excluding Union responsibility from applying to the territories of EU Member States which have not yet ratified the particular agreement. However, in practice such a limitation clause is not used.

[134] The use of infringement proceedings under Art. 258 TFEU is a very inefficient means of inducing adherence, given that such enforcement action may only be directed against Member States (not private actors), is typically protracted in nature, has very limited success in being able to induce swift changes to national regulation or policing systems and is capable of being used only to a limited extent by the Commission.

[135] Whilst this step has not received endorsement within the EU institutional decision-making circles generally and has not been employed in the environmental sector, on occasion the Council of the EU has allowed the incorporation of soft general exhortatory declarations on the need for speedy and coherent ratification within the preamble to an EU decision approving Union conclusion of a mixed agreement. See e.g. recitals 4-5 of Council Dec. 2006/515 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (OJ 2006 L201/15). It is conceivable that a Union ratification decision could stipulate a soft or hard deadline for EU Member State ratification in a Union ratification decision, see Hoffmeister *op. cit.* n. 69 at p. 256.

[136] 38 *ILM* 517 (1999). The text of the 1998 Århus Convention is available for inspection on the following website: http://www.unece.org/env/pp/treatytext.html.

[137] For a general overview and assessment of international and EU compliance controls with respect to the Århus Convention see e.g. Tanz, A., Pitea, C., "The interplay between EU law and international law procedures in controlling compliance with the Århus Convention by EU Member States", Ch. 14 in Pallemaerts, M. (ed.), *The Aarhus Convention at Ten: Interactions and tensions between Conventional International Law and EU Environmental Law* (2011 Europa Publishing).

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amongst the most important legal instruments at international level on environmental protection. The Convention is intended to enhance the opportunities for the public to become involved in participating in environmental policy decisions and ensuring that national environmental law is adhered to. As at the time of writing the Convention has currently 45 CPs, including the EU and 26 of its Member States. To date the Republic of Ireland has failed to follow up its 1998 signature and ratify the Århus Convention. The Århus Convention focuses on securing a minimum floor of rights for private persons in three key respects (commonly referred to as the "three pillars"), namely guaranteeing a right of access to environmental information held by public authorities,[138] a right to participate in public authority decision-making affecting the environment[139] and a right to be able gain effective access to justice to be able to enforce the other two rights as well as be able to challenge conduct of private and public entities that contravene national environmental law. This part of the article focuses on the access to environmental justice pillar of Århus, which is of particular significance for the EU as it is evident that the Union is facing some difficulties in ensuring that the obligations under the Convention on access to environmental justice are fulfilled by all EU Member States.[140] As yet, the European Commission has not taken any infringement proceedings under Art. 258 TFEU in order to enforce the Århus Convention specifically. However, as will be explored below, this could be a matter that the Commission may wish to review in light of difficulties experienced by individuals in certain Member States such as the UK in accessing national courts to enforce environmental law.

Article 9 of the Århus Convention sets out a range of obligations designed to ensure that individuals enjoy genuine opportunities to be able to have recourse to judicial or administrative review in order to assert their Convention rights. The provisions within Article 9(1)-(2) oblige CPs to ensure that persons, who consider that their rights to access to environmental information or with respect to participation in environmental decision-making under the Convention have been abrogated by national authorities, are to be entitled under certain conditions to have recourse to judicial or administrative review before a court or independent statutory body. In addition, Art. 9(3) requires that members of the public are to be granted the right to have access to judicial or administrative review procedures in order to be able to challenge conduct by private or public entities which breaches national environmental law in areas other than access to information and public participation in decision-making. By way of complement to these provisions, Art. 9(4) of the Århus Convention stipulates a number of common minimum requirements relating to the operation of these review procedures, namely that they:

> "... shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive including the obligation that such procedures must not be "prohibitively expensive". Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

Finally, with a view to ensuring the effectiveness of Art. 9 provisions, Article 9(5) of the Convention requires that the public is to be provided with information about such review procedures and that the CPs are to consider the establishment of appropriate mechanisms to remove or reduce financial and other barriers to access to justice.

As is the case with its membership of most[141] types of international environmental protection agreements, the EU signed up to the Århus Convention on the basis of joint competence as foreseen under the EU's founding treaty provisions establishing the framework for the development of a common environmental policy.[142] However, the process of completing ratification as well as implementation of the Convention's obligations by the Union and the Member States has proved to be far from straightforward, reflecting a failure on the part of the regional organisation to ensure smooth co-ordination of ratification by both Union and EU Member States in a timely and coherent fashion. The Århus Convention, like all other IEAs adopted under the TFEU's provisions on the EU's common environmental policy,[143] is deemed to fall into the category of a mixed agreement for the purposes of EU law in so far as Member States have

[138] Art. 4.

[139] Art. 6.

[140] The EU has also been susceptible to criticism that EU law has failed to ensure that individuals have adequate recourse to environmental justice in respect of decisions taken by EU institutions, including by the Århus Convention's Compliance Committee in March 2011(see *Draft findings and recommendations of the Compliance Committee with regard to communication ACCCC/C/20008/32 concerning compliance by the EU*). This is not, though, the subject of this particular article. For analysis of this particular problem, see e.g. Lange, F., "Beyond Greenpeace, courtesy of the Århus Convention" (2003) 3 *Yearbook of European Environmental Law* 227; Krämer, L., *EU Environmental Law* 7th Ed. (2011 Sweet & Maxwell) at pp. 415-416.

[141] The EU has exclusive competence to conclude international agreements regarding the conservation of marine biological resources under the aegis of its common fisheries policy: see Art. 3(1)(d) and (2) in conjunction with Arts.38(1) and 216 TFEU.

[142] Specifically, now contained in Arts.4(2)(e) and Title XX Environment (Arts. 191-193) of the TFEU. Prior to the entry into force of the Lisbon Treaty 2007 in December 2009, the EU's environmental policy was grounded essentially in Title XIX Environment (Arts.174-176) of the former EC Treaty.

[143] Specifically Arts. 191(4) and 192 TFEU, located within Title XX Environment.

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retained competence to act in the relevant field of policy. Accordingly, in most cases both the Union and EU Member States are obliged to accede to it in order to ensure that the EU's participation in the international agreement is complete and fully effective. In practice, all IEAs appear to be signed jointly by the EU and Member States (irrespective of the extent of EU competence). This is reflective of a continued strong desire on the part of most EU Member States to retain a distinct role in the external dimension to EU environmental politics. However, the application of "mixity" in practice for all IEAs gives an unwarranted level of autonomy to Member States, given that individual Member State ratification alongside that of the Union is required even in cases where internal decisions on matters covered by an international environmental could be determined on the basis of qualified majority voting by the Council of the EU.

In adopting a Council decision in 2005[144] approving EU (then European Community) membership of the Århus Convention, the EU departed from its common practice of waiting until all of its Member States had completed ratification. From an environmental political perspective, such assertiveness on the part of the EU might well be commended. Notably, it demonstrates active serious commitment and leadership in the task of implementing environmental protection obligations entered into. A policy of waiting for every single EU Member State to ratify places no element of pressure, legal or political, on Member States to deliver on their promises within a reasonable period of time, and makes the process of implementing IEA obligations effectively a hostage to fortune of one or more Member States delaying or rejecting national ratification for internal (usually non-environmental) reasons. Moreover, it undermines the EU's constitutional commitment set down in its foundational treaty framework to a "high level of protection and improvement of the quality of the environment",[145] a commitment inherently designed not to be contingent upon the degree of political will of any particular Member State government to deliver on their IEA commitments. At the time of the EU's decision to ratify Århus there was little in the way of hard evidence to indicate that there would be a lengthy delay by any particular Member State to complete its membership to the Convention.

However, from an orthodox legal perspective, a stance of waiting for national ratifications to be completed avoids a number of potential legal difficulties and challenges arising for the EU, albeit that this might well lead to a protracted process of implementation. For deciding to ratify prior to this point in time opens up the possibility of the EU shouldering legal responsibility under the terms of an IEA to ensure that the obligations under Århus would be respected in non-ratifying EU Member States, states that might have not adopted internal measures or invested in adequate administrative and financial resources adequate to meet the obligations of the agreement. Such a position might be avoided if the EU had seen to it that internal Union legislative measures have been already adopted containing obligations commensurate with that the international agreement. In the case of the Århus Convention the EU took the step, contrary to the European Commission's previously stated intention,[146] to ratify the Convention prior to having adopted internal EU legislation designed to ensure the implementation of its requirements at national level. By the time of the adoption of its ratification instrument, the EU had failed to ensure that the Union had passed legislative measures which were adequate to ensure that all the access to justice provisions contained in the Convention would be implemented at EU institutional as well as Member State levels. This was in no small part due to the fact that the Union's Member States have resolutely refused to approve a 2003 European Commission legislative proposal[147] intended to require EU Member States to guarantee minimum standards of access to environmental justice for the public for the purpose of enforcing EU environmental protection. This proposed directive, had it been enacted, would have served to ensure that the principles enshrined in Art. 9 of the Convention would have been implemented at Member State level, at least insofar as EU environmental legislation was concerned. To date, the EU has only adopted a few measures intended to implement the obligations enshrined in Art. 9 of the international agreement. Specifically, in 2006 the Union adopted a regulation[148] directed at the decisions and activities of the EU's own institutions. In addition, it has also passed a few legislative instruments[149] requiring Member States to ensure minimum standards of access to environmental justice in respect of a limited range of fields of EU environmental policy. Jurisprudence of the CoJ is

[144] Council Decision 2005/370/EC (OJ 2005 L124/1).
[145] Art. 3(3) TEU and Art. 191(2) TFEU.
[146] See section 1.1 of the Explanatory memorandum to COM(2000)402final *Commission proposal for a directive on public access to environmental information*, 29.6.2000, at p. 3.
[147] COM(2003)624final, 24.10.2003.
[148] Regulation 1367/2006 on application of the provisions of the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies (OJ 2006 L264/13).
[149] The EU has adopted legislative measures requiring the EU Member States to ensure that their legal systems ensure access to justice in a limited number of areas concerning environmental protection, notably including access to information on the environment (Directive 2003/4 OJ 2003 L41/26), environmental impact assessment and integrated pollution prevention and control (Directive 2003/35 OJ 2003 L56/17) management of mining waste (Directive 2006/21 OJ 2006 L102/15) and in relation to industrial emissions (Directive 2010/75 OJ L334/17).

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beginning to confirm that private persons may be able to rely on the EU's legislative provisions before the national courts to useful effect in challenging unduly restrictive national rules regarding access to environmental justice.[150] The Commission has also been prepared to act by using the infringement procedure in order to uphold these legislative instruments.[151] Nevertheless, significant gaps remain in terms of the EU's legislative implementation of its commitments under the Convention with regard to the securing of minimum standards regarding access to environmental justice. In failing to adopt a single comprehensive legislative instrument on the subject of access to environmental justice, the EU has made at best only relatively modest progress in this area in ensuring that Art. 9 is respected.

Notwithstanding the fact that it was evident already at the time of the EU's ratification of the Århus Convention that there were ongoing implementation challenges at EU Member State level, the Union's political institutions may have considered these issues to have been defused to a large extent by virtue of the EU having completed a carefully worded declaration of competence in its ratification decision.[152] Article 19(4) of the Århus Convention envisages that a regional economic integration organisation that becomes a CP alongside one or more of its member states is to "decide on their respective responsibilities for the performance of their obligations". Article 19(5) stipulates that such organisations "shall declare the extent of their competence with respect to the matters governed by this Convention" in their instruments of ratification, as well as inform the Depositary[153] of the agreement of any substantial modification to the extent of their competence. In the Community's declaration of competence, which is annexed to the ratification decision of the Council of the EU, the following sections are included:

> "Moreover, the European Community declares that it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention and will submit and update as appropriate a list of those legal instruments to the Depositary in accordance with Article 10(2) and Article 19(5) of the Convention. In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.
>
> [...]
>
> The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force.
>
> The exercise of Community competence is, by its nature, subject to continuous development".

Without doubt, the above sections were incorporated into the declaration with the intention of clarifying that the Union's legal responsibility to other CPs of the Convention would be limited to the extent that internal EU legislation has been adopted covering the matters addressed by the Convention's provisions. Those sections in the declaration could be fairly said to have restricted the degree of legal responsibility of the EU under international law *vis-a-vis* other CPs to ensure fulfilment of Convention obligations within the territory of the Union in respect of which it has internal competence, namely competence as determined under the Union's constitutional framework. However, as was discussed above in Section 2 of this article, it is important to note that the effect of such a declaration on the question of Union legal responsibility to adhere to the Convention's obligations from the perspective of *European Union* law is an issue distinct from that under international law.

4.2 Recent case law of the Court of Justice

The relationship between EU law and the Århus Convention was in some respects explored recently in a recent ruling of the CoJ in *Lesoochranárske*

[150] See e.g. Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämd* [2009] ECR I-9967.

[151] See Cases C-354/06 *Commission v Luxembourg* [2007] ECR I-116, Case C-69/07 *Commission v Italy* [2008] ECR I-18, Case C-427/07 *Commission v Ireland* [2009] ECR I-6277 and case C-378/09 *Commission v Czech Republic*, 31.7.2010 (OJ 2010 C209/10). The Commission has also referred the UK to the CoJ under Art. 258 TFEU over non-compliance with the access to justice provisions contained in Directive 2003/35 (EU RAPID Press Release IP/11/439, Brussels, 6 April 2011). In addition, in 2010 the Commission opened proceedings against Ireland and the Czech Republic under Art. 260 TFEU for failing to adhere to the CoJ's judgments against the two Member States noted above in Cases C-427/07 and C-378/09 (EU RAPID Press Releases IP/10/313, Brussels, 18 March 2010 and IP/10/1587, Brussels, 24 November 2010).

[152] Declaration by the European Community in accordance with Article 19 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, adopted by the EC as an Annex of Council Decision 2005/370/ EC (OJ 2005 L124/1)at p. 3 and submitted to the Secretariat of the Århus Convention.

[153] Secretary-General of the UN (see Art. 18 Arhus Convention).

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zoskupiene.[154] In that case a Slovakian environmental NGO, Lesoochranárske zoskupiene (LZ), had sought review of decision of by Slovakian authorities to issue permits to private persons allowing the hunting of certain wild fauna, including the brown bear, in contravention of the EU Habitats Directive 92/43, as amended. By virtue of Slovakian law, though, only parties to administrative proceedings could seek an appeal in respect of administrative decisions resulting from them. LZ, considered to be a third party "participant" and not a "party" to the administrative proceedings which had led to the grant of permits, was not entitled under national law to seek a review of the administrative decisions. In challenging that exclusion, LZ submitted that this exclusion contravened Art. 9(3) of the Århus Convention. During the the course of this legal dispute the Supreme Court of Slovakia referred a number of questions to the CoJ essentially requesting the CoJ to confirm whether, taking account of the fact that the EU had ratified the Convention, Art. 9(3) was directly effective as a matter of EU law. Confirmation of direct effect would have enabled private individuals and organisations such as LZ to be able to rely upon and enforce its obligations as of right against the Slovakian public authorities before the Slovakian courts.

In order to be able to determine the question of direct effect, the CoJ in *Lesoochranárske zoskupiene* considered it first necessary to assess the general legal status of the Århus Convention and in particular the provision of Art. 9(3) within the EU legal order. These initial considerations are also especially pertinent to the question as to whether the obligations flowing from Art. 9(3) are capable of being the subject of infringement proceedings under Art. 258 TFEU. First, the Court referred to the fact that that the EU treaty framework specifically states that agreements concluded by the Union are binding both on Union institutions and Member States.[155] Relying on well-established case law relating to mixed agreements, the CoJ affirmed that the signature and ratification by the Union of the Convention meant that the mixed agreement formed an integral part of the Union legal order.[156] The CoJ further held that, within the framework of the Union's legal order, it was also clear from its jurisprudence[157] that it had jurisdiction to provide interpretation of the Convention in preliminary rulings.[158] More specifically, it had competence to determine which obligations of the mixed agreement had been assumed by the Union and those which remained within the sole jurisdiction of the EU Member States.[159]

Having addressed general jurisdictional issues, the CoJ proceeded to determine whether Art. 9(3) of the Århus Convention concerned an area in respect of which EU Member States had retained exclusive competence *vis-a-vis* the Union. The starting point for the CoJ in analysing this issue was to examine whether in the "particular field into which Article 9(3) of the Århus Convention falls" the EU had exercised its powers and adopted implementing measures.[160] With reference in particular to its earlier ruling in *Etang de Berre*, the CoJ the confirmed that sole Member State responsibility could not be inferred simply from the absence of such internal implementing measures. Specifically, if the issue regulated in the mixed agreement "concerns a field in large measure covered by" EU legislation, the CoJ affirmed this would be deemed to be part of EU law.[161] Given this general test established by CoJ jurisprudence, one might have thought, as Advocate General Sharpston did in her Opinion,[162] that in the specific circumstances the subject matter covered by Art. 9(3) fell outside the scope of EU law. Two factors appear especially material in this regard. First, as the Advocate General noted,[163] the provisions in Art. 9(3) have only been partially transposed into EU law. First, as noted earlier, the EU has only adopted a few measures which serve to implement the access to justice provisions contained in Art. 9 of the Convention. It would be difficult to argue persuasively that the subject of access to environmental justice is a field that, in the words of the CoJ, is "in large measure" covered by EU law. Second, as mentioned earlier above, the EU's 2005 ratification was accompanied by a declaration which appeared to have the clear purpose of limiting Union responsibility for the implementation of Art. 9(3) in EU Member States insofar as the EU has not adopted internal legislation harmonising the Union's position with respect to the subject of access to environmental justice. Such a declaration had not been present in the *Etang de Berre* case. In her opinion to the case, Advocate General Sharpston considered that, given the absence of internal EU legislation relevant to the subject-matter addressed by Art. 9(3) of the Convention, the CoJ should not consider that this particular IEA provision lies within a sphere falling within the

[154] Case C-240/09 *Lesoochranárske zoskupiene VLK (WOLF Forest Protection Movement) v Slovakian Environment Ministry*, judgment of 8.3.2011 (not yet reported). The ruling may be inspected on the CoJ website: www.curia.eu.int.

[155] Para. 29 of judgment in Case C-240/09.

[156] Para. 30 of ruling in Case C-240/09.

[157] Cases 181/73 *Huegeman* [1974] ECR 449 and 12/86 *Demirel* [1987] ECR 3719.

[158] Para. 30 of ruling in Case C-240/09, *op. cit.* n. 154.

[159] Para. 31, ibid. The CoJ drew support from the following judgments on this point: Case C-300.392/98 *Dior and others* [2000] ECR I-11307 (para. 33 of judgment) and C-431/05 *Merck Genéricos* [2007] ECR I-7001 (para. 33 of judgment).

[160] Para. 34 of ruling in Case C-240/09, *op. cit.* n. 154.

[161] Para. 36 of ruling in Case C-240/09, *op. cit.* n. 154.

[162] See paras 73-79 of Advocate General Sharpston's Opinion of 15.7.2010 in Case C-240/09 *op. cit.* n. 154.

[163] See para. 73, *ibid.*

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scope of Union law.[164] In her view, the Court would be "stepping into the legislature's shoes" if it considered it had competence to rule on whether Art. 9(3) had direct effect under Union law,[165] and concluded that only international law (not EU law) imposed obligations on EU Member States to comply with the terms of the Convention.[166]

Notwithstanding the Advocate General's Opinion, the CoJ found nevertheless that the subject matter addressed by Art. 9(3) of the Convention was covered in substantial part by EU law in accordance with its test for EU competence set out in *Etang de Berre*. The analysis of the Court followed a radically different tack from that used by the Advocate General. Specifically, the Court considered that the dispute between LZ and the Slovakian authorities concerned in essence the granting of a derogation to the system of protection afforded to a particular species of wild bear, a matter which fell directly within the scope and overriding control of the EU's Habitats Directive 92/43. Given that a derogation could only be granted subject to the requirements of the EU directive, the CoJ concluded that the legal dispute in respect of a which a preliminary ruling had been requested under Art. 267 TFEU fell within the scope of EU law.[167] As a consequence, the CoJ felt able to dismiss the impact of the EU's declaration of competence as irrelevant in this case on the grounds that that the legal dispute related to an area (i.e. nature protection) covered in large measure by Union law. The boldness of the CoJ's approach is underlined all the more by the fact that it did not see fit to address the Advocate General's warning in her Opinion that such an approach to interpreting the test in *Etang de Berre* would lead to a fragmentation of the interpretation of Art. 9(3), making this depend in a random and arbitrary fashion upon precise facts of particular cases.[168]

Having effectively affirmed that Art. 9(3) of the Convention was an integral part of Union law for the purposes of this case, the CoJ proceeded to assess its legal effects from a EU legal perspective. First, it considered the referring national court's question as to whether the provision was directly effective under Union law. The Court, in applying its well-established test[169] for determining direct effect of norms contained in mixed agreements signed up to by the Union, found that Art. 9(3) failed to fulfil the requirements for direct effect, having regard to the fact that it envisaged the adoption of further measures at national level to determine which members of the public are deemed to have legal standing to bring legal action to challenge decisions affecting the environment. Notwithstanding its rejection of direct effect being relevant in this particular case, the CoJ did not leave the Slovakian environmental NGO empty handed. Notably, it held that by virtue of the general principle of effectiveness[170] under Union law, national courts of the Member States are under a legal duty to interpret "to the fullest extent possible" consistent with Art. 9(3) of the Convention all national procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in order to challenge a public authority's decision taken in alleged contravention with the Habitats Directive. As a consequence, the CoJ made it clear that the referring court should consider itself under a legal duty to construe domestic rules on access to proceedings in line with the requirements of Art. 9(3), unless it considered itself barred from so doing under Slovakian rules of statutory interpretation.[171] Whether or not LZ would be afforded access to justice would therefore ultimately rest upon the extent to which Slovakian law entitled its national courts to construe its rules on legal standing applicable to the case in line with a CoJ judgment.

Although the question of Art. 258 TFEU infringement proceedings were not specifically in play or brought up in the CoJ's recent judgment in *Lesoochranárske zoskupiene*, the judicial ruling does arguably contain some grounds for reinforcing the view that the door is open to the Commission to take legal action in order to secure adherence to the Århus Convention by the Member States. In its judgment the CoJ effectively confirmed that the obligations enshrined in Art. 9(3) of the Convention are to be considered to be an integral part of Union law, thereby implicitly confirming that the Convention's provisions

[164] Para. 79 of Advocate General Sharpston's Opinion in Case C-240/09. *op. cit.* n. 154.
[165] Para. 77, *ibid.*
[166] Para. 80, *ibid.*
[167] See paras. 37-38 of the CoJ judgment in Case C-240/09, *op. cit.* n. 154.
[168] Para. 70 of Advocate General Sharpston's Opinion in Case C-240/09, *op. cit.* n. 154.
[169] The CoJ held, in accordance with previous jurisprudence such as set out in its earlier rulings in Case C-265/03 *Simutenkov* [2005] ECR I-2579 (para. 21 of judgment) and case C-372/06 *Asda Stores* [2007] ECR I-11223 (para. 82), that a provision contained in a mixed agreement conclude by the Union is deemed to have direct effect "when, regard being had to its wording and to the purpose an nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure" (para. 44 of judgment in case C-240/09, *op. cit.* n. 154).
[170] In para. 47 of the CoJ's ruling in Case C-240/09 *op. cit.* n. 154, the Court confirmed that EU law requires national court of EU Member States to ensure that the procedural rules for upholding an individual's rights under Union law are no less favourable than those governing similar domestic legal actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness), as confirmed by the CoJ e.g. in Case C-268/06 *Impact* [2008] ECR I-2483 (paras. 44-45 of judgment).
[171] See paras. 50-51 of the CoJ judgment in Case C-240/09 *op. cit.* n. 154.

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are binding on EU Member States, including national courts. The CoJ, in being prepared to scrutinise whether Art. 9(3) of the Convention is a directly effective norm of EU law, by implication endorses the point that the Convention's provisions constitute sources of EU law, binding on Member State governments and authorities. The fact that the CoJ held that Art. 9(3) did not fulfil the requirements of direct effect does nothing to detract the nature of the Convention as a source of EU law, and is immaterial for the purposes of whether infringement proceedings are to be triggered or not. The CoJ also most recently underscored the binding quality of the Århus Convention's provisions on Member State authorities in the *Boxus* case.[172] In *Boxus* the CoJ advised a Belgian court that it was obliged to disapply national rules if the national court found that national law contravened Art. 9(2) of the Convention. In *Boxus*, a number of individuals wished to challenge the legality of the legislative consent granted by Belgian Wallonian Region in respect of certain transport-related development projects. Under Belgian law, individuals could only gain access to a limited judicial review before the Belgian Constitutional court of a legislative act that ratified consent for a development project. Only questions of constitutionality of the act could be raised before the national court. This meant that no substantive review of the consent procedure could be required, namely whether compliance with environmental laws had been respected. Both the Convention and the EU's EIA Directive 85/337,[173] subject to certain qualifications, stipulate that legislative acts fall outside their material scope.[174] The CoJ held that Art. 9(2) of the Convention and Art. 10a of the EIA Directive 85/337 required that that it must be possible for a person to secure access to a court of law or other independent and impartial statutory body to subject the legislative act to a review to test whether it fulfils the necessary conditions set out in the EIA Directive in order for the project to fall outside the scope of those instruments. It held that a national court of a Member State is obliged to disapply national rules of law that fail to respect those requirements. The CoJ did not feel the need to explain that Art. 9(2) of the Convention was an integral part of Union law, which might imply that the Court now considers this to be an elemental point that requires no substantive elaboration or explanation.

Whether or not the infringement procedure is used by the Commission in practice, though, remains a matter ultimately within its discretion. However, the longer a state of non-compliance remains will increase the likelihood of the Commission deciding to test legal waters and precipitate legal action. The infringement procedure in Art. 258 TFEU offers itself as a useful lever to bear down on non-compliant Member States.

4.3 Non-compliance by the UK: a potential target of Infringement Proceedings

This section of the article considers an example of possible recourse to the infringement procedure under Art. 258 TFEU in relation to a particular aspect of the Århus Convention's access to justice obligations. Specifically, recent legal disputes between the UK government and environmental NGOs have highlighted shortfalls in the state's implementation of certain aspects of the Convention's obligations relating to its third pillar. The disputes have illustrated clear possibilities for the Commission to have recourse to the infringement procedure under Art. 258 TFEU in order to enforce those international obligations.

In a particular recent dispute known as the "Port of Tyne" case, adjudicated before the Århus Convention's complaints body (the Århus Convention Compliance Committee (hereafter referred to as the "ACCC"), it was found by the ACCC in September 2010[175] that the UK contravened Art. 9(4) of the Århus Convention, which *inter alia* requires CPs to the Convention to ensure that procedures governing the right of access to seek judicial review of public authority decisions affecting the environment must not be "prohibitively expensive". The Århus Convention is unique amongst IEAs in having established an independent international body in the form of the ACCC designed to consider complaints from members of the public about alleged instances of non-compliance by CPs with their obligations under the Convention. Established in 2004,[176] the ACCC constitutes the crystallization of a compliance review mechanism envisaged in Art. 15 of the Århus Convention. Specifically, Art. 15 requires CPs to establish optional arrangements for a non-confrontational, non-judicial and consultative nature for reviewing compliance with the Convention, allowing for public involvement.

The "Port of Tyne" case originated with a complaint[177] filed in December 2008 by certain environmental NGOs and a member of the public[178] to the ACCC that particular obligations of the

[172] Joined Cases C-128-131, 134-135 /09 *Antoine Boxus and others v Région Wallonne*, CoJ judgment of 18.10.2011 (not yet reported). The judgment is available for inspection on the CoJ website: www.curia.eu.int.

[173] OJ 1985 L175/40.

[174] See Art. 2(2) of the Århus Convention and Art. 1(5) of the EIA Directive.

[175] Findings and Recommendations with regard to communications ACCC/C/2008/23 and ACCC/C/2008/27 concerning compliance by the UK, adopted on 24.9.2010 (ECE/MP.PP.C.1/2010/6/Add.1 and ECE/MP.PP.C.1/2010/6/Add.2 respectively) available for inspection on the AC website at http://www.unece.org/env/pp/pubcom.htm.

[176] Decision I/7 Review of Compliance, adopted at the first Meeting of the Parties in Lucca, 21-23.10.2002 (ECE/MP.PP/2/Add.8) available for inspection at the following UNECE website: http://www.unece.org/env/pp/ccDocuments.html).

[177] Communication ACCC/C/2008/33, 2.12.2008.

[178] Specifically, ClientEarth, the Marine Conservation Society and Robert Latimer.

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Convention, including Art. 9(4), had failed to be respected by UK authorities in connection with an environmental dispute regarding the management of hazardous waste. Specifically, the dispute concerned a UK government licence having been issued to the Port of Tyne to permit the disposal and capping of highly contaminated port dredgings containing TBT (tributyltin) and heavy metals at a site known as "Souter Point" located four miles off the coast. The complainants objected to the fact that no full environmental impact assessment had been made of the suitability of the site or of the management of waste deposition envisaged. Whilst the complainants considered that the licence had been granted in breach of environmental law, notably in contravention of the EU's environmental impact assessment legislation,[179] they felt deterred to do so by the significant amount of legal costs involved in taking legal proceedings through the English court system. In the absence of legal aid being available in most cases to support environmental litigation taken by individuals or associations due to a combination of strict means testing and limits to sponsoring public interest litigation,[180] legal fees for judicial review proceedings before the High Court represents a considerable financial burden for claimants.[181] In addition, the complainants considered that the effect of the rule in English civil procedure[182] of "costs follow the event", namely that the loser in a court case is to meet the legal costs of both their own counsel and that used by the opposing side, exacerbates the situation considerably by placing an unduly expensive and risky financial burden on plaintiffs.[183] Their assessment was that, in many instances, ordinary members of the public and environmental NGOs were deterred from taking legal action, taking into account the real risk that losing a case might result in their personal bankruptcy or insolvency. Whilst the complainants acknowledged that English courts[184] had taken some steps to mitigate against the threat of exacerbated legal costs through the introduction of protective cost orders (PCOs), namely limits being imposed to each sides' legal costs, they submitted that in practice the application of these orders did not have much impact. Notably, not only did the usage and setting of PCOs remain within the discretion of the court,[185] the levels of financial caps imposed in some cases remained relatively high.[186] In addition, the application fee for a PCO was considerable,[187] having a chilling effect on the pursuit of litigation. The complainants also submitted that the rules on legal costs also had an adverse impact on applications for interim relief in environmental disputes. Specifically, under rules of civil procedure applicable to England and Wales, any person in judicial review proceedings wishing to seek an injunction against another party pending the delivery of a ruling of the court on the substantive merits of the case may be obliged to provide a cross-undertaking in damages,[188] namely effectively a financial guarantee to provide compensation to an interested party in proceedings who has suffered commercial loss as a result of being subject to an interim injunction and where the plaintiff loses the case. Given that a cross-undertaking may entail a considerable sum of money, the complainants

[179] Directive 85/337 (OJ 1985 L175/40) as amended.

[180] The restrictions on legal aid funding are summarised in para. 28 and Appendix 2 of the "Sullivan Report" (2008 Report of the Working Group on Access to Environmental Justice chaired by Hon Mr Justice Sullivan *Ensuring access to environmental justice in England and Wales*).

[181] The complainants cited the example given in studies of lawyers' fees amounting to between £10-20,000 in straightforward cases, with the costs of instructing counsel for a one-day hearing being between £5-15,000 (see para. 98 of their Communication to the Complainants Committee).

[182] Rule 44.3(2)(a) of the Civil Procedural Rules applicable to England and Wales.

[183] The complainants cited the example of the so-called "Ghost Ships" litigation (*R (Friends of the Earth) v Environment Agency* [2003] EWHC 3139 (Admin) where an interested party in the judicial review proceedings served FoE notice of a schedule of their legal costs of over £100,000 for a one day judicial hearing on a preliminary issue. Whilst FoE did not in the event have to pay for these costs, it is evident that not many members of the public or environmental NGOs could afford to take this degree of financial risk in pursuing litigation.

[184] See notably *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

[185] Confirmed in judgments such as *Corner House*, *op. cit.* and *R (Francis Morgan) v Hinton Organics (Wessex Ltd)* [2009] EWCA Civ107 and exemplified in *R(Edwards and Palliokaropoulos) v Environment Agency* [2008] UKHL 22 in which an application for a PCO was dismissed for the plaintiff who had taken over a claim dropped by a legally aided litigant on grounds of ill-health. The effect of this was to render the plaintiff liable for substantial legal costs of £88,000.

[186] The complainants cited the example of the "Anti-Vivisection" case, in respect of which the protective costs cap was a sizeable £40,000 (*R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250 (admin) (see para. 107 of complainants Communication ACCC/C/23). In addition, the Coalition for Access to Justice for the Environment (CAJE), an observer in respect of the Århus complaint, referred to the example of the "Buglife" case, in which the cost cap (£20,000) imposed in that case represented nearly 5 per cent of the charity's annual income (*R (Buglife) v Thurrock Gateway Development Corpn et al* [2008] EWCA Civ 1209).

[187] Estimated to be at the time in the order of between £2,500-7,500 plus VAT (see Appendix 3 of the Sullivan Report, paras. 11-14).

[188] *American Cyanamid v Ethicon Ltd* [1975] AC 396. It is ultimately within the discretion of the English courts whether or not to impose a cross-undertaking in damages and in some instances interim relief has been awarded without this being imposed: e.g. *R v Durham CC, ex p Huddleston* [2000] Env LR D21.

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submitted that any such requirement may entail prohibitive expense to legal proceedings and fatally undermine them, as exemplified in the infamous *Lappel Bank* case.[189]

The ACCC delivered its findings and recommendations on the case on 24 September 2010.[190] Amongst its key findings, it agreed with the complainants that the operation of civil procedural rules for England and Wales breached the terms of Art. 9(4) of the Convention, in failing to ensure that the legal costs of taking action to assert Convention rights were not prohibitively expensive. It also found that the UK had breached the Convention in other respects, specifically in failing to ensure: that its legal system removed or reduced financial barriers to access in accordance with Art. 9(5); that clear time limits are set regarding applications for judicial review in accordance with Art. 9(4); and that its legal system had a clear, transparent and consistent framework to implement its obligations under Art. 9(4).[191] The ACCC recommended that the UK review its rules on costs awards in environmental cases and take practical and legislative measures to overcome the problems of non-compliance it identified.[192] The ACCC report on the Port of Tyne case was delivered concurrently with two other of its reports which found breaches of Art. 9(4) of the Convention by the UK in relation to the award of legal costs in civil disputes involving environmental law.[193]

It is important to note that the final reports of the ACCC on complaints referred to it, whilst influential in terms of their detailed analysis of the individual issues, have no automatic binding legal status under the terms of the Convention. Ultimately, it is the Meeting of the Parties (MOP) which decides how to proceed on the basis of ACCC reports containing recommendations submitted to it, with a view to bringing about full compliance with the Convention.[194] The MOP may ultimately decide to take one of a range of measures, including issuing cautions, declarations of non-compliance and suspension of privileges.[195] Pending consideration of a report by the MOP, the ACCC has only power to provide advice and assistance to individual CPs[196] and, subject to their consent, issue recommendations to them and request that they submit a compliance strategy.[197] Significantly, ACCC findings have no formal binding status in themselves and are intended instead to have persuasive value, underpinning the fact that CPs have not been prepared to conceive and construct a complaints regime to be outside of their overriding control. The involvement of the MOP in complaints management also means that the follow up to ACCC findings might become drawn out as well as open to formal and/or informal negotiation and resolution between the CPs themselves. Overall, the particular legal framework established for the management of complaints under the auspices of the Convention reflects a priority of achieving and maintaining a consensual and co-operative attitude amongst Parties with respect to the issue of implementation of Convention obligation.[198]

This raises the question as to how effectively compliance shortcomings identified by the ACCC are followed up and addressed on the ground by CPs. Unlike the system employed by the European Union, which requires its Member States to adhere to judicial decisions of the CoJ where the judicial body finds that they have breached rules of EU law, the Århus Convention as noted above adopts a softer approach in that the ACCC is only able to make findings and recommendations. ACCC findings do not have a formal legally binding quality; instead the MOP is the principal entity in charge of deciding upon a range of

[189] *R v Secretary of State for the Environment ex p RSPB* (1997) Env LR 431. In that case the RSPB were denied interim relief in relation to a development of a protected area of estuary for not being able to come forward with a cross-undertaking. The result was that by the time the judicial ruling on the merits of the case was delivered in favour of RSPB, the protected area had already been destroyed on account of the site being developed.

[190] Findings and Recommendations of the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/33 concerning compliance by the UK adopted on 24.9.2010 (ECE/MP.PP/C.1/2010/6/Add.3) available for inspection on the AC website at http://www.unece.org/env/pp/pubcom.htm.

[191] The Complaints Committee, whilst expressing concern with the state of UK law, on the evidence presented to it rejected the complainants' claim that the UK was in breach of Art. 9(2) and (3) of the Convention in failing to ensure that the public has access to review procedures capable of reviewing both the procedural and substantive legality of decisions, acts and omissions regarding public participation obligations under Art 6 and environmental protection requirements under national law respectively. (Para. 127 of Complaints Committee findings and recommendations ACCC/C/C/2008/33).

[192] See para. 145 of ACCC/C/2008/33 Findings and Recommendations.

[193] Findings and Recommendations with regard to communications ACCC/C/2008/23 and ACCC/C/2008/27 concerning compliance by the UK, adopted on 24.9.2010 (ECE/MP.PP.C.1/2010/6/Add.1 and ECE/MP.PP.C.1/2010/6/Add.2 respectively) available for inspection on the AC website at http://www.unece.org/env/pp/pubcom.htm.

[194] See Arts.X and XII of Decision I/7.

[195] Art. XII of Decision I/7.

[196] Art. XI(a) of Decision I/7.

[197] Art. XI(b) of Decision I/7.

[198] This is illustrated by the fact that MOPs are obliged under its Rules of Procedure (ROP) to make every effort to reach its decisions by way of consensus. Only if all efforts to reach consensus have been exhausted and no agreement is able to be reached, decisions shall be taken on the basis of a three-fourths majority vote of the CPs present and voting (Rule 35 of Decision I/1 Rules of Procedure of the MOP, adopted at MOP-1, 21-23 October 2002 (ECE.MP.PP2/Add.2).

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actions at its disposal to follow up the findings. The degree to which ACCC findings are acted upon and how swiftly is, in practice, heavily dependent upon the goodwill of individual "defendant" CPs. In relation to the Port of Tyne case, it appears from a recent 2011 MOP report[199] endorsing the ACCC's findings that the UK has indicated willingness and has made progress on implementing the ACCC's recommendations. The UK has been invited by the MOP to submit to the ACCC periodically in February 2012 and 2013 and 6 months before MOP-5 information on progress in implementing the ACCC's recommendations.[200] At first glance, the MOP report appears to signal encouraging news of the response by the defendant CP to the issue of legal costs. However, it should be borne in mind that the Convention's framework leaves a substantial amount of control in the hands of the UK over the nature and timing of any legislative reform to its national rules on the award of legal costs. Seen in this light, the complaints management regime under the Convention may prove to be vulnerable in practice when confronted by uncooperative CPs who not motivated to change the rules of their national legal systems in the absence of hard sanctions. The experience of the EU demonstrates that its Member States often take far greater (i.e. quicker) notice of Court of Justice rulings when it is clear that continued failure on their part to ensure discontinuance of instances of non-compliance with EU environmental legislation may result in imminent financial sanctions being imposed as a result of legal proceedings brought under Art. 260 TFEU.[201]

Whilst it would be incorrect to suggest that the EU has not shied away from actively monitoring the situation with regard to the state of the UK's rules on access to environmental justice, it would fair to say that the European Commission's strategy has hitherto been relatively limited in scope and ambition. Specifically, it has so far chosen to focus solely on seeking to ensure adherence by the UK and other EU Member States of EU internal legislative requirements regarding access to justice and has declined the opportunity to use norms of the Århus Convention as the basis for initiating infringement proceedings under Art. 258 TFEU. Prior to the ACCC Recommendations on the "Port of Tyne" complaint, the European Commission had been concerned with the state of UK law and had already opened proceedings against the UK under Art. 258 TFEU on grounds of it breaching the access the justice provisions enshrined in Directive 2003/35. As at the time of writing, a case is pending before the CoJ after the Commission referred the UK to the Court in April 2011.[202] The Commission considers that in the UK legal proceedings, contrary to the requirements of the Directive, are prohibitively expensive for civil society to pursue, and is not convinced that the operation of protective costs orders has been sufficiently clear or certain to limit the amount of legal costs that private individuals might face in seeking to uphold EU environmental legislative standards covered by the Directive. In addition, the Commission's action also considers the requirements under UK law for persons seeking interim measures to suspend work on projects to provide a substantial cross-undertaking in damages in the event of the case proving to be unfounded also to breach the terms of the EU Directive. In response to a citizen's complaint against the UK and a European Parliament question which arose as a result of the ACCC's recommendations, the Commission has preferred not to extend to the scope of current legal action against the UK so as to include specific reference to Art. 9 of the Århus Convention.[203] It appears confident that its current legal action will assist to procure the necessary changes in the UK, notwithstanding its material scope is limited to the areas of environmental policy covered by that EU directive. Additional legal action to embrace Art. 9 of the Convention would reflect better the extent of the problem of non-compliance in the UK as well as adding pressure on the UK government to accelerate the pace of domestic legal reform required.

It is interesting to note in this regard that the current legal action taken by the Commission against the UK does not address all the legal problems encountered by the complainants in the Port of Tyne dispute. Specifically, one could view the action of the

[199] Decision IV/9i on compliance by the UK with its obligations under the Convention, adopted at MOP-4 on 29.6-1.7.2011 (ECE/MP.PP/2011/L.20) available for inspection via the following UNECE website: http://www.unece.org/env/pp/mop4.html.

[200] See para. 6 of MOP Decision IV/9i.

[201] See e.g. Jack, B., "Enforcing Member State compliance with EU environmental law: a critical evaluation of the use of financial penalties" (2010) *Journal of Environmental Law* at pp. 9-10; Hedemann-Robinson, M., *Enforcement of EU Environmental Law: Legal Issues and Challenges* (2007 Routledge Cavendish) at pp. 177-8.

[202] IP/11/439, Brussels, 6 April 2011.

[203] On 18.11.2010 the author filed a complaint was filed against the UK to the European Commission in the wake of the ACCC's recommendation that the Member State had breached Arts. 3(1) and 9(4)-(5) of the Århus Convention (CHAP(2010)03795). In early 2011, by way of follow up to a citizen's petition, the European Parliament tabled a question to the European Commission enquiring what steps it is taking to ensure compliance by EU Member States with the Århus Convention on the subject of access to justice (EP Written Question E-002454/2011 (Lambert/Belier)). The responses in respect of both complaint and EP question have revealed a distinct lack of willingness on the part of the Commission to consider actively relying directly upon the Convention's norms for the purposes of infringement proceedings and instead a preference to rely on EU legislative norms as the principal foundation for law enforcement action, in particular with Directive 2003/35. The Commission's reply to the EP question was give on 18.4.2011 and is available for inspection on the EP's website.

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complainants in that particular case as an attempt on their part to take legal steps so as to prevent uncontrolled and dangerous disposal of hazardous waste. Under the terms of the EU's Waste Framework Directive (WFD),[204] EU Member States are obliged to ensure that management of waste located in their territories is handled in a way that is safe in terms of both health and the environment.[205] Notwithstanding that the WFD has been subject to periodic amendment and consolidation since its inception in 1970s, most recently in 2008, it does not expressly require at present that Member States ensure that private persons enjoy minimum standards of access to justice commensurate with that set out in Art. 9 of the Convention. The procedural difficulties experienced by the complaints in the Port of Tyne case, notably over legal costs in connection with the prosecution of their case does not appear to breach the specific terms of the WFD, notwithstanding that mismanagement of waste lies at the heart of their dispute with the port authorities. However, in light of the recent ruling of the CoJ in *Lesoochranárske zoskupiene* noted above, it would appear possible for the Commission to bring a case against the UK on grounds of an infringement of Art. 9(4) of the Convention as well as a breach of the EU general principle of effectiveness in response to the way in which the Member State's rules on judicial review of a public authority's decision operated in relation to the complainant's case.

The Århus Convention is a particularly important IEA, in that it is designed to see that its CPs provide a framework of rights for private individuals to have the means to bring pressure to bear on national authorities for the purposes of enhancing the state of environmental protection. In particular, the Convention requires them to be able to access national courts in order to seek review of conduct or decisions taken by national authorities or private entities in breach of environmental law. The right of access to environmental justice constitutes a vital legal instrument in the toolbox of environmental law enforcement, providing an important means of assisting in the supervision of environmental protection laws. Within the EU, it is evident that there have been a number of occasions when the European Commission has felt it necessary to take infringement proceedings against several EU Member States in respect of failures to comply with access to justice requirements contained in various pieces of EU environmental legislation. The Commission's approach has been to focus on identifying breaches of access to justice obligations contained in the relatively few pieces of Union environmental legislation that have served to implement the third pillar of the Convention. It has so far refrained from taking action in order to enforce the access to justice provisions contained in the Convention directly against infracting Member States, notwithstanding recent requests to intervene on this basis.[206] As a consequence, the Commission's current enforcement strategy on access to environmental justice is unduly limited in its material scope. It should seek to enforce the obligations of Århus amongst EU Member States across the board and independently of whether or not the Union has adopted specific legislative measures to incorporate third pillar obligations within the corpus of its existing body of substantive legislation on environmental protection. For as confirmed by the CoJ, the provisions of the Århus Convention have the status of legally binding norms of EU primary law, given that they have been subject to ratification by the Union. This action by the Commission is all the more necessary, in view of the fact that the possibilities of private persons being able to rely upon and enforce the access to justice provisions of the Århus Convention directly before the national courts appear very limited if not entirely remote.

Moreover, in view of the fact that the provisions of the Århus Convention are to be considered an integral part of the Union legal order, it is immaterial for the purposes of its enforcement by the European Commission whether or not a EU Member State is a CP to the international agreement. Although being one of the original signatories to the Århus Convention in 1998, the Republic of Ireland has to date failed to ratify the international agreement. It is the only EU Member State not to have ratified. Notwithstanding that, as a result of not being a CP Ireland is not bound to the terms of Århus under *international* law, this does not mean that the Member State may ignore the requirements contained in the Convention. For as a Member State of the EU, the Republic of Ireland may be considered to be subject to the obligations of the Convention from the perspective of *European Union* law. The Commission has had a long-standing legal battle with the Irish Republic as a result of the latter's failure to adhere to access to justice provisions

[204] Directive 2008/98 (OJ 2008 L312/3).

[205] See, in particular, Art. 13 of Directive 2008/98.

[206] On 18.11.2010 the author filed a complaint was filed against the UK to the European Commission in the wake of the ACCC's recommendation that the Member State had breached Arts. 3(1) and 9(4)-(5) of the Århus Convention (CHAP(2010)03795). In early 2011, by way of follow up to a citizen's petition, the European Parliament tabled a question to the European Commission enquiring what steps it is taking to ensure compliance by EU Member States with the Århus Convention on the subject of access to justice (EP Written Question E-002454/2011 (Lambert/Belier)). The responses in respect of both complaint and EP question have revealed a distinct lack of willingness on the part of the Commission to consider actively relying directly upon the Convention's norms for the purposes of infringement proceedings and instead a preference to rely on EU legislative norms as the principal foundation for law enforcement action, in particular with Directive 2003/35. The Commission's reply to the EP question was give on 18.4.2011 and is available for inspection on the EP's website.

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enshrined in EU environmental legislation. This has led to a condemnatory judgment from the CoJ against the Member State as a result of proceedings being brought before the Court under Art. 258 TFEU, as well as initiation of follow up "second round" infringement proceedings under the auspices of Art. 260 TFEU.[207] There is no legal reason why the Commission should not consider itself entitled to supplement its legal action by invoking the provisions of the Århus Convention against the Republic, as part of its strategy in seeking to ensure the introduction of fair access to justice rules in that Member State.

V. Some Reflections on the Enforcement Role of the European Commission

The examples discussed above in connection with the Arhus Convention highlight real and significant possibilities open to the European Commission to be able to use infringement proceedings to enforce provisions of IEAs of which the EU is a CP. The recent jurisprudence of the Court of Justice, notably in the *Etang de Berre* and *Lesoochranárske zoskupiene* rulings, have confirmed that such agreements must be taken seriously by Union Member States as integral parts of the EU legal order and may not be readily evaded. As guardian of the EU treaties, the Commission has a fundamental institutional responsibility under EU law to ensure that the Union's Member States adhere to their Union obligations. For this purpose, it has been vested with various powers under the TFEU to bring pressure to bear on those Member States considered by it to have breached their EU legal obligations, including the power to open infringement proceedings under Arts. 258-260 TFEU against them and ultimately bring them before the CoJ for judgment. Given these powers and responsibilities, it needs to ensure that its law enforcement operations in the environmental sphere take full account of the extent to which EU Member States are in compliance with IEAs signed up by the Union.

This article concludes with a number of recommendations for the European Commission to take on board, with a view to significantly enhancing the prospects of the Union being able to fulfil environmental protection commitments entered into by it at international level:

- *EU should restrict the use of mixity in IEAs*: The EU should reflect whether it is absolutely necessary from a legal perspective for the Member States to sign an IEA as well as the EU. The presumption should be that the EU alone should sign and ratify an IEA on the basis of it having competence so to do on the grounds set out in the *Etang de Berre* judgment.
- *No delays to EU ratification of IEAs*: the practice in the past of the EU waiting for all Member States to ratify an IEA before it did so should be abandoned. The EU should proceed to ratify an IEA as swiftly as possible after the decision has been made in accordance with the Union's relevant political institutional decision-making procedure for the Union to become a CP. If it is legally required that Member States should ratify an IEA alongside the EU, the EU should no longer wait until all EU Member States have ratified before it does so. Such an approach not only introduces the prospect of substantial delays for Union participation in the IEA, but it also undermines the Union's constitutional commitments[208] on ensuring a high level of protection for the environment. There is no overriding legal reason justifying delayed ratification. In addition, as is evident from CoJ jurisprudence, the EU does not have to wait for the adoption of internal legislative instruments covering the same subject matter as the IEA before ratification of the latter either. Once ratified at Union level, an IEA stands as a distinct as well as enforceable source of primary EU law.
- *EU ratification decisions should, where appropriate, specify time limit for compliance by its Member States*: Given that, as the CoJ has confirmed in cases such as *Etang de Berre*, IEAs are constituent parts of the Union legal order capable of being the subject of infringement proceedings under Art. 258 TFEU, there should be a deadline specified in the ratification decision identifying a time limit (e.g. 2 years) by which Member States are expected to have implemented the IEA's provisions into national law and administrative practice. By way of complement, Member States should also be required in the ratification decision to notify the Commission of implementing measures having been taken. Fundamentally, the incorporation of a time limit clause would mean that Member States would not be able to delay their compliance with IEA provisions for substantial periods of time until the Union has adopted EU legislative instruments Not only would a time limit provide greater certainty as to when the European Commission would be minded to consider a recourse to infringement proceedings, it would also afford all Member States with a reasonable margin of time in order to determine which policy tools should be used to fulfil their

[207] See Case C-427/07 *Commission v Ireland* [2009] ECR I-6277. In 2010 the Commission opened proceedings against Ireland under Art. 260 TFEU for failing to adhere to the CoJ's 2009 judgment (EU RAPID Press Releases IP/10/313, Brussels, 18 March 2010: Case 2005/0633).

[208] See Art. 3(2) TEU and Art. 191(2) TFEU.

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international and (by virtue of Art. 216 TFEU) Union commitments with respect to the provisions set down in the IEA. A time limit clause would affect all EU Member States equally, irrespective of whether or not they become CPs to the IEA.[209] These steps would serve to elevate the significance and importance of EU ratification on a par with the adoption of Union legislative measures on environmental protection, notably through the use of EU directives which stipulate deadlines for transposition of their requirements into national law.

- *Restricted use of EU declarations of competence for IEAs*: The use of declarations of competence by the Union in IEAs should be used far less extensively than at present. Their current use appears to have been employed with the intention of limiting the Union's degree of commitment in seeking to ensure maximum compliance by Member States with IEAs to which the Union is a CP. Such an approach appears highly questionable. First and foremost, it undermines the possibilities for enhancing environmental protection within the EU geographical area, something that goes utterly against the constitutional tenets of the Union. Given that the Union has a specific, binding constitutional mandate to ensure that it pursues a high level of environmental protection, it should ensure that it does not seek to limit its remit, through declarations of competence, for monitoring compliance by Member States of its IEA obligations. Moreover, the reticence on the part of the EU to supervise compliance on the part of its Member States serves to detract from the European Commission's legal responsibilities under Union law to ensure that EU law is properly respected by Member States. Once ratified at EU level, an IEA becomes an integral part of the Union legal order. It should be noted that, in light of rulings of the CoJ in cases such as *Etang de Berre* and *Lesoochranárske zoskupiene*, it is inaccurate to assume that Member States have sole responsibility and legal competence to implement a provision of an IEA that addresses a matter that may not yet have been the subject of internal EU legislation. All the environmental protection related provisions of the IEA fall within the competence and responsibility of the Union, insofar as the IEA provisions cover an area that has been covered in large measure by EU environmental legislation, as confirmed by the CoJ. The CoJ has indicated in its case law that it adopts a broad interpretation of the question as to what is meant by the scope of material coverage of EU legislation, thereby considerably narrowing the possibilities for sole Member State competence in cases where the EU has not (yet) adopted legislative measures addressing the same subject matter specifically broached by a particular provision in an IEA. In light of these judicial insights, it would be appropriate for the EU to confine the scope of its declarations of competence issued in conjunction with ratification of an IEA to focus on and identify matters addressed by provisions of the IEA that unambiguously fall outside the competence of the Union. Such matters would be few and far between and would be most unlikely to concern issues connected with environmental protection, given the wealth of existing EU legislative measures on the subject. Accordingly, any declaration of competence should be constructed on a negative footing, in the sense that it should only need to identify matters that are without question outside the scope of EU competence.
- *European Commission should actively police the IEA compliance by EU Member States*: Given the fact that EU Member States are bound by IEAs of which the Union is a CP, it is important that the European Commission, as guardian of the EU's treaties, ensures that its institutional resources are set up to be able to monitor compliance of the IEA effectively. In practice this will mean that the Commission's Environment Directorate-General (DG ENV), in particular its legal unit in conjunction with the relevant sectoral and international units, must be in a position to be able track the progress of Member States in implementing IEA provisions. It should also be the case that the legal unit, in each infringement action it recommends that the Commission opens against a Member State, should check to see whether one or more provisions of IEAs are relevant to the litigation at hand.

  It has been commented elsewhere that the Commission does not appear currently to display a marked commitment in general to policing its international treaty obligations.[210] Undoubtedly, this should change so that monitoring of IEA compliance by Member States should become fully integrated within the routine as well as non-routine work of the legal unit of DG ENV.

[209] The fact that a Member State chooses, for whatever reason, not be a CP to an IEA should not affect any decision by the EU to approve accession to the agreement, which is foreseen to be taken on the basis of a qualified majority vote within the Council of the EU. A Member State should not be allowed to evade responsibility under EU law for implementing the IEA's provisions on the grounds that it is not a CP to the IEA.

[210] Mendez, M., *op. cit.* n. 49.

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The Aarhus Convention's Third Pillar

EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 1

*Martin Hedemann-Robinson**

I. Introduction

Half a century ago, in 1964, the former and late UK Prime Minister Harold Wilson is attributed as having pointed out the truism that a week is a long time in politics.[1] What then, if the timescale is ten years? It is now over a decade since the European Commission came forward with a legislative proposal in 2003 to implement at EU member state level certain obligations concerning the promotion of access to environmental justice contained in 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 Aarhus, Denmark (hereinafter referred to as the "Aarhus Convention").[2] Having become a contracting party to the Aarhus Convention in 2005,[3] the EU has subsequently struggled to implement the entirety of the legally binding commitments contained in that regional international accord. Whilst having relative success in adopting internal measures to implement Aarhus requirements relating to EU institutional activities, the Union has only partially ensured that implementation is secured at the level of EU member states. Specifically, whilst the EU has adopted Union legislation targeted at member states in relation to access to environmental information (known as the "first pillar") and participation in certain public authority decisions affecting the environment (known as the "second pillar") it has so far failed to take sufficient measures to secure effective implementation of the "third pillar" of the Convention which relates to the field of access to environmental justice at national level, namely within the legal systems of the EU member states. The final piece in the EU implementation jigsaw, so to speak, has yet to be properly fitted.

The failure to fit that jigsaw piece has had significant adverse consequences in terms of opening up possibilities for civil society to be able to participate in the enforcement of EU and national environmental law within the EU member states. Several of the member state legal systems, whether by design or default, place a range of restrictive conditions, requirements and obstacles in the way of members of the public or non-governmental environmental organizations (NGEOs) wishing to bring judicial review proceedings against public authorities or private entities considered by them to have breached environmental norms. These challenges include, notably, restrictive rules on legal standing (*locus standi*) to be able access judicial or other review fora as well as high levels of costs relating to legal representation.[4] The shortcomings in EU legislative implementation of the Aarhus Convention have resulted in several legal disputes before the CJEU as well as before the Aarhus complaints committee mechanism under the Convention to the effect that a number of EU member states' national rules governing administrative and judicial review have fallen short of the third pillar requirements of the Convention. This remains an ongoing issue.

This article, which is divided into two parts, considers the extent to which the EU has fallen short of implementing its international commitments regarding the third pillar at the level of the member state. Part I examines the general EU legal framework and political backdrop that have served to underpin the Union's ongoing efforts to deliver on its international access to environmental justice obligations. This will comprise two main sections. Specifically section II considers in outline the key obligations underpinning the Aarhus Convention as well the evolution of the Union's policy towards promoting access to environmental justice within the EU legal order. Section III proceeds to examine the legal impact of the Convention itself in Union law, in light of the EU's foundational treaties and jurisprudence of the Court of Justice of the European Union (CJEU). Part 2 of this article, which will be published in a subsequent issue of this journal, will assess the extent to which the Union has adopted legislative measures to implement the third pillar of Aarhus at the level of the member states of the Union as well as analyse the prospects for further EU legislative reform in this area, with reference to the recently adopted Seventh EU Environment Action Programme (2013-2020) (EAP7)[5] and

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[1] E. Knowles (ed.) *The Oxford Dictionary of Quotations* (2009, Oxford).

[2] 2161 UNTS 447. The text of the Convention is accessible on the following UNECE website: www.unece.org.

[3] By virtue of Council Decision 2005/370 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L124/1).

[4] For an overview, see for instance De Sadeleer, N., Roller, G., Dross, M. (eds) *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (2005, Europa Publishing).

[5] Decision 1386/2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" (OJ 2013 L354/171).

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the 2003 draft directive on access to justice in environmental matters (the Draft AJEM Directive)[6] which has to date remained on the legislative table but not made it into the statute books.

II. General: Aarhus and the EU Policy Context

2.1 Overview of the Aarhus Convention

The Aarhus Convention entered into force on 30 October 2001. As at time of writing,[7] the Convention has 46 contracting parties.[8] As far as EU participation in the Convention is concerned, the European Union[9] together with now all 28 EU member states[10] have ratified the international instrument. The Convention seeks to promote the development of individual rights in relation to environmental affairs in three areas, commonly referred to as the three pillars underpinning the Convention: access to environmental information, public participation in environmental decision-making and access to environmental justice.[11] It preserves the right for contracting parties to introduce or maintain measures offering more generous individual rights than those contained in the Convention.[12]

The overall principal aim underpinning the Aarhus Convention is to enhance the possibilities for the public to understand, influence and challenge decisions taken by national authorities affecting the environment with a view to promoting protection of the environment. It seeks to build upon Principle 10 of the Rio Declaration[13] agreed at the 1992 UN Conference on Environment and Development, which affirms the need for states to enhance citizen involvement in environmental affairs in terms of enhancing access to information, public participation in environmental decision-making and access to judicial and administrative proceedings.[14] The Aarhus Convention is structured around these three strands or pillars to enhancement of citizen involvement, which crystallizes them into a rights-based format. The Convention's approach is to promote involvement of civil society in a broad sense, defining the "public" to include "natural and legal persons and, in accordance with national legislation or practice, their associations, organizations or groups".[15] The rights-oriented approach of the Convention is emphasised by its stated objective in Article 1 of contributing "to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well being". The emphasis of the Convention is on reconfiguring the relationship between the ordinary citizen and public authorities, taking into account the latter's central importance for the environment in being empowered to stipulate binding levels of protection for the environment. As a consequence, it contains only a very few provisions relating to the issue of accountability of private persons' activities affecting the environment to the general public. Its three pillars will be briefly considered in turn.

The first pillar of the Aarhus Convention's framework, access to environmental information, is housed within Articles 4-5 of the international instrument. These two provisions focus on public access to environmental information from two main angles, namely active as well as reactive responsibilities of contracting parties. Article 4 sets down a number of minimum requirements relating to establishment of a right of the public to access information of the environment held by public authorities (reactive type obligations), whilst permitting a limited range of derogations. Article 5 stipulates a number of obligations for contracting parties with a view to ensuring that environmental information is collected on an up to date basis as well as disseminated efficiently (active type obligations). In addition, Article 3 houses some important general requirements related to the subject of access to information, including the right of applicants for information to be free from penalty, persecution or harassment in asserting their Convention rights[16] as well as the right of any person to have access to information as prescribed by the Convention, regardless of their citizenship, nationality, domicile or location of registered seat in the case of a legal person.[17] Moreover, contracting parties are required to ensure that the public receives guidance and assistance when seeking to access environmental information, in the form of education and environmental awareness campaigns as well as help from officials and authorities.[18] The implementation by the EU of the Aarhus provisions on right of access to

[6] COM(2003)624final, Commission proposal for a Directive on access to justice in environmental matters, 24.10.2003.
[7] March 2014.
[8] The status of ratification may be inspected at: www.unece.org/env/pp/ratification.html.
[9] Council Decision 2005/370, *op cit.*, fn 3.
[10] Ireland was the latest of the 28 EU member state to ratify the Convention, namely in June 2012.
[11] For an overview, see European Commission Rapid Press Release MEMO/03/210, Brussels, 20.10.2003 as well as the Commission's Environment Directorate-General's webpage on Aarhus: www.europa.eu.int/comm/env/environment/aarhus/index.htm.
[12] See Article 3(5) Aarhus Convention.
[13] Rio Declaration on Environment and Development, 3-14.6.1992 (UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992)). A copy of the Rio Declaration on Environment and Development may be inspected on the UN Environment Programme's website at: http://www.unep.org/Documents.-Multilingual/Default.asp?documentid=78&articleid=1163.
[14] The second recital of the Aarhus Convention specifically refers to Principle 10 of Rio.
[15] Art. 2(4) Aarhus Convention.
[16] Art. 3(8), *ibid.*
[17] Art. 3(9), *ibid.*
[18] Art. 3(2)-(3), *ibid.*

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environmental information is considered in a later section below.

The second pillar, focusing on the area of public participation in environmental decision-making, is housed within Articles 6-8 of the Aarhus Convention. These provisions set out basic rights of citizen involvement in relation to decisions concerning specific industrial projects as well as more general strategic public planning and policy-related decisions. Specifically, Article 6 establishes the right of the public to participate in decisions over the authorisation of specific activities[19] affecting the environment. Key elements of the framework securing effective participation include early and full public disclosure of proposed activities and information on their environmental impact, the right of the public to have their views taken into account on the issue of authorisation as well as dissemination of decisions on authorisation applications and their underlying reasoning. Article 7 extends this framework to include public participation in relation to the preparation of plans, programmes and, "to the extent appropriate", policies relating to the environment. Finally, Article 8 sets down some rather general and weak obligations on contracting parties "to strive to promote" effective public participation during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that might have a significant effect on the environment and to take this into account "as far as possible".[20]

The third pillar of Aarhus concerns the area of access to environmental justice and a number of important guarantees and commitments from contracting parties are secured in Article 9 of the Convention. This provision and its follow up by the EU constitute the particular focus of this article. In broad terms, Article 9 of the Convention 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)). In relation to the first category, Article 9(1) stipulates that persons who consider that their request for access to information has not been addressed in accordance with the requirements of Article 4 is to be granted under national legislation access to a review procedure either before a court of law or another independent and impartial body established by law. Contracting parties are obligated to make available, where they provide for review before a court, also access to an "expeditious" procedure which is free or "inexpensive" for reconsideration by a public authority or review by an independent and impartial body other than a court. In relation to the second category, Article 9(2) specifies that the public, subject to having either a sufficient interest or maintaining an impairment of a right where national administrative law requires this as a precondition, are to be provided under national legislation access to a review procedure before either a court and/or other independent and impartial body established by law to challenge the substantive or procedural legality of any administrative conduct relating to authorisation decisions covered by Article 6 of the Convention.[21] Contracting parties may require utilization of a preliminary review procedure and/or the exhaustion of administrative review procedures prior to recourse to judicial review or review by an independent body.[22] Whilst recognising as a matter of principle that contracting parties should determine the parameters of legal standing (*locus standi*) of members of the public to bring forward challenges, Article 9(2) also specifies that this should be done in a manner consistent "with the objective of giving the public wide access to justice". In addition, it also stipulates that NGOs promoting environmental protection and meeting any requirements under national law shall be deemed to have a sufficient interest or impairment of right.[23] This provision seeks to promote an enhanced role for NGEOs in enforcing the requirements of Article 6, albeit this role is qualified according to rules of recognition stipulated at national level.

In relation to the third category of access to environmental justice, Article 9(3) of the Aarhus Convention sets out a general obligation on contracting parties to facilitate environmental law enforcement by the public. Article 9(3) stipulates the following general binding commitment:

> "3. [. . .] [E]ach Party shall ensure that, where they meet the criteria, if any, laid down in its national law,[24] members of the public have access to

[19] An Annex to the Convention contains a list of activities covered by Article 6.

[20] Given that the Aarhus Convention does not stipulate access to justice obligations in relation to the fields covered by Articles 7-8, these particular aspects relating to the second pillar will not be considered further for the purposes of this paper. The Union, in adopting Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L197/30) (Strategic Environmental Assessment Directive), has effectively taken measures in the area covered by Article 7 of the Convention. For an assessment on the extent to which the SEA Directive serves to implement Art. 7 of the Convention see e.g., Mathiesen A., "Public Participation in Decision-Making and Access to Justice in EC Environmental Law: The case of Certain Plans and Programmes" (2003) *Eur. Energy and Env. Law Rev.* 36.

[21] No access to justice provision is made in respect of the activities covered by Articles 7-8 of the Convention.

[22] Final subparagraph of Art. 9(2) Aarhus Convention.

[23] Art. 9(2) in conjunction with Art. 2(5) of the Convention.

[24] For the purposes of the Aarhus Convention, EU law constitutes a source of "national law" for the EU member

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administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

The provision is couched in general terms, leaving a lot of discretion in the hands of contracting parties as to how its requirements are to be implemented by them. In particular, it is important to note that the contracting parties reserved for themselves the right to determine the specific requirements of legal standing (*locus standi*) to be fulfilled by members of the public in order to be in a position to pursue environmental litigation against a private or public defendant. Accordingly, the Convention itself does not strictly speaking require the parties to establish a general citizen's right of action or *actio popularis* to enforce environmental law, but instead leaves it to contracting parties to determine the particular *locus standi* requirements in any given case. However, it is evident from the wording of the provision that contracting parties are obliged to facilitate access to justice. The obligation, as crafted, is evidently intended to steer them to introduce systems sympathetic to facilitating access to justice to a wide range of claimants; in particular, this is emphasised by the reference to the words "if any" in Article 9(3). The Aarhus Convention Compliance Committee has concluded that the phrase "where they meet the criteria, if any, laid down in its national law" does not entitle contracting parties to introduce or maintain so strict criteria on legal standing so that effectively all or almost all NGEOs would be barred from being able to challenge administrative conduct that contravene national environmental law.[25] Moreover, it is also clear that the material scope of Article 9(3) is broad, in covering both substantive as well procedural types breaches of environmental law. Contracting parties to the Convention are not entitled to limit the scope of legal review to only certain types of breaches.[26]

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 referred to in Article 9. These provisions 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, namely that:

"In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

Article 9(5) contains two further general obligations, one hard and one soft. Firstly, it obliges the contracting parties to ensure that the public is provided with access to information about access to judicial and administrative review procedures. In addition, contracting parties are required to "consider" the establishment of "appropriate" mechanisms to remove or reduce financial and other barriers to access to justice. Notably, the second commitment falls far short of requiring the provision of legal aid or other financial assistance mechanisms for the purpose of facilitating public interest environmental litigation. The information requirement in Article 9(5) is reinforced more broadly in the general provisions of Article 3 of the Convention, with Article 3(2) obliging contracting parties to "endeavour" to ensure that officials and authorities assist and provide guidance to the public in seeking access to justice, and Article 3(3) requiring parties to "promote" public education and awareness, especially on how the public may obtain information on access to justice. Although these flanking provisions to Article 9(1)-(3) are very general in nature and leave considerable room for legal interpretation, they contain in essence a core requirement for contracting parties to ensure that their relevant administrative review and judicial procedures are appropriately advertised and structured so as to ensure that the public is aware of them and is in a genuine position to able to use them to good effect without having to face unnecessary or insurmountable financial or procedural hurdles. Collectively, such provisions contain an important body of fundamental general legal principles that are to underpin national implementation of independent legal review mechanisms of environmental acts or omissions that breach national environmental law.

2.2. Access to Environmental Justice and EU Policy Development

Subsequent to its signature of the Aarhus Convention in 1998 the EU has adopted a range of legislative initiatives in order to introduced important procedural as well as substantive rights for private persons at national level so as to assist the latter to be better able to engage in the political and legal appraisal of the state of the environment. Specifically, in 2003 the

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states as well as the European Union as contracting parties of the Convention. This was confirmed in the Aarhus Compliance Committee's Communication ACCC/C/2006/18 (Denmark).

[25] ACCC/C/2005/11 (Belgium).

[26] So Ebbesson, J, "Access to Justice at the National Level: Impact of the Aarhus Convention and EU law", Ch. 9 in Pallemaerts, M. (ed) *The Aarhus Convention at Ten: Interactions and tensions between Conventional International Law and EU Environmental Law* (2011, Europa Publishing) at p. 267.

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Union came forward with an initial package of instruments intended to implement the Convention's three pillar framework at national level within the Union. To a significant extent, the implementation programme was successful in that two EU directives were adopted to implement the first two pillars: namely, Directive 2003/4 on access to environmental information[27] and Directive 2003/35 on public participation in respect of the drawing up of certain plans and programmes relating to the environment.[28] However, the legislative initiative accompanying the other two and intended to fulfil the third pillar commitment in Aarhus on guaranteeing the public a minimum level of access to national legal review fora (courts and tribunals) for the purpose of taking legal action in order to enforce EU environmental law in general (the 2003 Draft AJEM Directive) was not adopted by the EU legislature, on account of political resistance within the Council of the EU. In 2006 the Union adopted legislation intended to ensure that conduct of the political EU institutions complied with Aarhus commitments.[29] This particular section focuses on the EU's development of policy in relation to third pillar compliance at the level of the member states of the Union, the area in which it has struggled the most in terms of complying with the demands of Aarhus.

Broadening access to justice in the environmental protection sphere has been an item on the political agenda of the EU for quite a period of time, dating back to the early 1990s.[30] Before the Aarhus Convention was agreed in 1998, the European Commission had, for instance, already noted its concern with the relative lack of legal avenues for private persons including NGEOs to seek redress for breaches of EU environmental legislation at national level. This has been exemplified by the restrictive nature of rights of legal standing for private persons to take legal proceedings against acts or omissions by state authorities before an independent court or review body in a number of EU member states, such rights commonly being predicated upon the plaintiff having to show that they have a distinct legal interest that sets them apart from other members of the public in order to justify their access to court. Arguments in support of such restrictions tend to centre on concerns to avoid courts being flooded with disputes (so-called "floodgates" argument), and there is often an inbuilt presumption within national legal systems that a claim is most likely to be unmeritorious where the plaintiff has no specific personal legal interest in its outcome, such as a proprietary right or claim. Such argumentation carries little or no weight in relation to environmental litigation, particularly where it is the case that environmental damage alleged to be illicit has not resulted in adverse legal effects to any particular individual or group of individuals on account of it being diffuse in nature (eg air pollution) or having resulted in adverse impacts exclusively on non-anthropocentric matters (eg. habitat destruction). The position of legal standing is fractured amongst the EU member state's legal systems, with some systems allowing for members of the public or NGEOs to take legal action on behalf of an environmental interest (*actio popularis*) and others adopting more restrictive regimes requiring a plaintiff to demonstrate either an impairment of an individual right or other sufficient interest.[31] Other major hurdles include ones of an essentially evidential nature (access to information), cost of financing litigation as well as possibilities of obtaining interim relief.

The EU first raised concerns about the state of access to environmental justice at national level in earnest in the early 1990s. This initially came in the form of a political commitment incorporated within the EU's Fifth Environmental Action Programme (1993-2000) (EAP5)[32] which affirmed the need to improve the public's access to environmental justice.[33] In its 1996 Communication on the state of implementation of EU environmental law the Commission proposed that policy changes in the area of legal standing were needed to facilitate access of NGEOs in particular to be able to participate in the process of EU environmental law enforcement.[34] The Commission's views were supported both by the Council of the EU[35] and the European Parliament.[36] However, in the

[27] Directive 2003/4 on public access to environmental information and repealing Directive 90/313 (OJ 2003 L41/26).
[28] OJ 2003 L156/17.
[29] Regulation 1367/06 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L264/13). See more recently also Reg.1257/13 on ship recycling and amending Reg.101/06 and Dir.2009/16 (OJ 2013 L330/1).
[30] Dette, B., "Access to justice in environmental matters: a fundamental right", in Onida, M. (ed) *Europe and the Environment: Legal Essays in Honour of Ludwig Krämer* (2004, Europa Publishing) at p. 13.
[31] *Ibid*, at p. 11.
[32] Fifth Environment Action Programme of the European Union: *Towards Sustainability – A European Community Programme of policy and action in relation to the environment and sustainable development* (OJ 1993 C138/5).
[33] See entry in Ch. 9 (Implementation and Enforcement) of the 5th EAP (OJ 1993 C138/82):
"Individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped."
[34] COM(96)500 Commission Communication *Implementing Community Environmental Law*, 22.10.1996 at p. 11.
[35] Council Resolution on the drafting, implementation and enforcement of Community environmental law (OJ 1997 C321/1).
[36] European Parliament Resolution on a communication of the Commission on implementing Community environmental law (OJ 1997 C167/92).

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event no proposal was officially tabled by the Commission during the lifetime of EAP5.[37] It was not until 2003 before any official legislative proposals were published by the European Commission, in the wake of the EU's signature of the Aarhus Convention and political commitment for better public participation in environmental issues in the Sixth Environment Action Programme (2001-2010) (EAP6).[38]

As far as the area of access to justice is concerned, since 2003 a number of EU measures have been introduced with the purpose of seeking to enhance the rights of individuals and other private entities to access courts and tribunals in the event of disputes over the correct application of EU environmental legislation. The European Commission's original aim, in the early 2000s, of having the Union adopt a principal legislative instrument designed to lay a common basic (default) framework on access to justice across EU environmental policy sectors stalled due to political resistance from member state governments. Instead, what has emerged to date is an incremental implementation of the obligations flowing from the Aarhus Convention, namely an approach by the Union to implement access to justice requirements within the framework of particular EU legislative instruments in certain environmental policy sectors. Admittedly, the Union member states have distinct obligations themselves under international law as contracting parties to the Aarhus Convention (alongside the EU) to ensure that their respective national legal systems comply with the Convention's requirements. The Convention is a "mixed agreement" in the sense that it involves a policy field in which the Union and member states share competence to contract international obligations.[39] However, this does not legally excuse the Union from failing to ensure that the writ of the Convention runs across the geographical span of the combined territories of its member states.

The original attempt by the European Commission to introduce a principal legislative instrument in order to implement the access to justice requirements contained in the Aarhus Convention at national level within the EU member states' legal systems was the 2003 draft directive on access to justice in environmental matters (the Draft AJEM Directive).[40] It was intended to serve as a "horizontal" measure in the sense of being designed, as a matter of general principle, to apply generally across EU environmental policy sectors. However, insofar as other EU legislative rules on access to justice would arise in relation to specific sectors and contexts, they would operate as *lex specialis* so that the Draft AJEM Directive would not be applicable. The Draft AJEM Directive contains provisions granting rights for individuals and other private entities, in particular NGEOs, to have access to specific types of administrative and judicial review procedures. Such procedures are intended principally to serve as mechanisms to enable private entities to hold member state public authorities to account in relation to administrative acts or omissions in breach of EU environmental legislation. In addition, it also requires member states to grant members of the public rights of access to administrative or judicial review proceedings in order to challenge acts and omissions by private persons in breach of EU environmental legislation. Subsequent to its publication, the Draft AJEM Directive however failed to make legislative headway, with the Council of the EU deciding not to respond to the initiative. It was apparent that a substantial majority of member states considered at the time that the adoption of such an instrument would constitute an excessive encroachment in an area considered to be by them a matter that should rest principally within the competence of individual member states, namely the organization of judicial procedures before national courts.[41]

With the Council deciding not to given the proposal a first reading, the Draft AJEM Directive was placed effectively into the political deep freezer. However, the European Commission never formally withdrew its proposal and it has remained a relevant reference point since then. Subsequent to 2003, two EU-level developments in particular have assisted to ensure that the subject of access to environmental justice at national level has remained on the EU political agenda. Firstly, mention should be made of the incorporation of the EU's Charter on Fundamental Rights (CFEU) [42] into EU primary law by virtue of the Lisbon Treaty 2007,[43] which has ensured that the subject of access to justice under EU law has become formally elevated to an issue of human rights protection. Specifically, Article 47 CFEU stipulates a set of basic set of rights for individuals to an effective remedy and fair hearing as a means of securing redress for violations of their rights and freedoms under Union law.[44] EU member states are bound by the

[37] Krämer, L., *EC Environmental Law* 5th ed. (2003, Sweet & Maxwell) at p. 144.

[38] See Art. 3 (9) of Decision 1600/2002 laying down the Sixth Community Environment Action Programme (OJ 2002 L242/1).

[39] See Arts. 4(2)(e) and 191(4) TFEU. On the nature and impact of mixed competence in EU law, see e.g., Koutrakos, P., Hillion, C. (eds) *Mixed Agreements Revisited – The EU and its Member States in the World* (Hart 2010); O'Keeffe, D., Schermers, H. (eds), *Mixed Agreements* (Kluwer, 1983).

[40] COM(2003)624final, *op cit.* fn 6.

[41] See Maurici, J., "The influence of the Aarhus Convention on EU Environmental Law" (2013) *Jl Planning & Env. Law* at 1510 and Krämer, L., *EU Environmental Law* 7th edn (2011) at p. 147.

[42] OJ 2010 C83/2 (consolidated version).

[43] See Art. 6(1) TEU.

[44] Art. 47 CFEU states:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

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CFEU when they implement Union law.[45] Secondly, the EU has most recently signalled in its Seventh Environment Action Programme (2013-2020) (EAP7)[46] that the area of access to environmental justice is a matter of renewed political priority. Specifically, EAP7 requires the principle of effective legal protection for citizens and their organizations is enhanced by 2020, which includes "ensuring that national provisions on access to justice reflect the case law of the Court of Justice of the EU".[47] The implications of EAP7 will be assessed in a later section of this article.

Notwithstanding the failure of the EU to adopt a "horizontal" instrument on access to environmental justice at national level, from 2003 onwards the Union has passed a series of legislative measures intended to enhance access to justice in various areas of EU environmental policy. Notably, the two EU legislative instruments implementing the first two pillars of Aarhus, namely Directive 2003/4 on access to environmental information[48] and the EU Participation Directive 2003/35[49] contain specific guarantees in relation to civil society's rights to have recourse to legal review in the event of access to information and participation rights failing to be respected. Subsequently, the EU has consolidated the access to justice guarantees contained in the EU Public Participation Directive through the Industrial Emissions Directive 2010/75[50] and Environmental Impact Assessment (EIA) Directive 2011/92.[51] In addition, the EU has also adopted certain access to justice provisions within Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage.[52] However, a substantial number of EU environmental policy areas remain without Union legislative safeguards on access to justice including notably in the water, waste, air quality, noise pollution and nature protection sectors.

III. Legal Impact of the Aarhus Convention in EU Law

From the perspectives of both international and EU law the contents of the Aarhus Convention constitute a legally binding source of obligations for the Union.

Accordingly, notwithstanding the fact that the EU has yet to adopt its full legislative programme of implementing the Convention, this does not mean that Aarhus is without legal impact in those areas not yet covered by EU internal legislation. In addition, it is important to note that the Convention plays an important residual role regarding the interpretation of EU legislative measures that have been passed in order to implement it within the EU with respect to Union institutional decision-making or with respect to conduct by private persons or public authorities within EU member states. Although amongst the first signatories to the Aarhus Convention in 1998, the EU took a considerable period of time to become a contracting party, it being only in 2005 when the Council of the EU concluded the Union's ratification of the Aarhus Convention.[53]

As a matter of general international law the Union, as an entity with international legal personality[54] and as contracting party to an international treaty, is obligated to ensure that the provisions of Aarhus are honoured within its area of jurisdiction; the duty to ensure implementation of treaty obligations rests normally solely with individual contracting parties, insofar as a treaty does not provide other law enforcement mechanisms.[55] Unusually, in addition to the standard and infrequently used modes of inter-state dispute settlement mechanisms employed in multilateral environmental agreements (notably referral to the International Court of Justice and international arbitration),[56] the Aarhus Convention also foresaw from the outset the establishment of a special mechanism of a "non-confrontational, non-judicial and consultative nature" for the purpose of reviewing compliance by contracting parties, with the option of considering communications from the public.[57] At the meeting of the parties in 2002 a compliance committee structure was established to hear complaints from parties as well as the public on implementation

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Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."

The environmental dimension to human rights protection in the EU Charter is underlined by Art. 37 CFEU which states:

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

[45] Art. 51(1) CFEU (OJ 2010 C83/2).

[46] Decision 1386/2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" (OJ 2013 L354/171).

[47] See para. 65 (e)(v) of (Priority Objective 4: To maximise the benefits of Union environmental legislation by improving implementation) the EAP7 (OJ 2013 L354/190-191).

[48] OJ 2003 L41/26.

[49] OJ 2003 L156/17.

[50] Art. 25 of Dir.2010/75 (OJ 2010 L334/17).

[51] Art. 11 of Dir.2011/92 (OJ 2012 L26/1).

[52] OJ 2004 L143/56.

[53] Council Decision 2005/370 *op cit.*, fn. 3.

[54] Art. 47 TEU.

[55] See Arts 3, 26, 27 and 46 of the 1969 Vienna Convention on Law of Treaties (UNTS Vol. 1155, p. 331).

[56] See Art. 16 Aarhus Convention.

[57] Art. 15, *ibid.*

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shortcomings.[58] Since its inception, the Aarhus Compliance Committee has heard a substantial number of complaints, including ones against both EU member states and the Union itself. These have resulted in a number of adverse findings against certain contracting parties, including notably vis-à-vis the UK[59] as well as the EU[60] in relation to the Convention's requirements concerning access to justice. Given the non-confrontational nature[61] of the Compliance Committee procedure no sanctions are able to accompany committee conclusions that a contracting party has defaulted on its Convention obligations. The Compliance Committee may only issue non-binding recommendations, which are considered at the subsequent (biennial) Meeting of Parties (MOP) of the Convention. As Ebbesson notes,[62] with the endorsement of their findings by the MOP, the normative influence of Committee recommendations is further enhanced to be considered valid sources of interpretation of the Convention from the perspective of international law.[63] To what extent, though, the Committee's findings are taken into account by courts of the contracting parties of the Convention is ultimately a matter for the law of the individual contracting parties of the Convention. As far as EU law is concerned, the Committee's findings are to be treated formally as non-binding, although they may be considered as valid reference points to be taken into account for the purposes of judicial deliberation on questions of interpretation of the Convention.[64]

From an EU law perspective the Aarhus Convention constitutes a legally binding source of Union law. Under the EU's foundational treaty framework international agreements concluded by the Union are binding upon the Union's institutions as well as the member states as a matter of EU law.[65] In terms of their legal hierarchy within the Union legal system, the CJEU has confirmed that such agreements take precedence over EU secondary law (ie EU legislation), so akin to primary sources of Union law. However, the CJEU has also confirmed that international agreements concluded by the Union may not override fundamental precepts of the EU's founding treaties, including human rights commitments.[66] Accordingly, as a general tenet of EU law, EU member states are obliged to ensure they comply with the requirements of international agreements entered into by the Union.

The EU legal position is more nuanced and requires further clarification where, as in the case of international agreements concerning the environment sector, the Union and EU member states share competence.[67] Under EU law, the degree of competence of the Union to act in a particular policy sphere is determined by the foundational Union treaty framework, specifically by Title I of the TFEU (Articles 2-6 TFEU). The standard types of competence that may be allocated to the Union are in essence exclusive, shared or supplementary in nature. In relation to the environment sector, competence over policy is shared between the Union and member states.[68] Accordingly, this means that EU member states may in principle intervene unilaterally in those environmental policy areas in respect of which the Union has not adopted measures as part of the EU's developing common policy on the environment under the aegis of Title XX of the TFEU (Articles 191-193 TFEU).[69] Where, however, the EU has adopted policy measures in relation to the particular environmental matter, Union member states are then obliged to refrain from acting in the same field unless they wish to enact more stringent environmental protection measures than those adopted at Union level.[70] Such national measures are required to be compatible with the requirements of the founding

[58] Decision I/7 of the Meeting of the Parties of the Aarhus Convention (October 2002).

[59] See the Aarhus Complaints Committee Findings and Recommendations with regard to Communication ACCC/C/2008/33 concerning compliance by the UK, 21.9.2010 (UK's implementation of access to environmental justice requirements). For a recent overview of the UK's implementation of the Convention's access to justice obligations see Macrory, R., Westaway, N., "Access to Environmental Justice: A UK perspective", Ch. 11 in Pallemaerts, M. (ed) *The Aarhus Convention at Ten: Interactions and tensions between Conventional International Law and EU Environmental Law* (2011, Europa Publishing) (2011) at p. 315 *et seq.*

[60] See e.g. Aarhus Complaints Committee Findings and Recommendations with regard to Communication ACCC/C/2008/32 concerning compliance by the EU, 24.8.2011 (Client Earth legal standing case).

[61] See Wates, J., "The Future of the Aarhus Convention: Perspectives arising from the Third Session of the MOP', Ch. 15 in Pallemaerts, M. (ed) *The Aarhus Convention at Ten: Interactions and tensions between Conventional International Law and EU Environmental Law* (2011, Europa Publishing) at pp. 393-394.

[62] Ebbesson, J. (2011) *op cit*,. fn. 26 at p. 251.

[63] Art. 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties (1155 U.N.T.S. 331, 8 I.L.M. 679).

[64] See comments by Advocate General Kokott in her Opinion in Case C-260/11 *Edwards* [2013] CMLR 18. See also Tanzi, A., Pitea, C., "The interplay between EU Law and International Law Procedures in Controlling Compliance with the Aarhus Convention by EU Member States', Ch. 14 in Pallemaerts, M. (ed) *The Aarhus Convention at Ten: Interactions and tensions between Conventional International Law and EU Environmental Law* (2011, Europa Publishing) (2011) at pp. 379-380.

[65] Art. 216(2) TFEU.

[66] See e.g., para.326 of the judgment in Case C-402/05P *Kadi and Al Barakaat* [2008] ECR I-6358 and para. 97 of the judgment in Joined Cases C-584,593 and 595/10P *Commission, UK and Council v Kadi* (judgment of 18.7.2013 not yet reported (nyr)). CJEU judgments may be accessed from the Court's website: http://curia.europa.eu.

[67] Art. 4(2)(e) TFEU.

[68] Art. 4(2)(e) TFEU.

[69] Art. 2(2) TFEU

[70] See Art. 2(2) TFEU in conjunction with Art. 193 TFEU.

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EU treaties.[71] In other words, the policy competence of the Union is transformed to be virtually exclusive subsequent to the adoption of Union acts, subject to the retention of power by member states to adopt stricter protection measures.

The principles concerning sharing of competence are also reflected to a degree in the context of the Union's external relations (commonly referred to as "mixity" or "mixed competence"). In situations of mixity, international agreements involving the EU are anticipated to be concluded by both the Union and the member states. In relation to environmental policy matters, at the international level the TFEU charges the Union and member states to co-operate with third countries and competent international organizations in their respective spheres of competence.[72] The EU treaty framework foresees as a matter of general principle a strengthened presence of the Union in the context of relations with the international community in shared policy areas. The material treaty provision here is Article 3(2) TFEU which stipulates that:

> "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope."

Exclusive external competence is accordingly vested in the Union in situations additional to the scenario of the member states ceding sovereignty in the event that the Union has adopted legislative rules concerning a particular policy matter (doctrine of pre-emption as first established in the *ERTA* ruling[73]). Article 3(2) TFEU itself consolidates existing CJEU jurisprudence on the general principles of implied exclusive Union competence. For the environment sector, though, member states will almost invariably retain some competence in the external relations sphere of policy given that Article 193 TFEU guarantees them the possibility of taking a more stringent environmental protection position than that adopted by the Union. Accordingly, in practice both the Union and member states share competence in international environmental negotiations arena and both will be expected to sign and conclude any agreements struck between the European Union and third parties. Confirmation that the European Union engages in negotiations on the based of shared internal competence between Union and constituent member states is often now conveyed to non-EU contracting parties in the form of a declaration of a division of competence, that sets out in broad terms to clarify the parameters of the respective external relations powers of the Union and member states, noting that the balance of competence may change over time. Such a declaration[74] was, for instance, made by the EU when ratifying the Aarhus Convention, which foresees that in the event of a regional economic integration organization together with its member states becoming contracting parties they are to determine their respective responsibilities for performance of the Convention and may not be entitled to exercise their rights under the agreement concurrently.[75]

A number of legal questions have arisen and continue to arise in connection with the legal status and impact of mixed agreements within the EU legal order, such as the Aarhus Convention. In particular, clarification has been needed about to what extent such agreements ratified by the Union may be considered as sources of EU law, given the fact that they may concern areas of policy not subject to internal Union legislative regulation and may not have been concluded by all the member states. CJEU case law has, to a significant extent, assisted in clarifying a considerable number of these legal issues. In essence, the Court has confirmed that all the provisions of such mixed agreements are to be considered legally binding sources of EU law upon Union ratification,[76] including the Aarhus Convention.[77] Such agreements may also be enforced against a Union member state by the European Commission through infringement proceedings under Articles 258/260 TFEU irrespective of whether or not the latter has become a contracting party.[78] In *Etang de Berre*[79] the CJEU confirmed that the Commission had power to take infringement proceedings against France over the latter's failure to adhere to aspects of the 1976 Convention for the protection of the Mediterranean Sea against pollution

[71] Art. 193 TFEU.
[72] Art. 191(4) TFEU.
[73] Case 22/70 *Commission v Council (European Road Transport Agreement (ERTA/AETR)* [1971] ECR 263.
[74] Declaration by the European Community in accordance with Art. 19 of the Aarhus Convention (OJ 2005 L124/3).
[75] Art. 19(4) Aarhus Convention.
[76] See e.g., paras. 9 and 14 of judgments in Case 12/86 *Demirel* [1987] ECR 3719 and Case C-13/00 *Commission v Ireland (Berne Convention)* [2002] ECR I-2943 respectively. This is supported by Art. 216(2) TFEU which, in stating that agreements concluded by the Union are binding on Union institutions as well as the member states, does not make any qualification to this requirement on grounds that an agreement involves the exercise of mixed competence.
[77] See para. 30 of judgment in Case C-240/09 *Lesoochranárske zoskupenie VLK (Slovak Brown Bear) v Slovakian Government* [2011] ECR I-1255. (See also Joined Cases C-128-131,134-5/09 *Boxus and Others* [2011] ECR I-9711and Case C-182.10 *Solvay* (judgment of 16.2.12 nyr) which arguably implicitly confirm this position in advising referring national courts on the Convention's requirements).
[78] Case C-13/00 *Commission v Ireland (Berne Convention) op cit.*, fn. 76. For an overview of this area, see Hedemann-Robinson, M., "EU enforcement of International Environmental Agreements: The Role of the European Commission" (2012) 21(1) *Eur Energy & Env Law Rev* 2.
[79] Case C-239/03 *Commission v France (Etang de Berre)* [2004] ECR I-9325.

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(Barcelona Convention) and an accompanying 1980 Protocol for the protection of the Mediterranean Sea against pollution from land-based sources,[80] both of which had been ratified by the EU.[81] The CJEU held that both international accords are legally binding on member states as a matter of Union law. In addition, it held that it was irrelevant that the Union had not already adopted internal legislation specifically concerning matters regulated by the international agreements, namely discharges of freshwater into the marine environs, taking into account that the agreements fell "in large measure" within Union competence,[82] as reflected by the fact that the EU had adopted a number of legislative instruments concerning water quality issues, such as the Water Framework Directive 2000/60.[83]

One particular legal important legal issue that has arisen in connection with shared or mixed competence status of the Union's relationship with the Aarhus Convention has been the extent to which the member states retain (sole) competence in relation to the delivery of treaty commitments entered into with respect to the third pillar, in particular the guarantees regarding access to justice under Article 9(3) of the Convention. At the time of the Union's ratification of the Convention in 2005, a statement was made within the EU's declaration on the division of competence between itself and member states accompanying the ratification instrument that the member states and not the Union would remain responsible for the implementation of Article 9(3) in respect of those administrative and judicial procedures concerning challenges to conduct of public authorities and private persons other than EU institutions covered by Article 2(2)(d) of the Convention so long as the EU did not adopt EU legislative measures covering implementation of those Article 9(3) obligations.[84] The thrust of this part of the EU's declaration appeared to imply that the Union did not have legal responsibility for the implementation of Article 9(3) within the Union's member states in the absence of internal EU measures targeted at the national level. Such a position appeared to be held by the European Commission as recently as May 2008, when the Commission published its first implementation report of the Convention.[85] The impact of the adoption of the Environmental Liability Directive 2004/35 appeared not to have made any impact on the division of competence issue from the Commission's perspective, notwithstanding this being an internal EU instrument serving to implement, albeit partially, Article 9(3) obligations at member state level. In sum, it was not evident from the European Commission's perspective to what extent EU legal obligations arose in relation to the third pillar of Aarhus. However, subsequent jurisprudence from the CJEU has clarified that clear EU legal obligations do arise in relation to Article 9(3) of the Convention, as confirmed notably by the judgment in *Lesoochranárske zoskupenie VLK (Slovak Brown Bear)*[86] which is discussed below.

In *Lesoochranárske zoskupenie VLK* the CJEU had occasion to assess the legal impact of Article 9(3) of the Aarhus Convention on the EU legal order and specifically whether it could be considered to be directly effective. An integral part of analysis of the legal impact of the Aarhus Convention with the EU legal order is the assessment as to what extent, if at all, private persons are entitled as a matter of EU law to rely as of right upon the provisions of an international agreement concluded by the Union, with a view to enforcing them, where necessary, before the national courts. The CJEU had acknowledged as a general proposition prior to this case that provisions of international agreements concluded by the Union may be capable of having direct effects, depending on the fulfilment of certain criteria, whether falling within the exclusive competence of the Union[87] or subject to shared competence with member states.[88] Specifically, the Court has consistently that Union agreements concluded with third countries and/or international organizations may have direct effects when, regard being had to the wording, purpose and nature of the agreement, the material provision concerned contains a clear, precise and unconditional obligation.[89] This particular case involved a Slovakian

[80] The Commission claimed France had breached the terms of the agreements in having firstly failed to prevent the pollution of a Mediterranean-linked saltwater marsh (Etang de Berre) through the discharge of freshwater and sediment into the marsh from a hydroelectric plant, with consequences detrimental to aquatic life and to the state of eutrophication of the marsh. Secondly, the Commission complained that France had failed to issue an authorisation for discharges in accordance with terms of 1980 Protocol.

[81] Council Decisions 77/585 (OJ 1977 L240/1) and 83/101 (OJ 1983 L67/1).

[82] See paras. 27-31 of judgment in Case C-239/03 *Commission v France (Etang de Berre) op cit.*, fn. 79.

[83] OJ 2000 L327/1.

[84] Declaration by the European Community in accordance with Article 19 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, as annexed to Council Decision 2005/370 *op cit.*, fn. 74.

[85] SEC(2008)556 *European Commission Report: Aarhus Convention Implementation Report – European Community*, 7.5.2008 produced to fulfil the reporting requirements of Decision 1/8 of the MOP of the Aarhus Convention.

[86] Case C-240/09 *Lesoochranárske zoskupenie VLK (Slovak Brown Bear) op cit.*, fn. 77.

[87] See e.g., Case 104/81 *Kupferberg* [1982] ECR 3641.

[88] See e.g., Case 12/86 *Demirel op cit.*, fn. 76. For an analysis of direct effect of international agreements concluded by the Union and member states (so falling within the category of shared or "mixed" competence) see e.g., Gáspár-Szilági, S., "EU Member State Enforcement of "Mixed Agreements" and Access to Justice: Rethinking Direct Effect" (2013) *LIEI* 163.

[89] See e.g., paras. 21, 82 and 44 of judgments in Case C-256/03 *Simutenkov* [2005] ECR I2579, Case C-372/06 *Asda Stores* [2007] ECR I-11223 and Case C-240/09 *Lesoochranárske zoskupenie VLK op cit.*, fn. 77 respectively.

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NGEO which wished to seek judicial review of a decision taken by national authorities to authorise the hunting of certain wild fauna, including the brown bear, a species protected under the aegis of the Habitats Directive 92/43.[90] The NGEO considered that such authorisations breached the EU legislation. However, under Slovakian law at the time private associations were excluded from being able to subject such decisions to judicial review (being only permitted to participate in administrative proceedings). The NGEO challenged the legality of the national rules excluding its legal standing to seek redress before the Slovakian courts by claiming that they breached Article 9(3) of the Aarhus Convention. As referred to earlier in this section, Article 9(3) requires contracting parties to ensure that, where they meet the criteria, if any, laid down in national law, members of the public are to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment. The Habitats Directive 92/43 itself was of little assistance to the NGEO, in not containing any specific safeguards on access to justice for civil society. The dispute came before the Slovakian Supreme Court on appeal, which sought a preliminary ruling from the CJEU specifically on the question as to whether Article 9(3) had direct effect.

In her opinion to the CJEU, Advocate General Sharpston considered that the Union (and accordingly the CJEU) had no jurisdiction to consider this issue, on the grounds that Article 9(3) did not lie within a sphere falling within the scope of Union law.[91] In support of this view, she noted that the EU had not adopted any specific internal measures to implement Article 9(3) and also the wording of the Declaration on division of competence deposited by the EU upon its ratification of the Convention in 2005 indicates that Union member states are to be deemed responsible for the performance of Article 9(3) obligations in the absence of internal EU legislation implementing those Convention obligations to challenge acts and omissions by private persons and public authorities of the EU member states.[92] Consequently, the Advocate General concluded that it was for national courts of the member states to determine whether Article 9(3) had direct effect within their own internal order, whilst opining also that the particular Convention provision failed to meet the standard criteria of unconditionality and sufficient precision required for direct effect to exist.[93]

In contrast with the Advocate General's opinion, the CJEU in considered that it had jurisdiction to consider whether Article 9(3) of the Convention was directly effective as a source of EU law. First, the Court affirmed that it had jurisdiction to interpret the Convention on the grounds that it formed an integral part of the EU legal order in accordance with settled case law on mixed agreements.[94] Second, the CJEU proceeded to assess whether the field covered by Article 9(3) fell within the competence of the member states rather than the Union. The test used by the Court to determine this issue was whether the Union had exercised its powers and adopted provisions to implement obligations deriving from it. Referring to its ruling in *Etang de Berre*,[95] the Court noted that the an issue addressed in an international agreement but not yet subject to specific EU legislation is nevertheless to be deemed to be part of EU law where the issue concerns a field in large measure covered by EU law. Whilst acknowledging the absence of specific internal EU legislation implementing Article 9(3) with respect to the national level of the EU member states, the Court held in this case that the issue did however concern a field in large measure covered by EU law. Specifically, the CJEU considered that coverage was provided in the form of the Habitats Directive 92/43, which under its aegis[96] makes protected species (such as the brown bear) subject to a system of protection subject to a system of strict protection from which derogations may only be permitted under the terms of the EU directive (Article 16).[97] For the Court it was therefore irrelevant that the EU had only adopted measures to implement Article 9(3) in respect of the conduct of EU institutions (via Regulation 1367/06) and not in respect of the conduct of private persons or public authorities of the member states.[98] On this jurisdictional point, the CJEU underlined that it is "clearly in the interest" of EU law for a uniform interpretation to be provided in relation to a provision of an international accord falling within the scope of national and EU law, in order to prevent future differences of interpretation arising.[99]

Having affirmed the EU legal status of the Aarhus Convention and specifically the access to justice provision contained in Article 9(3), the CJEU then proceeded to assess the legal effects of the latter. Firstly, the Court considered the question of direct

[90] Directive 92/43 (OJ 1992 L206/7).
[91] See para. 79 of her Opinion in Case C-240/09 *Lesoochranárske zoskupenie VLK op cit.*, fn. 77.
[92] See para. 2 of the Declaration by the European Community in accordance with Art. 19 of the Aarhus Convention *op cit.*, fn. 74.
[93] See paras. 80-88 of Advocate General Sharpston's opinion in Case C-240/0909 *Lesoochranárske zoskupenie VLK op cit.*, fn. 77.
[94] Paras. 29-31 of judgment in Case C-240/0909 *Lesoochranárske zoskupenie VLK op cit.*, fn. 77.
[95] Paras. 27-31 of judgment in Case C-239/03 *Commission v France (Etang de Berre) op cit.*, fn. 79.
[96] In particular, Articles 12 and 16 in conjunction with Annex IV of the Habitats Directive 92/43 *op cit.*, fn. 90.
[97] Paras. 32-40 of judgment in Case C-240/09 *Lesoochranárske zoskupenie VLK op cit.*, fn. 77.
[98] Para. 41, *ibid.*
[99] Para. 42, *ibid.*

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effect. In concurring with the Advocate General on this point, it considered that Article 9(3) fails to fulfil the requirements of precise and unconditionality, since its implementation and effects are predicated upon the promulgation of a subsequent measure. This was arguably an unsurprising conclusion to make, given the open-ended terms of the Convention provision, although it has been argued that it was open for the Court to confirm that the Aarhus provision was a directly effective source of EU law.[100] However, the CJEU did not stop at that point, but proceeded secondly to assess whether Article 9(3) procured other legal effects from an EU legal perspective. The Court held that, notwithstanding the absence of direct effect, national courts could not ignore the implications of the Convention provision which, although drafted in broad terms, was "intended to ensure effective environmental protection".[101] It recognised, in accordance with settled case law that, in the absence of EU rules, as in this instance, it was in principle for the member states to lay down the procedural requirements regarding legal actions for protecting an individual's EU rights such as those under the EU Habitats Directive, so long as the national rules were non-discriminatory and did not render it in practice impossible or excessively difficult to exercise such rights.[102] With reference to the effectiveness principle, the CJEU went onto hold that national courts, in order to ensure effective environmental protection in the fields covered by EU law, are obliged to interpret their national law "in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention."[103]

The CJEU's findings in *Lesoochranárske zoskupenie VLK* are significant in confirming that, as sources of EU law, the provisions of the Aarhus Convention contain binding obligations for national courts to take into account for the purpose of interpreting national rules concerning or affecting rights of access to justice of the public seeking to uphold EU environmental legislation.[104] The obligation is, however, somewhat ambiguous in terms of the Court's reference to the phrase "to the fullest extent possible", which could be interpreted in one of two ways. One interpretation of the CJEU's phrase could be that the Court has thereby implicitly suggested that national courts' duty is to interpret national procedural rules insofar as is permissible under national law, akin to the doctrine of indirect effect in case law such as *Marleasing*.[105] In contrast, the alternative way of interpreting this part of the CJEU's judgment would be to assess that the Court has construed that a far more significant obligation befalls national courts, whereby the latter are under an absolute duty to ensure that members of the public have access to judicial review in line with the requirements of Article 9(3) if existing national procedural rules make it effectively impossible or excessively difficult to secure.[106] It is probable that the CJEU meant the former interpretation, not least given the fact that Article 9(3) does not itself stipulate a self-contained obligation, but defers to national rules to determine the rules on legal standing. The CJEU did not, however, have occasion to consider the legal impact of the complementary provision of Articles 9(4)-(5) of the Convention. The former provision is not predicated upon the existence or promulgation of national rules and requires contracting parties to provide "adequate and effective remedies, including injunctive relief and be fair". Arguably, the CJEU might consider a far more potent form of the effectiveness principle applying in relation to Article 9(4), akin to the approach taken in the *Janacek* case.[107] The text of Article 9(5), similar to Article 9(3), is expressly contingent upon a national decision to take legislative action and consequently would not be expected to contain implicit interpretative duties on national courts.

Elsewhere, the CJEU has consolidated its approach in *Lesoochranárske zoskupenie VLK* by confirming that, where the EU has adopted particular rules implementing the three Aarhus pillars, the Union secondary legislation must be interpreted in light of the Convention's provisions.[108] This consistent seam of case law confirms the well-established principle of supremacy of international accords concluded by the EU in relation to EU secondary legislative rules[109] as well as recognising the intention of the EU legislative institutions, which typically make a specific reference in the preamble to the Aarhus Convention as a key or primary source for introducing legislation[110] and/or noting the importance of ensuring that the EU legislative instrument is interpreted in line with the

[100] See e.g., Krämer, L., (2011) *op cit.*, fn. 41 at p. 147.
[101] Para. 45 of judgment in Case C-240/09 *Lesoochranárske zoskupenie VLK op cit.*, fn. 77.
[102] Para. 48, *ibid.*
[103] Paras. 50-51, *ibid.*
[104] See C. Reid, "Case Comment on Case C-240/09 Lesoochranárske zoskupenie" (2011) *Scot.Pl. & Env. Law Rev.* 89 and Ebbesson J (2011) *op cit.*, fn. 26 at p. 264.
[105] Case C-104/89 *Marleasing* [1990] ECR I-4135.
[106] This interpretation would be akin to the bold approach taken by the Court in cases such as Case C-237/07 *Janacek v Bayern* [2008] ECR I-6221 which held that members of the public must be allowed to bring actions before the national courts in order to uphold directly effective obligations contained in EU air quality legislation.
[107] Case C-237/07 *Janacek v Bayern op cit.*, fn. 106.
[108] See e.g., para. 41 of the judgment in Case C-115/09 *Bund für Umwelt und Naturschutz v Arnsberg (Trianel)* [2011] ECR I-3673 concerning interpretation of the EU Public Participation Directive 2003/35 (OJ 2003 L56/17).
[109] See e.g., para. 42 of judgment in Case C-308/06 *Intertanko v Secretary of State for Transport* [2008] ECR I-4057.
[110] See e.g., recital 27 of preamble to Directive 2010/75 on industrial emissions (OJ 2010 L334/17) and recitals 18-21 of the EIA Directive 2011/92 (OJ 2012 L26/1).

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Convention.[111] The CJEU has also confirmed that the implementation guide published by UN Economic Commission for Europe (UNECE) in relation to the Aarhus Convention may be taken into consideration but is not to be considered to have any binding force in terms of interpreting the Convention's provisions.[112]

In light of the above-mentioned jurisprudence of the CJEU, it is clear that the Aarhus Convention has a distinct independent legal impact within the EU legal order as a source of EU law, both directly and indirectly. Its direct impact may be felt through the possible use of infringement proceedings by the European Commission under Articles 258/260 TFEU or by members of the public before national courts through direct reliance on those of the Convention's provisions able to fulfil the requirements for direct effect. Its indirect and more residual legal impact may be seen through the deployment by the CJEU of the principle of effectiveness, according to which national courts are obliged to the fullest extent possible to ensure that national law is interpreted by them to be in alignment with Aarhus requirements.

Part 2 of this article, to be published in a subsequent issue of this journal, will assess the extent to which the Union has adopted legislative measures to implement the third pillar of Aarhus at the level of the member states of the Union as well as analyse the prospects for further EU legislative reform in this area.

[111] See e.g., recital 5 of the preambles to both Directive 2003/4 on access to environmental information and Directive 2003/35 on public participation, *op cit.*, fn. 28.

[112] See para. 28 of judgment in Case C-182/10 *Solvay* (judgment of 16.2.2012 nyr).

EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 2

*Martin Hedemann-Robinson**

This is the second part of a two-part article assessing the extent to which the EU has fallen short of implementing its commitments relating to access to environmental justice (the third pillar) 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 Aarhus, Denmark (hereinafter referred to as the "Aarhus Convention")[1] at the level of the EU member states. Part 1 examined the general EU legal framework and political backdrop that have served to underpin the Union's ongoing efforts to deliver on its international access to environmental justice obligations. Specifically, it considered the key obligations underpinning the Aarhus Convention, the evolution of the Union's policy towards promoting access to environmental justice within the EU legal order as well as the legal impact of the Convention itself in Union law. This second part (Part 2) is structured in two main sections. Section I assesses the extent to which the Union has adopted legislative measures to implement the third pillar of Aarhus at the level of the member states of the Union. Section II then analyses the prospects for further EU legislative reform in this area, with reference to the recently adopted Seventh EU Environment Action Programme (2013-2020) (EAP7)[2] and the 2003 draft directive on access to justice in environmental matters (the Draft AJEM Directive)[3] which has to date remained on the legislative table but not made it into the statute books. The paper concludes with some reflections upon the most recent policy developments within the Commission services which, at the time of writing in March 2014, give cause to believe that publication of a new legislative initiative may be fairly imminent.

I. EU Legislative Implementation of Aarhus's Third Pillar

Subsequent to its signature of the Aarhus Convention in 1998, the EU proceeded to take steps to implement the three pillars of the international instrument internally. As already mentioned in Part 1 of this article, however, the Union has so far failed to roll out comprehensive implementation of the third pillar, access to environmental justice, via EU secondary legislation. Notwithstanding the absence of a "horizontal" EU instrument implementing the third pillar of Aarhus, the Union has adopted a limited range of legislative measures in order to promote and introduce certain safeguards for civil society regarding access to environmental justice at national level. Notably, the Union has adopted EU legislation securing access to justice in relation to the fields of access to environmental information and public participation in environmental decision-making (first and second pillars of Aarhus). It has also adopted access to justice provisions within the framework of its legislation on environmental liability. However, these initiatives have only led so far to a partial and rather fragmented state of implementation of the third pillar of Aarhus at the level of the member state. Broad areas of EU environmental law are not yet underpinned by EU secondary legislative guarantees on access to justice, including notably the sectors covering air quality, waste, water, noise and nature protection. This section will consider the extent to which the Union has implemented through the adoption of legislation its access to environmental justice commitments under Aarhus, as far as the level of the member state is concerned.

1.1 Access to justice regarding the first pillar of Aarhus (environmental information)

As part of its original wave of measures in 2003 to implement the Aarhus Convention, the EU introduced access to justice safeguards with respect to the first pillar of the Convention, namely with respect to the policy area of access to environmental information. These are safeguards housed within Directive 2003/4 on public access to environmental information (the AEI Directive).[4]

The inclusion of access to justice safeguards in the AEI Directive follows directly from the requirements set out in the Aarhus Convention. Whereas Article 4 of the Convention establishes rights to environmental information, Article 9 underpins this with a complementary right of members of the public to independent review of decisions concerning information disclosure. Specifically, Article 9(1) of Aarhus requires contracting

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[1] 2161 UNTS 447. The text of the Convention is accessible on the following UNECE website: www.unece.org

[2] Decision 1386/2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" (OJ 2013 L354/171).

[3] COM(2003)624 final, Commission proposal for a Directive on access to justice in environmental matters, 24.10.2003.

[4] OJ 2003 L41/26.

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parties to ensure that members of the public have access to a review procedure if dissatisfied with the response given by a public authority to a request for information. Article 9(1) stipulates that contracting parties must ensure within their national laws that any person who considers that his or her request for information has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not deal with in accordance with Article 4 of the Convention, has access to a review procedure before a court of law or another independent and impartial body established by law. The provision also requires that where a party provides for judicial review before a court of law, it must also offer access to a free or "inexpensive" and "expeditious" procedure under law for the purpose of either reconsideration by a public authority or review by an independent and impartial body other than a court of law. In addition, decisions by review bodies which are final must be binding on the public authority holding the information and reasons shall be stated in writing, at least where access to information is refused. Article 9(1) of the Convention is also complemented by other more general safeguards regarding access to justice contained in Articles 9(4)-(5). These Convention provisions have been considered earlier above. Article 9(4) is especially important in this regard, requiring in particular that contracting parties provide "adequate and effective remedies, including injunctive relief where appropriate" which are "fair, equitable, timely and not prohibitively expensive".

The implementation of Article 9(1) of Aarhus by the AEI Directive offers to some extent more safeguards than required in the Convention. Specifically, whereas the Convention foresees the possibility of a contracting party offering a single (non-judicial) review procedure to information applicants, the AEI Directive requires EU member states to secure two review channels. The relevant provisions are set out in Article 6 of the directive. Firstly, Article 6(1) of the AEI Directive requires member states to ensure that an applicant for environmental information from competent national authorities has access to an administrative review procedure. Specifically, this is to entail free or inexpensive and expeditious access to a procedure through which contested conduct of the public authority concerned in relation to an information request may be either reconsidered by it or another public authority, or subject to an administrative review by an independent and impartial statutory body.

Secondly, Article 6(2) of the AEI Directive requires member states additionally to ensure that an applicant has access to a court of law or another independent and impartial statutory body, so that the conduct of the public authority concerned may be reviewed and a final decision made. Article 6(2) also provides the option for member states to enable third parties incriminated by information disclosed to have "access to legal recourse". By virtue of Article 6(3), final decisions under Article 6(2) are required to be binding on the public authority holding the information concerned. In addition reasons are to be provided, at least where access to information is refused.

These requirements constitute a significant advance on the position under the former EU legislation preceding the AEI Directive, according to which member states were simply required in broad terms to provide the availability of a "judicial or administrative review" of any decision by a competent authority regarding access to information requests.[5]

On the other hand, the AEI Directive's access to justice provisions appear relatively weak in certain other respects. In particular, the right to judicial review or review by an independent body contained in Article 6(2) of the directive omits to incorporate the general complementary safeguards contained in Articles 9(4)-(5) of the Convention. However, the jurisprudence of the Court of Justice of the European Union (CJEU) makes it clear that the EU legislation implementing the Aarhus Convention must be interpreted in line with the latter,[6] taking into account in particular the express reference in the preamble that EU law provisions "must be consistent with" the Convention.[7] Accordingly, the access to justice safeguards in the AEI Directive are stronger than they may first appear. However, of course, the safeguards contained in Article 9(4) are rather general in nature and open to interpretation. It would have been far better had the AEI Directive incorporated specific obligations on these aspects from the outset. As it is, the directive leaves member states with a substantial amount of discretion in this field,[8] making it unclear as to what amounts to a minimum set of binding obligations with respect to key issues concerning public access to justice.[9]

[5] See Art. 5 of former Directive 90/313 on the freedom of access to information on the environment (OJ 1990 L158/56).

[6] See in particular Case C-115/09 *Bund für Umwelt und Naturschutz (Trianel)* [2011] ECR I-3673 at para. 41 of judgment. (All judgments of the CJEU may be accessed from the Court's website: http://curia.europa.eu/juris/recherche.jsf).

[7] Recital 5 of the preamble to the AEI Directive 2003/4 *op cit.* fn 4.

[8] As noted also by Ryall A, Implementation of the Aarhus Convention through Community Law (2004) *Env. Law Rev.* at p 276.

[9] In its recently published first report in 2012 on the application of the AEI Directive (*op cit.* fn 4) the Commission did not, however, raise any concerns in relation to access to justice framework of the directive: COM(2012)774 Commission Report on the experience gained in the application of Directive 2003/4, 17.12.2012.

[10] OJ 2003 L156/17.

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1.2 Access to justice regarding the second pillar of Aarhus (public participation in environmental decision-making)

As with first pillar issues, the EU introduced access to justice protection with respect to the Union's implementation in 2003 of the second pillar of the Aarhus Convention concerning public participation in relation to certain decisions relating to the authorisation of specific industrial activities affecting the environment. The original EU implementation instrument was 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 (hereafter referred to as the "EU Public Participation Directive").[10] Subsequently, the access to justice provisions contained in the EU Public Participation Directive have been effectively relocated within more recent EU legislation, as will be explained later below.

The incorporation of access to justice provisions with the EU Public Participation Directive constituted a natural implementation response to the requirements of the Aarhus Convention. Article 6 of the Convention establishes a series of related rights for members of the public to be able to participate in decisions to be taken by public authorities on whether certain proposed industrial projects listed in the Convention's Annex and other unlisted proposed activities potentially having a significant effect on the environment should be authorised. Article 9(2) of Aarhus sets out a complementary set of access to justice rights for members of the public, with the purpose of enabling them to be able to have recourse to independent review over such decisions where the public considers a decision has breached the requirements of Article 6. Specifically, Article 9(2) requires contracting parties to grant members of the public, subject to certain legal standing (*locus standi*) requirements, a right access to a review procedure before a court and/or an alternative independent and impartial statutory body for the purpose of challenging the substantive or procedural legality of the conduct of public authority concerning a matter caught by Article 6 decisions.[11] This right is flanked by supporting protections and guarantees set out in Articles 9(4)-(5) and discussed in earlier sections. The right of review contained in Article 9(2) in respect of second pillar decisions is arguably weaker than its counterpart in Article 9(1) relating to access to information in the sense that Article 9(1) guarantees applicants recourse to a separate, "free or inexpensive" non-judicial review mechanism where parties also provide for review before a court. Under Article 9(2) of the Convention contracting parties are obliged to ensure that members of the public have access to such a review procedure, either where they have a "sufficient interest" or "maintaining an impairment of right" depending upon the administrative procedural legal requirements set by national law. These terms broadly reflect the position commonly adopted by contracting parties with respect to judicial review proceedings, namely in establishing criteria for limiting possibilities of members of the public to have legal standing to bring claims in respect of administrative decisions unless they are able to demonstrate a particular private interest or other special connection in relation to the dispute. The stringency of the criteria vary considerably amongst the legal systems of the contracting parties.

As a matter of general principle, the Aarhus Convention defers to the law of contracting parties to determine the issue of legal standing. Accordingly, the terms "sufficient interest" and "impairment of right" are not terms defined by the Convention itself. However, the Convention at the same time qualifies contracting parties' autonomy in certain important respects. Firstly, Article 9(2) requires parties to ensure generally that the definition of a sufficient interest or impairment of a right defined under national law is consistent with the "objective of giving the public concerned wide access to justice" within the scope of the Convention.[12] Secondly, the provision also stipulates that non-governmental environmental organizations (NGEOs) should be given access to the review procedure, irrespective of whether they are deemed to have either a sufficient interest or an impaired right under national law, if they meet the requirements of Article 2(5) of the Convention. Article 2(5), which defines the term "the public concerned" and provides for preferential recognition in this context for NGEOs, stipulates:

> "5. 'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

It is evident, though, from this provision that the degree of preferential status of NGEOs remains ultimately dependent upon how each contracting party decides to construct recognition requirements for such organizations. The Aarhus Convention effectively allows contracting parties a wide margin of discretion in providing for broad or narrow recognition of NGEOs. However, in promoting wide access to justice

[11] Article 9(2) of the Aarhus Convention allows for the possibility of contracting parties establishing a preliminary review procedure before an administrative authority or requiring that administrative review procedures must be exhausted prior to recourse to the independent review procedure.

[12] See Ebbesson J, "Access to Justice at the National Level: Impact of the Aarhus Convention and EU law", Ch 9 in Pallemaerts M.(ed) *The Aarhus Convention at Ten: Interactions and tensions between Conventional International Law and EU Environmental Law* (2011, Europa Publishing) at p 258.

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the Convention also reflects an understanding that the common traditional approach applied in several jurisdictions to limit legal standing of the public to challenge administrative conduct, insofar as claimants are unable to show that their individual rights are unaffected by such conduct, is unsuitable to dealing with situations where public authority behaviour may give rise to or exacerbate diffuse types of environmental damage (eg. air pollution, habitat loss).[13]

As mentioned above, the EU Public Participation Directive was the original Union legislative instrument to implement the second pillar of Aarhus. For this purpose, a key aspect of the 2003 directive was its amendment of two key legislative instruments relating to authorisation of industrial activities affecting the environment, namely the former 1985 directive on environmental impact assessment (EIA Directive 85/337)[14] and 1996 directive on integrated pollution prevention and control (IPPC Directive 96/61).[15] An integral part of the amendments was the incorporation of access to justice provisions in the two former directives.[16] Subsequently, these provisions have been transferred to the most recent versions of the Union legislation on impact assessment and IPPC, namely Article 11 of the codified Directive 2011/92 on the assessment of certain public and private projects on the environment (the "EIA Directive")[17] and Article 25 of the recast Directive 2010/75 on industrial emissions (integrated pollution prevention and control) (the "Industrial Emissions Directive").[18] Both provisions contain a virtually literal implementation of the requirements of Article 6 of the Aarhus Convention. As is the case with the AEI Directive, both legislative instruments make specific reference to the Convention in their preambles and make it evident, as recognised by the CJEU,[19] that interpretation of the EU legislation (eg. on access to justice) must be interpreted in line with Convention requirements.[20]

Predictably, both sets of access to justice provisions contained in the EIA Directive and Industrial Emissions Directive are structured on a similar basis, each with five subparagraphs sharing the same functions and virtually the same wording. Accordingly, it is only necessary to reproduce the access to justice provisions of one of the instruments here, those of the EIA Directive being selected. Article 11 of the EIA Directive (as successor to Article 10a of former Directive 85/337) states:

> "1. Member States shall ensure that, in accordance with the relevant national legal systems, members of the public concerned:
> (a) having a sufficient interest, or alternatively;
> (b) maintaining an impairment of right, where administrative procedural law of a Member State requires this as a precondition;
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
> 2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.
> 3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public wide access to justice. To that end, the interest of any non-governmental organization meeting the requirements in Article 1(2)[21] shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.
> 4. The provisions of this Article shall not exclude the possibility of a preliminary review before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
>
> Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

[13] See Lee M., *EU Environmental Law: Challenges, Change and Decision-Making* (2005, Hart) at p 139.
[14] Former Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L175/40), as amended.
[15] Former Directive 96/61 concerning integrated pollution prevention and control (OJ 1996 L257/26).
[16] Specifically, Article 10a of former Dir.85/337 and Article 15a of former Dir.96/61 (as introduced by virtue of Arts.3 and 4 respectively of the EU Public Participation Directive 2003/35 *op cit.* fn 10).
[17] OJ 2012 L26/1.
[18] OJ 2010 L334/17.
[19] See Case C-115/09 *Bund für Umwelt und Naturschutz (Trianel) op cit.* fn 6 at para. 41 of judgment, Case C-416/10 *Križan and others* (judgment of 15.1.2013 nyr) at para.77 of judgment, and Case C-260/11 *Edwards and Pallikaropoulos* (judgment of 11.4.2013 nyr) at para. 26 of judgment, in which the CJEU has confirmed access to justice requirements in the EU legislation relating to impact assessment or IPPC matters need to be interpreted in line with the requirements of the Convention.
[20] See recital 27 of the preamble to the Industrial Emissions Directive 2010/75 (*op cit.* fn 18) and recitals 19-21 of the preamble to the EIA Directive 2011/92 (*op cit.* fn 17).
[21] Art. 1(2)(e) EIA Directive (*op cit.* fn 17), in implementing Art. 2(5) of the Convention, states:
> "(e) 'public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making referred to in Article 2(2). For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest".

An identical definition of NGEOs is contained in Art. 25(3) of the Industrial Emissions Directive 2010/75 (*op cit.* fn 18).

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5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

Since EU legislative implementation of the second pillar of the Aarhus Convention, the CJEU has had a number of opportunities to provide clarification on various aspects of the accompanying access to justice provisions. Notwithstanding the often general nature of the provisions, the Court has made it clear that the EU legislative requirements on access to environmental justice in relation to second pillar decision-making constitute significant legal constraints on the autonomy of member states to construct their administrative and judicial review systems. The legal terminology employed in the EU legislation not only constitutes part of the autonomous body of norms that collectively form Union law (and so independent and distinct from national legal interpretation), but also is required to be interpreted in line with key objective underpinning the access to justice provisions of providing "wide access" to review.[22] Judicial clarification from the CJEU on various aspects of the EU legislative provisions, provided notably to national courts via the medium of the preliminary ruling procedure under Article 267 TFEU, has resulted in a cementing and greater specification of member state (and consequently national court's) obligations emanating from the EU legislation. To date, the CJEU has already had occasion to consider a range of legal issues arising from the operation of the EU access to justice provisions, including notably in relation to legal costs, legal standing requirements, privileged status of NGEOs and interim relief. It should be borne in mind that this emerging seam of case law is relevant to the entire the spectrum of EU legislation on access to environmental justice, not simply confined to provisions derived from the EU Public Participation Directive, given the similarity of wording and function of access to justice legislative provision. Some of the key aspects and implications of the case law is considered here.

An important part of the emerging jurisprudence of the CJEU has been on the question of legal costs relating to review procedures, namely those relating to court fees as well as in particular legal representation. It is apparent that such costs may in practice be substantial for litigants, not least in jurisdictions which apply the principle of legal costs of both sides having to be paid by the loser such as in relation to the courts of the UK and Ireland. Those drafting the Aarhus Convention recognised that this issue could be a problem in deterring members of the public and/or NGEOs from seeking recourse to judicial review mechanisms as a means of assisting the enforcement of environmental legislation. As a consequence Article 9(4) of the Convention requires contracting parties to ensure that legal costs are not "prohibitively expensive" and this general requirement has also been incorporated into the EU legislation implementing the international instrument. At the same time, it is evident that this requirement of itself in offers relatively limited assistance to members of the public and NGEOs. Notably, litigants are not entitled to "free or inexpensive" access to a review procedure as is the case in relation to reviews of access to environmental information decisions under Article 9(1), neither are there any guarantees afforded in relation to legal aid in the Convention. Accordingly, public interest environmental litigation is allowed to remain an expensive and accordingly risky enterprise for members of the public and NGEOs alike.

In a few cases already the CJEU has had occasion to interpret the requirement in relation to prohibitive costs in relation to costs awards being imposed on unsuccessful litigants.[23] The case law has been important in fleshing out the implicit parameters of this obligation. Although neither the Aarhus Convention nor the EU's implementing legislation defines what "prohibitively expensive" means, the CJEU has taken note of (whilst not accepting as definitively binding) the Convention's implementation guide in this respect, which indicates that costs must not be so expensive as to prevent persons seeking a review in appropriate cases.[24] The CJEU has confirmed the prohibition broadly to cover all the costs arising from a claimant's participation in legal proceedings,[25] thus including any fees imposed by a court as well the costs of legal representation.[26] That legal representation fees are covered is particularly important, as they typically constitute the bulk of costs involved in litigation, particularly so in the context of legal disputes conducted in jurisdictions, such as the UK and Ireland, which are based on adversarial approaches to justice and employ costs rules that stipulate as a matter of principle that the loser should bear both parties' costs ("costs follow the event" rule). Moreover, in *Commission v UK* the CJEU held that any imposition of a cross-undertaking in damages required

[22] See eg. paras 29-31 of judgment in Case C-260/11 *Edwards and Pallikaropoulos op cit.* fn 19.

[23] See notably Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, Case C-260/11 *Edwards and Pallikaropoulos op cit.* fn 19 and Case C-530/11 *Commission v UK* (judgment of 13.2.2014 nyr).

[24] See para. 34 of judgment in Case C-260/11 *Edwards and Pallikaropoulos* (*op cit.* fn 19).

[25] See eg. Case C-427/07 *Commission v Ireland* (*op cit.* fn 23) at para.92 of judgment and Case C-260/11 *Edwards* (*op cit.* fn 23) at para.27 of judgment.

[26] Previously, there had been some doubt expressed in some quarters as to whether the term "costs" under the Convention covered expenditure incurred for legal representation in proceedings (in addition to court fees), such as in the Irish High Court in *Sweetman v An Board Pleanla and the Attorney General* [2007] IEHC 153.

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to be paid an applicant for interim relief is also subject to the prohibition.[27] Again, this is an important development, given that in the not so distant past the levying of such undertakings could be so substantial so as to have a chilling effect on public interest environmental litigation brought by NGEOs, as in the *Lappel Bank* case.[28]

Whilst the Court has accepted that costs orders relating to costs incurred from participation in the national judicial review procedure may be imposed on unsuccessful litigants,[29] at the same time it has held that member states must ensure that these may never exceed the threshold of being prohibitively expensive. Accordingly, a discretionary practice on the part of national courts not to impose or to impose reduced costs awards on impecunious litigants has been held by the CJEU to violate the requirements of the access to justice provisions contained in the EU Public Participation Directive (as now contained in Article 11 of the EIA Directive and Article 25 of the Industrial Emissions Directive).[30] In *Edwards*[31] and *Commission v UK*[32] the CJEU has confirmed that the discretionary practice of UK courts to award protective costs orders[33] contravened the access to justice requirements of the EU Public Participation Directive, largely on the basis that such awards constituted an uncertain and therefore insufficient implementation of the duty to ensure against prohibitive costs. The successful infringement action brought by the Commission against the UK followed a previous recommendation by the Aarhus Compliance Committee[34] in 2010, which concluded that the UK breached *inter alia* the requirement in Article 9(4) of the Convention against prohibitively expensive legal costs.[35] The CJEU in *Edwards* and *Commission v UK* also clarified that a legal costs assessment for a litigant by a national court must be undertaken to take into account the interests of the litigant (as rights holder) as well as the public interest in protecting the environment. Accordingly, a costs assessment needs to be seen from both a subjective and objective perspective by national courts. Specifically, not only should the financial situation of the litigant be taken into account but also national courts must consider whether the costs are not unreasonable from an objective standpoint, taking into account that the public and NGOs are entitled to play an active role in defending the environment. For this purpose, the CJEU has acknowledged that national courts could take into account the following factors for the purposes of assessing the level of costs: whether the litigant has a reasonable chance of succeeding; the importance of the case for both litigant and environmental protection; degree of complexity of law and review procedure; and whether the claim is frivolous.[36] Such an assessment must be carried out at all levels of stages of appeals, it being irrelevant whether a claimant has so far been deterred from bringing a legal claim before the national courts.[37] As from April 2013, new rules have been introduced in the UK in order to cap the amount of legal costs that judicial review applicants may face in proceedings subject to the Aarhus Convention.[38]

The CJEU has also had occasion to consider the ambit of rights of legal standing and associated rights of members of the public and NGEOs to have access to national judicial review procedures. In *Gemeinde Altrip*[39] the Court clarified that, notwithstanding the broad discretion accorded to member states in determining the legal standing of members of the public to seek legal review of second pillar environmental decisions under the aegis of the access to justice

[27] Case C-530/11 *Commission v UK* (*op cit.* fn 23) at paras. 64-71 of judgment.

[28] *R v Sec. State for the Environment ex parte RSPB* [1997] Env LR 431.See also Macrory R/Westaway N, "Access to Environmental Justice: A UK perspective", Ch 11 in Pallemaerts (ed) *The Aarhus Convention at Ten: Interactions and tensions between Conventional International Law and EU Environmental Law* (2011, Europa Publishing).

[29] Case C-427/07 *Commission v Ireland* (*op cit.* fn 23) at para. 92 of judgment. Case C-260/11 *Edwards and Pallikaropoulos* (*op cit.* fn 19) at para. 25 of judgment and Case C-530/11 *Commission v UK* (*op cit.* fn 23) at para. 44 of judgment.

[30] See Case C-427/07 *Commission v Ireland* (*op cit.* fn 23) and Case C-530/11 *Commission v UK* (*op cit.* fn 23).

[31] Case C-260/11 *Edwards and Pallikaropoulos* (*op cit.* fn 19).

[32] Case C-530/11 *Commission v UK* (*op cit.* fn 23).

[33] Notably, in *R (Corner House Research) v SSTI* [2005] EWCA Civ 192. For an overview of the UK jurisprudence in this area, see eg. Bell S/McGillivray D/Pedersen O, *Environmental Law* 8th ed. (2013, Oxford) at pp 344-346.

[34] See Aarhus Complaints Committee Findings and Recommendations with regard to Communication ACCC/C/2008/33 concerning compliance by the UK, 21.9.2010 (UK's implementation of access to environmental justice requirements).

[35] The issue of member state compliance with Art. 9(4) of the Convention was also the subject of a written question from the European Parliament to the European Commission: E-002454/2011 (PE 461.596) (Questions from MEPs Lambert and Bélier).

[36] Para.42 of judgment in Case C-260/11 11 *Edwards and Pallikaropoulos* (*op cit.* fn 19) and para. 49 of judgment in Case C-530/11 *Commission v UK* (*op cit.* fn 23).

[37] Para.43 of judgment in Case C-260/11 *op cit.* fn 27and paras 50-51 of judgment in Case C-530/1111 *Commission v UK* (judgment of 13.2.2014 nyr).

[38] Practice Direction 45 introduced by virtue of the Civil Procedure (Amendment) Rules 2013 (SI 2013 262) sets a costs cap for judicial review applicants in relation to matters covered by the Convention: specifically a cap of £5,000 for individuals and £10,000 for other persons (eg. companies, NGEOs). For a comment on these changes, see D. Hart, "Case Commentaries: The CJEU on "prohibitively expensive" and the new protective costs order regime" (2012) 6 *Environmental Liability* at 257-258.

[39] Case C-72/12 *Gemeinde Altrip und Others v Land Rheinland-Pfalz* (judgment of 7.11.2013 nyr).

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provisions of the EU Public Participation Directive, this autonomy was by no means unqualified. In particular, any conditions fixed by members states relating to sufficiency of interest or existence of an impairment of right must accord with the standard principles of equivalence and effectiveness as applicable to national procedural rules governing remedies in relation to the safeguarding to EU legal rights.[40] The Court noted that the latter principle requires that any national requirements relating to *locus standi* must not make it in practice either impossible or excessively difficult to exercise second pillar rights, in order to give the public concerned "wide access to justice", with a view to contributing to preserving, protecting and improving environmental quality and public health.[41]

Elsewhere, the CJEU has appraised the privileged legal status afforded to NGEOs under the aegis of the EU Public Participation Directive. In *Arnsberg*[42] the CJEU confirmed that the access to justice provisions of the EIA Directive (specifically now Article 11(3)) guarantee a directly effective right to a judicial or independent review process, irrespective of whether or not an NGEO fulfils the requirements of a sufficient interest or impairment of right stipulated by national law for members of the public to have access to such a review in respect of public authority conduct. Accordingly, member states are not entitled simply to assume that they may conflate the standard legal standing requirements applicable to members of the public with those of NGEOs, otherwise this would according to the Court be contrary to the principle of effectiveness, in not allowing such associations to have access solely on the ground that they protect the environmental public interest.[43] In *Djurgården*[44] the CJEU also underlined that member states must ensure that they construct requirements governing the legal standing of NGEOs in a manner that accords with the general principle of effectiveness and obligation (in Article 11(3) of the EIA Directive) to secure "wide access" to legal review procedures.[45] In that case, the CJEU held that Swedish law had breached its EU legislative obligations on access to justice under the EIA Directive in having required an applicant NGEO to have at least 2,000 members. The Court considered that national rules may not fix minimum membership levels of NGEOs at such a level running counter to the directive's objectives to ensure wide access to justice, which had been the effect of national rules in this instance. It was irrelevant that the NGEO in question had an opportunity to express its views in the participatory phases of the relevant decision by a public authority, or that conceivably the NGEO could have lobbied other larger NGEOs to seek judicial review.[46]

The CJEU has also been instrumental in other respects in entrenching the access to justice rights concerning EU implementation second pillar legislation. In particular, the Court has confirmed that interim relief must be available as a remedy as an implied integral part of the access to justice legislative package, notwithstanding the absence of an express requirement to this effect contained in the EU legislative rules. In *Križan*[47] the CJEU confirmed, with reference to its general jurisprudence on national remedies in respect of breaches of Union law,[48] confirmed that that the exercise of rights under (the then equivalent to) Article 25 of the Industrial Emissions Directive must include the possibility of requesting a national court to order interim measures for the purposes of preventing pollution, including where necessary by way of temporary suspension of a permit.[49] This judicial conclusion is supported by the obligations contained in the Aarhus Convention, which in Article 9(4) requires that "injunctive relief, where appropriate" shall be provided in national review procedures. This is an important recognition that availability of interim relief may be critically important in order to prevent irremediable environmental damage that is liable to arise from an erroneous administrative decision to authorise a particular development project.[50] The CJEU has also made it clear that the utilization of review procedures in order to uphold EU environmental legislation may not be obstructed *per se* on grounds that a judicial decision arising from such a review interferes with fundamental personal freedoms of an operator. Specifically, in *Križan* the CJEU confirmed that a judicial annulment of a permit granted in breach of second pillar rights may not be construed as an unlawful interference with property rights guaranteed under Article 17 of the EU Charter of Fundamental Rights. In *Commission v UK*[51] the CJEU condemned the UK government for failing to ensure that UK law ensured that applications for interim relief were not prohibitively expensive as required by the access to justice provisions contained in the EU Public Participation Directive. In the UK, an applicant for an interim injunctions in the context of environmental judicial review proceedings may be subject to the imposition by a court of a cross-undertaking in damages, the purpose of which is to ensure the party

[40] Para. 45 of judgment, *ibid.*
[41] Para. 46 of judgment, *ibid.*
[42] Case C-115/09 *Bund für Umwelt und Naturschutz v Arnsberg (Trianel) op cit.* fn 6.
[43] Paras. 45-47 of judgment, *ibid.*
[44] Case C-263/08 *Djurgården–Lilla Vättens Miljöskyddsförening v Stockholm* [2009] ECR I-9967.
[45] Para. 45 of judgment, *ibid.*
[46] See paras. 47-51 of judgment, *ibid.*
[47] Case C-416/10 *Križan and Others op cit.* fn 19.
[48] See eg. Case C-213/89 *Factortame* [1990] ECR I-2433.
[49] Paras. 107-109 of judgment in Case C-416/10 *Križan and Others* (*op cit.* fn 19).
[50] Ebbesson J (2011) *op cit.* fn 12 at p 260.
[51] Case C-530/11 *Commission v UK op cit.* fn 23.

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subject to the injunction is compensated if the court subsequently decides that the injunction and that party suffers a quantifiable financial loss as a result of complying with the injunction. The CJEU found that the UK's procedural rules were insufficiently clear so as to ensure that they complied with the ban against prohibitive costs, the UK government having merely asserted that in practice such financial orders are not always imposed by UK courts and not demanded from impecunious litigants.[52]

1.3 Access to justice regarding the third pillar: environmental law enforcement

Notwithstanding the Union's efforts to implement the Aarhus Convention through the adoption of a range of EU legislative instruments, its implementation of the Convention's requirements relating to access to justice remains incomplete. As discussed above, the Union has taken measures to ensure that legislative safeguards are put in place at national level to ensure that civil society has access to legal review mechanisms in order to ensure that the first two pillars of the Convention (namely the rights of access to environmental information and public participation in environmental decision-making) are respected. However, the Union has so far failed to ensure at national level the complete implementation of the third dimension to access to justice requirements under Aarhus, specifically Article 9(3) of the Convention which requires contracting parties to ensure that the public has access to legal review procedures to challenge conduct of public or private entities which contravene the requirements of environmental law of the contracting parties. Specifically, the EU has not legislated to safeguard a general right of access to justice at national level for civil society to use in order to secure enforcement of EU environmental law, the Commission's original legislative proposal in this regard (the Draft AJEM Directive) having so far remained on the shelf due to member state resistance. As a consequence, the Union has taken few steps to implement Article 9(3) of the Convention with legislation targeted at the national level (i.e. adherence by EU member states). The notable exception to this omission has been the Environmental Liability Directive 2004/35,[53] which provides access to justice safeguards for the public including NGEOs in respect of ensuring that national competent authorities adhere to the directive's requirements regarding remediation of environmental damage generated as a result of braches of EU environmental law. The specific access to justice provisions of Directive 2004/35 will be considered below.

1.3.1 Access to justice under Directive 2004/35 on environmental liability (EL Directive)

An important source of EU law relating to access to environmental justice is Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage (hereinafter referred to as the "EL Directive"). The principal aim of this instrument is to establish, in accordance with the "polluter pays" principle, a legal framework for the purpose of ensuring that member states are equipped with the requisite legal tools in order to ensure that operators carrying out certain industrial related activities and causing actual or threatened damage to the environment are legally held to account. The environmental liability regime established under the EL Directive focuses exclusively on securing the prevention and remediation of damage to the environment. It does not affect existing rights that private persons enjoy under the civil law of the member states to compensation and other remedies in relation to impairment to the environment that causes damage to their personal legal interests (such as physical well-being or property rights in land).[54] The EL Directive effectively entered into force three years after its adoption in 2004, with member states required to have transposed it into national law by 30 April 2007.[55] The EL Directive focuses on the key role that public authorities of the member states are to play in taking requisite action in order to ensure that such operators take appropriate preventive or remedial steps in relation to environmental damage caused or threatened as a result of their activities. EU member states are required to designate competent authorities to ensure that the requirements of the EL Directive are fulfilled (hereinafter referred to as "competent authorities").[56] Detailed consideration of the substantive requirements of the EL Directive falls outside the scope of this article; analyses of its provisions are considered elsewhere.[57]

However, it is important to note that the EL Directive provides important procedural rights for member of the public and NGEOs engaged in environmental law enforcement at national level. Specifically, Articles 12-13 of the EL Directive contain

[52] Paras. 69 and 71 of judgment, *ibid.*

[53] Dir. 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L143/56) as amended by Directives 2006/21 (OJ 2006 L102/15), Directive 2009/31 (OJ 2009 L140/114) and Directive 2013/30 (OJ 2013 L178/66). A consolidated version of the EL Directive is available for inspection on the EU's EULEX website. Information about the EL Directive may also be found on the European Commission's DG ENV website at: http://ec.europa.eu/environment/legal/liability/index.htm.

[54] See recital 11 to the preamble and Art 3(3) of the EL Directive 2004/35 *op cit.* fn 53.

[55] Art 19, *ibid.*

[56] Art 11 *ibid.*

[57] See eg Hedemann-Robinson M., *Enforcement of EU Environmental Law: legal Issues and Challenges* (2007 Routledge Cavendish) in Ch 13 and Krämer L, *EU Environmental Law* 7th ed. (2011) at Ch 4-57.

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specific rules which confer a distinct law enforcement role on private entities, such as NGEOs. The EL Directive's provisions on law enforcement mechanisms for civil society are exclusively focused on the review of public authority conduct. Unlike the Aarhus Convention, the EL Directive does not provide any specific procedural rights for private entities to seek legal review and redress from other private entities in respect of environmental caused or threatened by the latter. The EL Directive's provisions concerned are structured on two tier basis: internal and external review. Specifically, (certain) individuals and other private entities are vested with rights to request a competent authority to investigate instances of alleged environmental damage[58] as well as having rights to seek independent legal review of the acts, decisions or omissions of a competent authority.[59] These two provisions will be examined in turn.

1.3.1.1 Rights of private entities to request action under the EL Directive

Article 12 of the EL Directive provides certain private entities with the right, in certain circumstances, to request a competent authority to undertake action in relation to instances of environmental damage or imminent threat of environmental damage alleged to have occurred in contravention with the directive's requirements. In principle, two criteria must be fulfilled before the competent authority is compelled to undertake a review of such a request, namely those relating to the legal standing of the applicant(s) and the supply of relevant information in support of the request. However, member states are entitled to waive any or all these requirements in relation to cases of imminent threat of damage.[60]

Article 12(1) addresses the aspect of legal standing. By virtue of this provision, only certain private entities are entitled to submit to the competent authority observations relating to alleged cases of actual or threatened environmental damage and file requests for action. Specifically, standing to file a request is granted to natural or legal persons:

> "(a) affected or likely to be affected by environmental damage or
> (b) having a sufficient interest in environmental decision-making relating to the damage or, alternatively,
> (c) alleging the impairment of a right, where administrative procedural law of a member state requires this as a precondition [.]"

Subject to one significant qualification, the EL Directive specifies that the definitions of "sufficient interest" and "impairment of a right" are to be matters left to national law of the member states.[61] The qualification is in relation to the position of NGEOs, which are vested with less restrictive rights of standing, as set out in the third paragraph of Article 12(1):

> "To this end, the interest of any non-governmental organization promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b). Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c)."

The impact of this qualification is to open up the possibility for NGEOs to be able to file requests for action, even though they or their members' personal legal interests or assets may not be affected or impaired in some way by the environmental damage. This is an important clause, as it does not predicate the right of request upon a local "residency" requirement that may otherwise be set down by national law. The phrase "meeting any requirements under national law" refers to any particular requirements laid down by member states' general laws on the incorporation and registration of bodies that would apply to such organizations. It is evident from the legislative background to the EL Directive that the phrase is not intended to permit member states to establish special standing requirements for NGEOs for filing Article 12 requests.[62] That would be a misinterpretation of the phrase. It is not clear why standing requirements have had to be laid down in respect of natural or legal persons. Indeed, it might be thought that it would be in the interests of competent authorities to be open to receive any well-founded information on environmental damage, irrespective of the source of that information, a view held by the Commission in relation to the filing of complaints to it that may lead it to open Article 258/260 TFEU infringement proceedings against member states. The view that a filter is needed in order to ensure that competent authorities are not flooded with ill-founded requests is unconvincing. For such authorities are not required to pursue any request other than which is adjudged by them to be plausible. The incorporation of legal standing requirements does not sit well with the EU treaty requirement of ensuring a high level of environmental protection, nor with the

[58] Art 12 EL Directive 2004/35 *op cit.* fn 53.
[59] Art 13 *ibid.*
[60] Art 12(5) EL Directive *op cit.* fn 53.
[61] Art 12(1) second paragraph, *ibid.*
[62] See the Commission proposal for the EL Directive (COM(2002)17) which refers to the right of any "qualified entity" to file a request for action. "Qualified entities" are defined in the proposal as meaning "any body or organization which, according to the criteria, if any, laid down in national law has an interest in ensuring that environmental damage is restored. Bodies and organizations whose purpose, as is shown by the articles of incorporation thereof, is to protect the environment shall be deemed to have an interest". Similarly, the discussion of recognition of environmental NGO rights in the context Draft AJEM Directive has revolved around the legal status of such an NGO as a corporate body, as opposed to any nexus between it and the subject matter of a particular dispute.

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spirit if not the letter of Aarhus Convention. Standing requirements restrict the possibilities for competent authorities in being able to ensure that they have the best possible means of securing information pertinent to their areas of responsibility that is both up to date and comprehensive in scope and depth.[63]

Article 12(2)-(3) of the EL Directive stipulate the requirements pertaining to the supply of information that must accompany any request for action. Article 12(2) specifies that the request must contain "relevant information and data supporting the observations" submitted in relation to environmental damage. Article 12(3) specifies that a competent authority is only obliged to consider observations and requests which "show in a plausible manner that environmental damage exists". These provisions confirm that requests must be sufficiently supported by credible information of some kind before a competent authority is under a duty to undertake a review of whether or not to take action. It is important to note that the burden of proof is relatively low, and probably no more onerous than a requirement to show reasonable suspicion of damage. A more onerous burden would be difficult to reconcile with the precautionary and preventive principles,[64] both being fundamental principles of EU environmental policy and law.[65] Significantly, the observations do not have to provide any evidence that of itself determines individual culpability; the persons making the request is required only to provide the authority with plausible information about the existence of damage. This is important, given that private persons filing requests are not usually going to be in any position, legally, technically of financially, of being able to deduce the source of environmental damage. Attribution of liability under the EL Directive is a matter for competent authorities to establish, not those who file requests for action.

Article 12(3)-(4) of the EL Directive contains some general provisions regarding the administrative procedural steps to be taken once an admissible request has been filed with a competent authority. Article 12(3) specifies that the authority is to consider the observations and request for action, and "give the relevant operator an opportunity" to comment on them. Article 12(4) requires the authority "as soon as possible" and in accordance with national law to inform the person who filed the request of its decision to accede to or refuse the request for action. The notification must provide the reasons upon which the decision is grounded. Regrettably, no timetable is set down in the provisions of the directive for the completion of these procedures. The EL Directive does not require competent authorities to meet any specific deadline to react to requests from the concerned public. The Commission's original draft proposal for the EL Directive had envisaged a four month deadline.[66] It should also be noted that member states' discretion over timing of public authority responses is limited in general terms also by the safeguards set down in the Aarhus Convention, specifically Article 9(4) thereof which requires access to environmental justice procedures to be *inter alia* both "effective" and "timely". However, the absence of a specific time limit for public authority responses to applicants is a potentially significant shortcoming, liable to cause unnecessary confusion and potential delay in the operation of review procedures as well as national distortions to what is supposed to be a common legal framework for the Union. In cases of imminent threat of environmental damage, the EL Directive provides that these particular procedural requirements need not apply before an authority decides to take action,[67] namely the obligation to hear the relevant operator(s) involved and notify persons requesting action.

1.3.1.2 Right to subject competent authority's conduct to legal review under the EL Directive

In addition to being granted the right to request action from a competent authority, the EL Directive also confers a right to persons to seek independent legal review of the authority's conduct. Specifically, Article 13(1) of the EL Directive states that persons granted the right to file requests for action must also have access to a court or other independent and impartial public body competent to review the procedural as well as substantive legality of decisions, acts or omissions of competent authorities in relation to the requirements of the directive. The right to seek review is accordingly very wide-ranging in that its remit applies to all formal aspects of a designated competent authority's work in relation to carrying out the EL Directive, not just in respect of its decisions whether or not to act in relation to requests to take action.

Article 13(1) of the EL Directive is made subject to a rather broad qualification in Article 13(2), to the effect that the EL Directive is to operate "without prejudice to any provisions of national law which

[63] One could argue that the standing requirements set out under Article 12(1) of the EL Directive contravene the requirements in Article 5(1)(a) of the Aarhus Convention, which requires contracting parties to ensure that their public authorities possess and update environmental information which is relevant to their functions. One might also point to there being conflicting approaches adopted under the EL Directive *op cit.* fn 53 (Art 12(1)) and the AEI Directive *op cit.* fn 4 (Art. 8).

[64] As set out in Art 191(2) TFEU.

[65] Indeed, the Commission proposal for the EL Directive (*op cit.* fn 53) did not refer to any filter requirement based on plausibility (see reference to Art 11 in COM (2002)17).

[66] See Art 11(3) of draft Commission proposal for the EL Directive in COM(2002)17. Best practice arguably would be for the authorities to apply in principle the time limits for responding to requests for internal review envisaged under Article 6 of the Draft AJEM Directive *op cit.* fn 3.

[67] Art 12(5) EL Directive 2004/35 *op cit.* fn 53.

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regulate access to justice" or national provisions that require administrative review procedures to be exhausted prior to recourse to judicial proceedings. At first glance Article 13(2) might appear to offer member states the possibility to adopt or maintain a restrictive stance on legal standing of private persons seeking judicial review of administrative conduct. However, this would be a misreading of that provision. Instead, Article 13(2) should be seen in the light of the access to justice protections offered under the aegis of the Aarhus Convention which, as a source of EU law, is also a component of "national law" for the purposes of Article 13(2). Article 9(3)-(4) of the Convention are especially important in this regard. Article 9(3) requires contracting parties to ensure that members of the public have access to administrative or judicial review procedures to challenge conduct by public authorities contravening their national laws on the environment. Article 9(4) requires parties *inter alia* to ensure that judicial review procedures "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive." Accordingly, the amount of discretion provided to member states under Article 13(2) is tempered and qualified by the legal constraints set down in Aarhus. It would, though, have been more in keeping with the objective of promoting access to environmental justice objective if the access formula contained in Article 12(1) of the Directive could have been applied also in Article 13.

1.3.1.3 Impact of the EL Directive on access to environmental justice

Given that the transposition deadline in respect of the EL Directive has only elapsed relatively recently in 2007[68] and at the time of writing the Commission has yet to issue its first implementation report on the implementation of the directive,[69] it is relatively early to assess the full extent of the practical impact the EL Directive is set to have with respect to assisting in the enforcement of EU environmental legislation. It is also worth noting in this context that the EL Directive contains a specific temporal limit as regards the scope of its application. Specifically, it does not apply to damage caused by an emission, event or incident that transpires prior to 30 April 2007 (the implementation deadline) or in respect of any emission, event or incident which, although occurring after 30 April 2007, derives from a specific activity which took place and ended prior to that date.[70] It is fair to say, though, that the EL Directive did not get off to an auspicious start, with the Commission having to take infringement proceedings in 2008-9 against several member states over failures to transpose the directive into national law.[71] No doubt transposition would have been somewhat swifter had the introduction by the Lisbon Treaty as from 1 December 2009 of financial penalties for non-transposition cases within the first round infringement procedure system under Article 258 TFEU been integrated earlier within the EU treaty framework.

On the one hand, there are a number of features of the EL Directive that point towards the instrument having a significant contribution to make in relation to enhancement of access to environmental justice for civil society. Notably, it appears that the right to request action and legal review enshrined in Articles 12-13 of the EL Directive will enable certain members of the public and NGEOs to become more readily involved in the review processes without having to negotiate through unclear or onerous legal standing (*locus standi*) requirements that may exist under some current national procedural rules of member states. It is also evident that member states will have to ensure that persons with standing have the opportunity to subject the conduct of a competent authority to procedural as well as substantive legal scrutiny before an independent body, whose decisions are to be binding upon the competent authority. Such a body must be capable of ensuring that the competent authority not only adhere to procedural rights of private persons filing requests or persons subject to investigation, it must also ensure that the substantive decisions taken by the authority accord with the EL Directive as well as with other EU environmental legislation. Accordingly, existing legal review procedures under national administrative law may have to be extended where review bodies are unable to conduct a comprehensive legal review as envisaged by the Article 13(1) of the EL Directive. To some extent it is also highly probable that the beneficiaries of these provisions will be able to rely upon them before national courts. True, elements of both legislative provisions would appear to rule out direct effect given their conditional and imprecise nature (eg. need for member states to establish the relevant competent

[68] 30 April 2007 (Art 19(1) EL Directive (*op cit.* fn 53).

[69] Under Art. 18(2) of the EL Directive (*op cit.* fn 53) the European Commission is required to submit a report on the application of the directive before 30.4.2014 on the basis of individual national reports received from the member states (which are required to have been sent to the Commission by 30.4.2013 under Art. 18(1)).

[70] Article 17 EL Directive 2004/35 *op cit.* fn 153.

[71] Infringement action taken by the Commission under Art. 258 TFEU culminated in the CFEU handing down judgments against 7 member states for failing to take measures to transpose the EL Directive: Cases C-328/08 *Commission v Finland* [2008] ECR I-200, C-330/08 *Commission v France* [2008] ECR I-191, C-331/08 *Commission v Luxembourg* [2009] ECR I-45, C-368/08 *Commission v Greece* [2009] ECR I-89, C-402/08 *Commission v Slovenia* [2009] ECR I-34, C-417/08 *Commission v UK* [2009] ECR I-106 and C-422/08 *Commission v Austria* [2009] ECR I-107. Infringement proceedings were launched against Belgium (Case C-329/08) but discontinued in 2009 (confirmed judicial order of the CJEU on 6.3.2009).

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authority and procedural rules on legal standing). However, there is little doubt in light of CJEU jurisprudence on indirect effect of directives and on national remedies that national courts are under a duty, as far as possible, to ensure that their national laws comply with the access to review procedures in Articles 12-13 of the EL Directive. This may well lead over time to the amplification of access to justice protection under the EL Directive by way of judicial clarification provided by the CJEU in preliminary rulings to national courts on the interpretation of the extent of the legislative instrument's guarantees.

On the other hand, there are several features of the EL Directive that give some cause for concern in terms of their impact on access to justice. For instance, the directive does not stipulate any requirements regarding the maximum level of administrative and legal costs that may be levied on persons utilising the review procedures.[72] Member states appear to retain substantial discretion to determine the amount charged in respect of such costs. If set at too high a level, they may well act as a significant deterrent to persons wishing to request action or seek legal review of a competent authority's conduct. However, member states do not have a complete free rein in the sense that they are obliged to adhere to the general requirements of Article 9(4) of the Aarhus Convention.

In addition, the EL Directive fails to set a clear timetable in respect of the handling of a request for action. The timetable will be set according to national rules and there is no guarantee that these will be sufficiently swift, commensurate with the degree of urgency attached to any particular case. Moreover, given that member states are required to take the step of designating their own competent authorities to carry out the requirements of the EL Directive, it is doubtful whether either Articles 12 or 13 are sufficiently unconditional in order to qualify as directly effective provisions; individuals will therefore probably not be able to enforce them in the absence of national transposition legislation which designates a competent authority.[73] Accordingly, the effectiveness of the EL Directive's access to justice provisions depends a good deal upon the particular detailed procedural provisions adopted by individual transposition legislation.

II. Prospects for EU Legislative Reform on Access to Environmental Justice

By way of rounding up on the state of the EU's implementation of the Aarhus Convention's access to environmental justice obligations, this particular section reflects on the possibilities that lie ahead for the EU in promulgating a general "horizontal" legislative instrument on access to environmental justice at national level. It will focus in particular on the European Commission's 2003 draft directive on access to justice in environmental matters (Draft AJEM Directive)[74] which remains a significant reference point, not least in the light of recent renewed political interest taken by the EU and in this area under the aegis of EAP7.

2.1 The Seventh EU Environment Action Programme (EAP7) and access to environmental justice at national level

Whilst the 2003 Draft AJEM Directive has remained effectively on the political shelf for over a decade due to resistance from member states its relevance has recently re-emerged onto the political agenda at EU level, in light of renewed interest from the European Commission in this area. The European Commission's current Environment Commissioner Jan Potoènik has been a strong advocate for moves to introduce legislative reform in the area on access to justice, as one of the components needed to be put in place for a more effective implementation of EU environmental law at national level.[75] He has played a significant role in ensuring that access to environmental justice is back on the EU political agenda.

The EU has recently confirmed in the context of its Union's latest Environment Action Programme (2013-2020) (EAP7)[76] that the area of access to environmental justice is to constitute one of the dimensions to its focus on implementation and enforcement. The EAP7 lists nine thematic priority policy objectives for the Union, the fourth of which focuses on the Union enhancing implementation of EU environmental legislation.[77] Listed amongst the measures to be taken

[72] Admittedly, neither the AEI Directive (*op cit.* fn 4) nor the EU Public Participation Directive (*op cit.* fn 10) set limits on fees. However, certain limits were integrated within the Draft AJEM Directive (*op cit.* fn 6).

[73] It is highly doubtful whether individuals would be able to invoke the principle of state liability under EU law to enforce the legislative provisions, given that one of the requirements for state liability as set by the CJEU is that the EU norm(s) breached must purport to create individual rights. This would appear to imply that EU norms intended to protect purely non-anthropocentric interests such as the environment are excluded from the scope of state liability (see e.g. Joined Cases C-6,9/90 *Francovich and Bonifaci* [1991] ECR I-5357 and Joined Cases C-46 &48/93 *Brasserie de Pêcheur and ex p Factortame* [1996] ECR I-1029).

[74] COM(2003) 624 final, *op cit.* fn 3.

[75] See the Commissioner's speech in 2012 *"The fish cannot go to court" – the environment is a public good that must be supported by a public voice*, SPEECH/12/856, Brussels, 23.11.2012 (accessible on the EU RAPID Press Release site: http://europa.eu/rapid). In that speech the Commissioner stated that a directive on access to justice was "indispensable".

[76] Decision 1386/2013 *op cit.* fn 2.

[77] Priority Objective 4: To maximise the benefits of Union environment legislation by improving implementation (OJ 2013 L354/189-191).

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under the auspices of "Priority Objective 4" is a specific commitment to enhance the Union's existing position regarding access to environmental justice at national level. This is contained within paragraph 65 of the Annex to the EU Decision adopting the 7th EAP, the relevant extracts of which are reproduced below:

> "65. In order to maximise the benefits of Union environment legislation by improving implementation, the EAP7 shall ensure that by 2020:
> [...]
> (e) the principle of effective legal protection for citizens and their organizations is facilitated.
> This requires, in particular:
> [...]
> (v) ensuring that national provisions on access to justice reflect the case law of the Court of Justice of the European Union. [...]"[78]

Interestingly, the EAP7 does not expressly commit to the promulgation of new legislation but this is a possible and plausible inference to be drawn from the Programme's text. Indeed, the European Commission has been keen to promote a renewed legislative agenda for some time during the preparations and negotiations over the EAP7. In particular, in a 2012 Communication[79] the Commission took note of the recent case law of the CJEU[80] that has confirmed on a number of occasions national courts' responsibilities to interpret national access to justice rules in line with the Aarhus Convention, and has viewed this development as giving rise to legal uncertainty. The Commission considered it appropriate to explore how greater certainty could be achieved for national courts and economic and environmental interests, such as through developing guidance on CJEU case law as well as defining at EU level the conditions for efficient as well as effective access to national courts in respect of all areas of EU environmental law. The European Parliament[81] and Committee for the Regions[82] have both voiced recent support for a directive on access to environmental justice.

During 2013 the European Commission took matters further with moves that indicate a shift in the direction of seriously contemplating EU legislative action. Specifically, the Commission's Environment Directorate-General (DG ENV) has launched a series of initiatives in order to prepare the ground for launching a legislative initiative.[83] In particular, DG ENV has commissioned a number of studies examining member state systems of access to environmental justice as well as a study on economic impacts of possible Commission initiatives. It has also set up an expert consultative working group as well as carrying out a public consultation on the possibility of an access to environmental justice initiative via questionnaire between June and September 2013.[84] The Commission has also published an explanatory consultation text on its DGENV website which sets out the range of policy options open to the Union.[85] The document signals that one of the options might be to revisit the Draft AJEM Directive, taking on board European Parliament first reading amendments, or to launch a completely fresh legislative initiative.

Given that the Commission is seriously contemplating the possibility of proposing legislation in this area once more, it is appropriate to consider, albeit relatively briefly, the 2003 Draft AJEM directive, which constitutes an influential guide for the Commission's prospective legislative reworking of this area.

2.2 The 2003 Draft AJEM Directive

In October 2003, the Commission presented the European Parliament and Council of the EU with a legislative proposal to implement the "third pillar"

[78] OJ 2013 L354/190-191.

[79] COM(2012)95 Commission Communication *Improving the delivery of the benefits from EU measures: building confidence through better knowledge and responsiveness* at p 9 (Objective: Improve access to justice).

[80] Notably, Case C-240/09 *Lesoochranárske zoskupenie VLK (Slovak Brown Bear) v Slovakian Government* [2011] ECR I-1255.

[81] See para. 68 of EP Resolution of 20.4.2012 reviewing the 6th EAP and the setting of priorities for the EAP7 (2011/2194(INI) available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=TA-2012-147

See also paras 29-42 of EP resolution of 12.3.2013 improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness (2012/104 (INI)) available at: http://www.europarl.europa.eu/sides/getDoc.do?type=PV&reference=20130312&secondRef=ITEM-010-10&format=XML&language=EN.

[82] Opinion of the Committee of the Regions of 28-29.11.2012 Towards a EAP7: Better implementation of EU environmental law (CDR 591/2013 - ENVE-V-024): available at: https://toad.cor.europa.eu/corwipdetail.aspx?folderpath=ENVE-V/031&id=21898

[83] The activities of DG ENV in relation to access to environmental justice may be inspected on its website at: http://ec.europa.eu/environment/aarhus/index.htm

[84] Between June-September 2013 the European Commission ran a brief stakeholder consultation on the future of access to environmental justice, specifically to consider whether EU legislative action would add value in ensuring effective and non-discriminatory access to justice in environmental matters across the member states. See EU press report IP/13 689, Brussels 15.7.2013 ("*Environment: 'The fish cannot go to court': Give your opinion on how to improve access to environmental justice*") accessible at: http://europa.eu/rapid/press-release_IP-13-689_en.htm. The results of the consultation may be inspected at: http://ec.europa.eu/environment/aarhus/consultations.htm.

[85] European Commission's Explanatory Consultation Text regarding the 2013 public consultation on possible EU legislative action on access to environmental justice is available at: http://ec.europa.eu/environment/consultations/pdf/access.pdf

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access to justice obligations contained in the Aarhus Convention into the legal systems of the member states. The draft EU legislative initiative took the form of a draft directive, the Draft directive on access to justice in environmental matters[86] (the "Draft AJEM Directive"). It was primarily designed to enable the broad spectrum of civil society to be endowed with rights to hold public authorities as well as private persons to account by way of taking environmental proceedings at national level in respect of acts or omissions to act in contravention of EU environmental law.[87] Whilst the material scope of the draft initiative is focused essentially on private enforcement of Union environmental legislation, the proposal also provides that member states have the option of transposing its requirements in respect of environmental laws of exclusively national origin, i.e. which have been established independently of EU environmental law.[88]

Based upon the core legal structures and requirements foreseen in the Aarhus Convention, the Draft AJEM Directive fleshes out how EU member states are to implement the Aarhus legal principles on widening access to environmental justice as far as the enforcement of EU environmental law is concerned. Specifically, it sets out a wide-ranging legal framework to ensure that members of the public and NGEOs (as "qualified entities") are able to secure better access to judicial proceedings at national level before the member state courts in order to seek redress in respect of conduct of private persons or national public authorities they consider to breach EU environmental law. In addition, it also provides such persons with the right to request a public authority to undertake an internal review of conduct alleged to have contravened EU environmental law. Given that the legal basis of the Draft AJEM Directive is Article 192 TFEU, member states are to remain competent to be able introduce or maintain measures more generous than the minimum floor of access to justice rights granted in the legislative proposal.[89] For reasons of space, a relatively brief outline and appraisal of the Draft AJEM Directive is provided here; more detailed analyses may be located elsewhere.[90]

The purpose the Draft AJEM Directive is to establish a set of binding provisions under EU law to ensure access to justice in environmental proceedings for both "members of the public" as well as "qualified entities".[91] "Members of the public" are defined broadly in the Draft AJEM Directive to mean "one or more natural legal persons and in accordance with national law, associations, organizations or groups made up by these persons".[92] This definition embraces a very wide notion of the public, given that it is not predicated on the criteria of nationality, residence, number of persons involved or particular legal forms. "Qualified entities" are a special category of private persons created by the Draft AJEM Directive vested with distinct enforcement rights, defined in Article 2(1)(c) as meaning any association, organization or group whose objective is to protect the environment and which is recognised by individual member states under a specific procedure set out in Article 9. Article 9(1) stipulates that member states are to adopt a special procedure to ensure an "expeditious" recognition of such entities, either on a case by case basis (ad hoc) or under an advance dedicated recognition procedure, where they fulfil specific requirements as set out in Article 8 of the Draft AJEM Directive.[93] Article 8 of the Draft AJEM Directive elaborates the criteria to be used for identifying a "qualified entity". It specifies four requirements to be met before a body is to be regarded as a qualified entity, namely: (1) it must be an independent, non-profit-making legal person whose objective is to protect the environment;[94] (2) it must have an organizational structure enabling it to "ensure the adequate pursuit of its statutory objectives;[95] (3) it must have been legally constituted and have worked actively for the protection of the environment in conformity with its statutes for a period to be determined by the member state but no longer than three years;[96] and (4) it must have its annual statement of accounts certified by a registered auditor for a period to be determined by the member state in which it is constituted.[97]

Under the Draft AJEM Directive qualified entities are to have special rights of legal standing, over and above those vested in the members of public, in taking legal steps to enforce EU environmental law. The object behind the creation of a special status of "qualified entity" is to vest NGEOs with a special role in terms assisting in ensuring that EU environmental law is complied with by public authorities. Effectively,

[86] COM(2003)624, *op cit.* fn 3.
[87] See esp. Arts. 1, 3, 6 and 7 of the Draft AJEM Directive (COM(2003)624) *op cit.* fn 3.
[88] See recital 7 and Art. 2(2) in conjunction with Art..2(1)(g) of the Draft AJEM Directive, *op cit.* fn 3.
[89] By virtue of Article 193 TFEU.
[90] See eg. De Sadeleer N./Roller G./Dross M (eds) *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (2005, Europa Publishing) (Ch 4); Hedemann-Robinson M. (2007) *op cit.* fn 57 at p 310 *et seq.*
[91] Art. 1 of Draft AJEM Directive *op cit.* fn 3.
[92] Art. 2(1)(b), *ibid.*
[93] Member states are to set up the procedures involved for recognition, determine the competent authorities responsible for deciding upon recognition as well as ensure that rejections of requests for recognition shall be subject to independent review laid down in law. See Arts 9(2)-(4) Draft AJEM Directive *op cit.* fn 3.
[94] Art 8(a) Draft AJEM Directive *op cit.* fn 3.
[95] Art 8(b) *ibid.*
[96] Art 8(c) *ibid.*
[97] Art 8(d) *ibid.*

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conferral of this status is recognition of their having the requisite organizational capability and experience in relation to environmental protection issues. The proposed rights of such entities to take legal action will be discussed in detail in the next sections.

2.2.1 The right to take environmental proceedings

The Draft AJEM Directive envisages a number of situations where members of the public as well as qualified entities are to have specific rights to initiate environmental proceedings in respect of contraventions of EU environmental law. Environmental proceedings are defined as meaning the administrative or judicial review proceedings in environmental matters before a court or other independent body established by national law, excluding proceedings in criminal matters, and concluded by a binding decision.[98] The Draft AJEM Directive requires that proceedings should be able to taken against either private persons or public entities, with more detailed rules set out in respect of action taken in respect of public administrative conduct. In addition, the instrument also contains various important stipulations with respect to recognition of legal standing of members of the public and qualified entities, for the purpose of assisting the latter in accessing possibilities to seek internal administrative as well as judicial review of decisions on the environment taken by public authorities. These elements of the draft initiative will be considered briefly in turn.

In relation to acts and omissions of private persons which are in breach of EU environmental law, Article 3 of the Draft AJEM Directive lays down a very general and qualified obligation on member states to open up access to justice. Specifically, under Article 3 member states are required to ensure that "where they meet the criteria laid down in national law" members of the public are to have access to environmental proceedings to challenge such conduct. This provision, laying down a requirement for a "horizontal" right of action in environmental matters, is very broadly worded leaving much discretion to the member states in terms of how they set about implementing it into national law. In particular, the text defers to member states as to how they wish to determine specific and crucial procedural issues such as legal standing, interim relief, burden of proof, evidential disclosure and legal costs. However, it should be noted that such proceedings are subject to the general overarching requirements for all national environmental proceedings stipulated in Article 10 of the Draft AJEM Directive (considered later below in this section). It is also noticeable that no special enforcement rights are granted to qualified entities in (horizontal) environmental proceedings directed against private persons. The limited and general nature of the Draft AJEM Directive's provisions on access to environmental justice against private persons does no more than reflect the bare essence of the relatively shallow requirements contained in Articles 9(3)-(5) of the Aarhus Convention. In its Explanatory Memorandum accompanying the Draft AJEM Directive, the Commission refers to the principle of subsidiarity[99] as a reason for it not proposing more detailed EU level obligations on horizontal environmental justice disputes.[100] It is questionable whether the Commission has struck the correct balance between, on the one hand, ensuring as much respect for procedural autonomy of member states over the administration of justice as is reasonably possible against, on the other hand, the need to ensure that EU environmental protection objectives crystallized in the Draft AJEM Directive are going to be sufficiently implemented across the EU in a credibly consistent and effective manner.

The Draft AJEM Directive provides a far more sophisticated and wide-ranging set of safeguards in for private persons seeking to challenge conduct of national public authorities. The draft proposal does this in a number of key respects. Firstly, it establishes a right for civil society to be able to utilise two types of review mechanism, not simply recourse to the classic forum of a national court. Specifically, it establishes the possibility for members of the public and qualified entities to seek an internal review by a national authority of conduct considered by the former to have breached EU environmental law before having recourse to environmental proceedings. Secondly, the draft proposal also establishes enhanced rights of legal standing (*locus standi*) for members of the public and qualified entities to be able to have access to both review channels (internal review and environmental proceedings).

2.2.2 Internal review mechanism

Article 6 of the Draft AJEM Directive provides an interesting stand-alone procedure designed to assist members of the public and qualified entities to able to seek review of national public administrative conduct in a far swifter and less expensive way than recourse to the national courts, the so-called "internal review" mechanism. This review procedure enables the public to request a national public authority to scrutinise whether a claim of illegality may be upheld, before having to consider the more expensive and protracted option of judicial review before the national courts. In providing for the internal review mechanism, the Draft AJEM Directive goes further than the Aarhus Convention, which requires contracting parties as a minimum to ensure the public's access administrative or judicial procedures to challenge conduct contrary to environmental law.[101] Under Article 6 of the Draft

[98] Art. 2(1)(f)) Draft AJEM Directive *op cit.* fn 3.
[99] As enshrined now in Art. 5(3) TEU.
[100] COM(2003)624 *op cit.* fn 3 at p 12.
[101] Art. 9(3) of the Aarhus Convention.

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AJEM Directive, members of the public as well as qualified entities, who consider that an administrative acts or omission is contrary to EU environmental law are entitled under this particular provision to make a request for an internal review to a competent public authority, subject to them having legal standing to do so in accordance with Articles 4-5[102] (considered later below). Member states are free to designate the public authority to be charged with the responsibility of carrying out the internal review: it need not be the state authority responsible for the act or omission. The time limit for submitting internal review requests is to be determined by the member states, but the limit must not be shorter than 4 weeks following the date of the alleged administrative act or, in the case of an omission to act, after the date when an administrative act was required by law.[103] Article 6(2)-(4) of the Draft AJEM Directive specifies the format and basic timetable of the internal review procedure to be carried out by the competent public authority. Unless the request relates is "clearly unsubstantiated", the authority is required in principle to make a decision on the matter within a period of no later than 12 weeks after receipt of the request. Article 6(4) stipulates that the relevant competent authority must make a decision on the request within 18 weeks of its receipt. Regrettably, the Draft AJEM Directive does not specify to what extent, if at all, applicants are to be required to pay in terms of administrative fees for an internal review; this is a matter left for member states. This is regrettable because, of course, a very high fee could act as a deterrent to meritorious requests.

2.2.3 *Environmental proceedings against public authorities*

In addition to providing for an internal review mechanism, the Draft AJEM Directive also affirms the right of civil society to have effective recourse to national courts of the EU member states in respect of the conduct of national public authorities. The draft proposal sets out some important rights and safeguards for the public when seeking judicial review, both in relation to the operation of the internal review mechanism as well as more generally speaking.

As regards legal challenges in relation to the outcome of an internal review, the Draft AJEM Directive contains only limited specific requirements relating to access to justice protection relating to this area. In the event that the internal review mechanism does not lead to a satisfactory outcome from the review applicant's perspective, Article 7 of the draft proposal stipulates that the applicant having requested an internal review "shall be entitled to institute environmental proceedings" where either no review decision is taken within the stipulated time limits (as set down in Articles 6(2)-(4)) or the applicant disputes that the decision is sufficient to ensure compliance with EU environmental law. This provision does not stipulate any detailed requirements on procedural guarantees relating to this access to justice right. By default, such aspects are addressed by the general provisions on legal standing contained in the draft proposal (Articles 4-5) which address access to justice rights of members of the public and qualified entities generally before the national courts.

Articles 4-5 of the Draft AJEM Directive set out the rights of legal standing to be accorded to members of the public and qualified entities for the purpose of being able to bring environmental proceedings in respect of national administrative acts and omissions claimed to be in breach of EU environmental law. These access to justice rights apply independently of the internal review mechanism contained in Article 6, discussed above. The position adopted by the Commission on legal standing rights in the draft is to seek a balance between two interests. On the one hand, the Commission is keen to enhance the public's rights of access to justice at national level so as to provide a meaningful opportunity for environmental law enforcement to be sponsored by the private sector in line with Aarhus. On the other hand, it is also desirous not to establish absolute rights of access tantamount to an "*actio popularis*", which the Commission considers would be incompatible with the principle of subsidiarity.[104]

Article 4 addresses the legal standing rights of members of the public. Specifically, it requires EU member states to ensure a right of the public to have access environmental proceedings, which is to include the availability of interim relief, where such persons either have a "sufficient interest"[105] or where they "they maintain the impairment of a right" where the administrative procedural law of the member state concerned requires this as a precondition.[106] The Draft AJEM Directive specifies that member states, "in accordance with the requirements of their law and with the objective of granting broad access to justice", retain competence to determine the fulfilment of either of these criteria (Article 4(2)). Crucially, member states retain significant controls over the structuring of legal standing requirements under the draft legislative provisions. Member state autonomy over *locus standi* is subject to only a general qualification of being required to be "in accordance [. . .] with the objective of granting broad access to justice".[107]

Article 5 of the draft legislative instrument specifies the extent to which "qualified entities" may have legal standing to bring environmental proceedings. Article

[102] Art 6(1), first paragraph Draft AJEM Directive, *op cit.* fn 3.
[103] Art 6(1) second paragraph, *ibid.*
[104] COM(2003)634 Explanatory Memorandum *op cit.* fn 3 at pp 12-13.
[105] See Art. 4(1)(a) Draft AJEM Directive, *op cit.* fn 3.
[106] See Art 4(1)(b) *ibid.*
[107] Art. 4(2) *ibid.*

5(1) specifies that such entities as recognised by a member state (in accordance with Article 9) may, subject to certain conditions, have access to environmental proceedings. Such proceedings may include those for the purpose of requesting interim relief, even though the entity may not necessarily have a sufficient interest or have a right impaired as would otherwise be required of members of the public under national when issuing legal proceedings to challenge the legality of public authority conduct as envisaged in Article 4. The conditions for a qualified entity to be able to take proceedings are that the subject matter of dispute is covered specifically covered by the "statutory activities" of as well as within the "geographical area of activities" of the qualified entity concerned. Although not expressly stipulated, it appears implicit from the wording and legislative context of the provision that the qualified entity will be responsible for determining the remit of its activities in terms of material scope and geographically. A member state will not be able to interfere in the autonomy of the entity to set its own corporate objectives.[108] The justification of the insertion of the stipulation relating to "geographical area" of the entity's activities is not clear and appears to conflict with the terms of the Aarhus Convention, which does not establish this element as a requirement.[109] Article 5(2) of the Draft AJEM Directive also provides the possibility of qualified entities being involved in certain types of trans boundary disputes, in stipulating that an entity recognised in one member state is entitled to submit a request for an "internal review" in another member state under the conditions of Article 5(1).

Reflecting the tenor of the Aarhus Convention, the Draft AJEM Directive seeks to ensure that environmental proceedings before national courts are subject to general principles of propriety and fairness in the Draft AJEM Directive. Specifically, Article 10 of the Draft AJEM Directive effectively replicates the conditions set out in Article 9(4) of the Convention by requiring that member states "shall provide for adequate and effective proceedings that are objective, equitable, expeditious and not prohibitively expensive" and are to be given or recorded in writing, and "whenever possible" made publicly accessible.

The legal standing rights accorded to members of the public and qualified entities to be able to take environmental proceedings constitute an important advance on the existing position of procedural rights granted to private persons under EU law. In particular, the important issue of availability of interim relief is addressed in relation to the acts and omissions of public authorities, albeit not in relation to conduct of private defendants. Accordingly, as recognised in the draft proposal's Explanatory Memorandum,[110] the Commission proposal goes further than the Aarhus Convention which does contain specific obligations regarding legal standing issues. The rights of qualified entities accorded in the draft text constitute a significant advance in terms of enhancing possibilities of private law enforcement of EU environmental law. Notably, under the Draft AJEM Directive, such entities will be able to take legal proceedings against public authorities acting in breach of EU environmental legal requirements without having to face the traditional procedural hurdles commonly applied under national administrative law of having to prove a direct personal interest in the subject matter of the dispute.

The factor of enhancing effectiveness of the practical application of EU environmental legislation is a key feature underpinning the motivation behind the Draft AJEM Directive.[111] The Commission has for a number of years recognised the lack of existing genuine possibilities at national level in the member states for private persons, including notably NGEOs, to engage actively in enforcement of EU environmental protection legislation.[112] Accordingly, the Draft AJEM Directive's ambition to remove the requirement of direct effect, as a precondition for private law enforcement, may be seen as an integral element of the Commission's long-standing aspiration to facilitating better access to environmental justice at national level.

III. Concluding Remarks

There is little doubt that the package of EU measures designed to implement the Aarhus Convention at national level on access to environmental justice have enhanced the possibilities for civil society to become more involved and influential in the enforcement of EU environmental legislation. Endowed with rights to seek legal review of acts and omissions of member state authorities affecting the environment as well as

[108] This interpretation is supported by reference to Art 8 of the Draft AJEM Directive, which refers to the entity's statutes in the possessive mode ("its statutes").

[109] See Art. 2(3) of the Aarhus Convention. In the context of the access to justice safeguards contained in the EU Public Participation Directive 2003/35 (*op cit.* fn 10) the CJEU has been critical of national provisions that require judicial review claimants to demonstrate that they are geographically linked or proximate to the legal dispute at hand: see eg. Case C-115/09 *Bund für Umwelt und Naturschutz v Arnsberg (Trianel) op cit.* fn 6.

[110] COM(2003)624 *op cit.* fn 3 at p 13.

[111] As indicated in the Explanatory memorandum to the legislative proposal (see COM(2003)624 at 4-5).

[112] See e.g. COM(96)500 Commission Communication on Implementation of EU environmental law; Commission's First, Second and Third Annual Surveys on Implementation of EU environmental law (SEC(1999)592, SEC(2000)1219 and SEC(2002)1041; and the Council Decision on EU's Sixth Action Programme on the Environment OJ 2002 L242/1.

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rights to obtain information on the state of the environment held by public authorities of the member states, private persons are now better equipped than ever with legal tools to hold public authorities to account in respect of their activities affecting the environment.

A significant shortcoming concerning the EU's legal position on access to environmental justice, though, concerns its partial fulfilment of its Aarhus Convention obligations. The refusal by the Council of the EU to enact a general legal framework based on the Commission's 2003 Draft AJEM Directive has led to date to a fragmented delivery of safeguards and protections for members of the public engaged in enforcing EU environmental legislation at national level, and specifically before national courts. Whilst the EU has nevertheless adopted some legislative measures in the wake of the effective suspension of the Draft AJEM Directive, these have been effectively sectorial in nature, leaving gaps in access to justice protection across broad areas of EU environmental policy. Notwithstanding the residual legal effects of the EU's 2005 ratification of the Aarhus Convention in light of CJEU jurisprudence, this has so far proved to be and is likely to remain an inadequate source of legal protection for private persons pursuing public interest environmental litigation in the member states.

At the time of writing the EU is in the process of actively revisiting the policy area of access to environmental justice. The EAP7 has provided the European Commission with a mandate to ensure that improvements are introduced across the piece with a view to ensuring that the public is guaranteed the same floor of procedural rights protection in accessing national courts with respect to all and not just some EU environmental legislative instrumentation. The European Commission's Environment Directorate General has already augmented its environmental governance priorities to include a policy track for developing existing Union level commitments towards access to environmental justice at member state level, with a stakeholder consultation[113] as well as studies (eg, comparing national legal systems) having been commissioned.[114]

Subsequent to the completion of stakeholder consultation at the end of September 2013, the European Commission has proceeded to move towards the next and final key stage of its internal evaluation on whether to give formal approval for a new EU legislative proposal on access to environmental justice. Specifically, in late autumn 2013 the Commission's Environment Directorate-General (DG ENV) produced a roadmap document[115] for the purposes of an impact assessment review by (in particular) the Commission's Secretariat General. The document notes that at a meeting of the Council of the EU's Working Party on International Issues (WPIEI) in May 2013, member state representatives were at that stage already "broadly supportive of an impact assessment to be carried out on the topic of access to justice".[116] At the time of writing in mid-March 2014, the road map was being subject to ongoing review amongst the cohort of 2014 Roadmap initiatives awaiting formal approval impact assessment.[117] The DG ENV roadmap document is of particular interest as it provides some insight into the broad themes that would underpin a new legislative proposal. As one might predict, the primary focus for a prospective legislative proposal favoured by DG ENV is on securing implementation of the core requirements of Article 9(3) in conjunction with Article 9(4) of the Århus Convention: appropriate legal standing rights for the public and NGOs to seek legal review for the purposes of EU environmental law enforcement as well as other related guarantees on legal review procedure (relating to scoping, costs, remedies and effectiveness).[118]

In addition, though, the DG ENV roadmap signals novel legislative components being introduced in the form of non-judicial conflict resolution as well as collective redress mechanisms.[119] Specifically, it emphasises that the proposed initiative will utilise these aspects as a complementary channels alongside the standard national judicial and administrative legal review procedures. Collective redress mechanisms have been promoted recently by the EU with a view to assisting consumers, in particular, in being able to secure access to an informal, speedy and inexpensive review procedure to ensure the cessation of practices contrary to their EU law rights and/or gain compensation in respect of harm caused to them by EU law infringements. In 2013, the European Commission adopted a Recommendation[120] in tandem with a

[113] See fn 84.

[114] The studies may be accessed at: http://ec.europa.eu/environment/aarhus/studies.htm.See notably the 2013 report by Darpö J, *Effective Justice? Synthesis report of the study on the implementation of Article 9.3 and 9.4 of the Aarhus Convention in the member states of the EU* (2013-1–11/Final) which recommends adoption of an EU directive on access to justice in environmental matters.

[115] European Commission Roadmap: Initiative on Access to Justice in Environmental Matters at Member State level in the field of EU Environmental Policy (11/2013 – Lead DG: DGENV/D4), available at the following Commission website: http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2013_env_013_access_to_justice_en.pdf.

[116] *Ibid*, p 1.

[117] See: http://ec.europa.eu/smart-regulation/impact/planned_ia/roadmaps_2014_en.htm#ENV

[118] European Commission Roadmap: Initiative on Access to Justice in Environmental Matters at Member State level in the field of EU Environmental Policy, *op cit*. fn 115 at p 3.

[119] *Ibid*, at pp 2 and 4.

[120] Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (C(2013) 3539/3), 11.6.2013.

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Communication[121] calling on member states to set up mechanisms to establish not-for-profit representative entities with the power to bring representative legal actions on behalf of injured parties in "mass harm" situations caused by violations of EU law rights. Effectively, the collective redress mechanism allows several similar legal claims to be bundled into a single court action, where the individual damage is so low that potential individual claimants would not think it worth pursuing an action. Collective redress is particularly suited to addressing breaches of EU consumer and competition law,[122] where victims of certain breaches of EU law might well be deterred from pursuing claims in the courts on account of the legal or other costs involved outweighing the economic damage sustained by the breach of law and/or on account that individual (as opposed to cumulative) damage is so low or not transparent that a victim might not necessarily notice the adverse economic impact personally. The Commission instrument recommends that within 2 years member states ensure that such collective redress mechanisms enable the representative entity to obtain expedient and effective injunctive and/or compensatory relief.[123] It also contains various safeguards to ensure that legal costs are subject to appropriate controls so as not to provide incentives to drive unnecessary litigation, notably recommending restrictions be placed on contingency fee arrangements regarding lawyers' remuneration and that punitive damages be prohibited.[124] In addition, the instrument recommends that the representative entity is to be properly resourced for the purpose of representing multiple claimants.[125] The Recommendation also stipulates[126] that member states should ensure that parties to a dispute in a mass harm situation are encouraged to settle disputes concerning compensation out of court, taking into account the requirements of Directive 2008/52 on certain aspects of mediation in civil and commercial matters.[127]

Other recent measures promoting non-judicial conflict resolution mechanisms in the field of EU consumer law complement the 2013 Recommendation on collective redress. These other measures are designed to enable persons who have sustained breaches of their consumer law rights to secure a more cost-effective and speedier remedy than would be the case through the courts. Specifically, these include Directive 2013/11[128] on alternative dispute resolution for consumer disputes (Directive on consumer ADR) and Regulation 524/2013[129] on online dispute resolution for consumer disputes (Regulation on consumer ODR), both of which are referred to in the DG ENV roadmap document. The Directive on consumer ADR requires member states to facilitate access by consumers to free or low-cost ADR procedures in the event of a dispute with a trader, with the dispute adjudicated by qualified and impartial ADR entities. The Regulation on consumer ODR complements this by requiring the establishment of an online platform to assist in particular in the resolution of trans boundary consumer-trader disputes. The DG ENV roadmap document refers to one of the operational objectives of the prospective legislative initiative as being to "promote the availability of alternative dispute resolution methods as a complementary solution",[130] signalling that the Commission's Environment Directorate-General is keen to include ADR mechanisms within the fabric of its prospective legislative proposal on access to environmental justice.

The references to non-judicial conflict resolution and collective redress mechanisms within the DG ENV roadmap are welcome and potentially very significant nascent policy developments in the context of Commission's efforts to implement the third pillar of the Aarhus Convention. In particular, ADR and collective redress mechanisms could serve to ensure that NGEOs, in particular, are not faced with significant legal costs when pursuing means to address instances of non-compliance with EU environmental law by public authorities or private entities. As the roadmap points out, EAP7 seeks to promote non-judicial dispute resolution as an alternative to litigation as part of its strategy to secure effective access to environmental justice and legal protection for citizens.[131] Although not entirely clear, it would appear that the DG ENV roadmap document implicitly favours a legally binding obligation being imposed on member states to establish ADR and collective redress mechanisms for the purpose of assisting in the resolution of EU environmental law disputes. This is important, given that a purely voluntary option for

[121] COM (2013)401final, Commission Communication, *Towards a European Horizontal Framework for Collective Redress*, 11.6.2013. See Commission Press Release *Commission recommends Member States to have collective redress mechanisms in place to ensure effective access to justice*: IP/13/524, Strasbourg, 11th June 2013.

[122] The Commission has been working towards a collective redress mechanism in the field of EU competition law for a considerable period now: See COM (2005)672, Commission Green Paper on Anti-trust Damages Actions (19.12.2005), COM (2008)165 Commission White Paper on Anti-trust Damages Actions (2.4.2008) and COM (2008)794, Commission Green Paper on Collective Redress (27.11.2008). UK competition legislation provides for a representative claim mechanism for consumers in relation to antitrust cases and cases involving abuse of dominance: see s.47B Competition Act 1998 (as introduced by the Enterprise Act 2002).

[123] See sections I.2, IV, V and VII.38 of the Commission Recommendation *op cit.* fn 120.

[124] Section V.29-32, *ibid.*

[125] See section III.4, *ibid.*

[126] Section V.25-28, *ibid.*

[127] OJ 2008 L136/3.

[128] OJ 2013 L165/63.

[129] OJ 2013 L165/1.

[130] DG ENV Road map document *op cit.* fn 115 at p 4.

[131] See para. 62 of EAP7, *op cit.* fn 2.

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such alternative mechanisms is likely to suffer a low take-up by member states, given the national financial and legislative investment implications, and would result in continuation of widely differing levels of access to environmental justice amongst the member states' legal systems. Further comment at this stage is speculative, though, and it will be particularly interesting to see the specific contents of the proposal, if and when it emerges to see the light of day.

It is probable that at some stage the Commission will publish a new revised legislative proposal for a principal "horizontal" instrument on access to environmental justice, although at the time of writing in mid-March 2014 no new EU legislative proposal had yet emerged.[132] It should be noted, though, that there is still considerable uncertainty as to how matters will progress from here. It is not clear even at this late stage that the incumbent EU Environment Commissioner will necessarily be able to carry the majority of the college of Commissioners with him to be able to launch a formal legislative proposal. Even if, as appears quite likely, the Commission comes forward at some stage with a new legislative proposal prior the termination of the incumbent Environment Commissioner's tenure later in 2014, there are likely to be serious political challenges ahead with the Council of the EU on this matter.

In particular, it is apparent that (a number of) member states have remained sceptical of interference from the Union in the field judicial procedure and protection concerning the operation of national courts and tribunals, an area historically considered to be a matter to be governed principally at national level.[133] This scepticism was made clear in member state responses in the recent 2013 stakeholder consultation, with the UK, Irish and Dutch responses signalled hostility and/or serious doubt as to whether EU legislative intervention would be needed. In addition, very few member states responded to the consultation, indicating perhaps lukewarm commitment to this issue.

In summary, in light of the various political as well as technical drawbacks and limitations discussed above, the EU has had a pretty mixed experience in seeking to implement and access to justice agenda in response to its membership of the Aarhus Convention. On the one hand, it has adopted a number of legislative safeguards on access to justice in crucially important areas, including notably the fields of access to environmental information, public participation in environmental decision-making and environmental liability. These achievements are without doubt pivotal for the Union in being able to deliver a more solid legal framework to protect and facilitate the development of public interest enforcement of EU environmental law pursued by the public and NGEOs. On the other hand, at the time of writing its implementation of that agenda is substantially incomplete and has been so for the best part of two decades since its original enthusiastic signing of the Convention back in 1998. Time will tell whether the EAP7 will be able to complete the project of implementing the third pillar of Aarhus.

[132] The author understands that the European Commission services were, as at March 2014, finalising the impact statement analysis.

[133] For instance, during negotiations over the 2007 Lisbon Treaty the then UK Labour Government made plain that non-interference with its national judicial processes constituted one of its so-called "red lines" (see Ch 3 of the House of Lords" Constitution Committee's Sixth Report *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution* (Session 2007-8) HL84, available at: http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/ldconst.htm)

SELECTED PUBLISHED WORK 6

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Enforcement of EU Environmental Law: Taking Stock of the Evolving Union Legal Framework

*Martin Hedemann-Robinson**

I Introduction

Over 40 years have now passed since the European Union first launched its initial policy programme[1] 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.[2] 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 191-192 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 per cent of environmental laws adopted at the national level in the Union are based upon EU environmental legislation.[3] Moreover, Article 11 TFEU 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 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 to provide a credible deterrence threat.[4] 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 EU institutional level. It provides some critical reflections on the principal aspects of the Union's developing legal framework concerning the enforcement of EU environmental law. 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

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[1] The first environment action programme of the (then) European Economic Community was adopted in November 1973 (OJ 1973 C112/1).

[2] 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).

[3] Environment Directorate General (DGENV), European Commission: *Management Plan 2013* (14.1.2013) at p.17 (Ref ARES (2013) 416906).

[4] See e.g. C. Abbott, *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence* (2009, Hart).

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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 moves to extend the degree of Union policy involvement in this area.

It is important to bear in mind that under the Union's constitutional framework[5] 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,[6] 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 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". This duty is entrenched further within the specific context of the Union's common environmental policy by Article 192(4) TFEU, which specifies that the member states "shall [] implement the environmental policy". 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. A recent (2014) survey of EU public opinion carried out by the European Commission confirmed that 79 per cent of EU citizens agree that the Union should be able to check that environmental laws are being correctly applied in the member states.[7]

In his publicised mission letter[8] 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 opines 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 affecting the Union and the broader international community. 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 very much a structure in progress, rather fragile and some way off from being in a position to have a genuinely effective impact. Prior to considering in turn the various components of the EU's legal framework on enforcement of EU environmental law, 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 monitoring 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[9] carried out by the EU association of environmental authorities IMPEL[10] assessed that in the region of 19 per cent of transboundary waste shipments in the Union were illegal. In 2013 the European Commission published a report[11] confirming

[5] Namely, the TEU and TFEU.

[6] *Ibid.*

[7] 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

[8] Available for inspection at: http://ec.europa.eu/commission/2014-2019/vella_en

[9] 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

[10] EU Network for the Implementation and Enforcement of Environmental Law: http://impel.eu/

[11] 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.

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that some 14 per cent of groundwater stations fail to meet minimum nitrate pollution standards stipulated by the EU Nitrates Directive.[12] The European Environment Agency (EEA) has assessed that in the region of 21 per cent, 14 per cent and 8 per cent of the EU-28 urban population resides in areas where the exposure to particular matter (PM_{10}), ozone (O_3) and nitrogen dioxide (NO_2) exceeds maximum EU limit values.[13] The EEA has attributed fine particulate matter and ozone pollution as being responsible annually for 430,000 and 16,000 premature deaths across the Union respectively.[14] 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.[15] Most recently, in March 2015 IMPEL has published a report[16] 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[17] 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 per cent),[18] the largest number of open (ongoing) infringement cases pursued under Article 258 TFEU (26 per cent)[19] and with the largest number of second round infringement cases currently pursued by the Commission under Article 260 TFEU (35 per cent).[20] Moreover, at the time of writing, 45 per cent of second round infringement rulings from the CJEU under Article 260 TFEU have concerned non-compliance with EU environmental law by member states.[21] In 2014 the Commission 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.

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

[13] 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

[14] EEA *The European Environment – State and Outlook: Synthesis Report* (2015) at p.127. Available for inspection at: http://www.eea.europa.eu/soer

[15] 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

[16] 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

[17] 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).

[18] 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%)).

[19] 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%).

[20] 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.

[21] Specifically, 11 out of a total of 24 second round infringement rulings decided by the CJEU by the end of 2014: 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 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

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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 state 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").[22]
- **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 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.

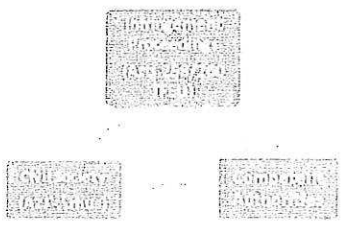

Diagram 1: Principal EU-level components re-enforcement of EU Environmental Law

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).[23] 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,[24] the

[22] 2161 UNTS 447. The text of the Convention is accessible on the following UNECE website: www.unece.org

[23] 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.

[24] 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 on 13.12.2005 (OJ 2007 C126) and which may be inspected on the following EU Commission website: http://ec.europa.eu/cu_law/infringements/infringements_260_en.htm

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CJEU is not bound by its recommendations.[25]

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[26]) 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.[27] 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.[28] The facility, introduced by virtue of the Lisbon Treaty, of non-communication cases being subject to a financial sanction in a first round infringement action has not yet led to any CJEU penalty judgment, notwithstanding that at the time of writing almost 6 years had elapsed since the treaty change came into effect and notwithstanding that this is not an uncommon type of breach of EU environmental legislation.[29] 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.[30] 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 per cent of global turnover of defendants may be imposed. For example, in 2013 a fine of €1.7bn was imposed by the Commission on eight multi-national banks operating cartels in the financial derivatives sector covering the European Economic Area.[31] 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

[25] As confirmed repeatedly 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.

[26] Accessible at: http://curia.europa.eu/juris/recherche.jsf?cid=667272

[27] 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.

[28] 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* 2nd ed. (2015 Routledge).

[29] For instance, in its annual reports on the monitoring of the application of EU Law the European Commission has reported that in 2010, 2011, 2012 and 2013 it was handling 115, 41, 13 and 92 non-communication cases in the environmental sector (representing some 26%, 12%, 4% and 26% of environmental infringement casework respectively). See Hedemann-Robinson (2015) *supra* note 29 at p.249. The Commission's annual monitoring reports are available for inspection at: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm

[30] Case C-196/13 *Commission v Italy (Illegal landfill sites)*, judgment of 2.12.2014.

[31] 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).

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early 1960s in relation to breaches of EU competition law.[32]

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[33] (and even before that) it is 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).[34] In the long term this prioritisation framework, which is a crystallization of a broader Commission initiative[35] 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.[36]

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,[37] a step that is binding on both on the Union as well as member states under EU law.[38] 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

[32] 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).

[33] COM (2008)773 Commission Communication *Implementing EC Environmental Law*, 18.11.2008.

[34] 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).

[35] COM (2007) 502, Commission Communication *A Europe of Results – Applying Community Law*, 5.9.2007.

[36] This particular realignment of the Commission's approach to environmental infringement proceedings may still take some time yet to become properly manifest. On the face of it, 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. 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). However, very few of these cases may now be expected to concern citizen complaints or own-initiative cases concerning practical instances of EU environmental legislation being misapplied. Moreover, it should be noted that the Commission considers certain structural shortcomings in implementation as falling under the heading "bad application" (e.g. absence of a plan being adopted (water/waste) or failure to designate a site for nature protection purposes) which may have a distorting influence on the statistics.

[37] 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).

[38] See Art. 216 (2) TFEU.

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 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,[39] public participation in certain environmental decision-making,[40] and environmental liability.[41] This article does not intend to discuss the individual access to justice provisions of these particular EU instruments, which are appraised in detail elsewhere.[42] 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.[43] 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[44] for the implementation of the third pillar of Århus in 2003, this particular 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,[45] 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 pronouncements 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".[46] Moreover, the Union's Seventh Environment Action Programme (2013-2020 (EAP7))[47] assures that

[39] See Art. 6 of Directive 2003/4 on public access to environmental information (OJ 2003 L41/26).

[40] 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).

[41] See Arts.12–13 of Directive 2004/35 on environmental liability (OJ 2004 L143/56).

[42] See e.g. Hedemann-Robinson (2015) *supra* note 29 and Wennerås, P, *The Enforcement of EC Environmental Law* (2007, Oxford).

[43] 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 "?rhus Regulation".

[44] 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.

[45] 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).

[46] 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.

[47] Decision 1386/2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" (OJ 2013 L354/171).

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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".[48] Specifically, the EAP7 stipulates that it 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".[49]

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,[50] in the *Slovakian Brown Bear* case[51] 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 rely upon the requirements Article 9(3) directly before member state courts. However, the CJEU has acknowledged the Convention provision does have indirect legal 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.[52] 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.[53] 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*[54] 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[55] 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.[56]

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. 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, which have remained virtually unchanged since the inception of the Union in the 1950s. 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 alleged illegality.[57] 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 its seminal 1963 judgment in *Plaumann*[58] the 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". Given that the vast majority of EU environmental measures are designed to impact generally upon the public, it is

[48] 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).

[49] See paras. 65(e) and 65(v), *ibid.*

[50] In accordance with Art. 216 (2) TFEU.

[51] Case C-240/09 *Lesoochranárske zoskupenie VLK (WOLF Forest Protection Movement) v Slovakian Environment Ministry* [2011] ECR I-1215.

[52] Paras. 50–51 of judgment in Case C-240/09.

[53] 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 e.g. *Garland v British Rail* [1983] 2 AC 751; *Duke v Reliance Ltd* [1988] AC 618.

[54] Case C-237/07 *Janecek v Bavaria* [2008] ECR I-6211.

[55] 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).

[56] In 1991, the CJEU had already signalled (in the context of a series of infringement proceedings against Germany) a link between individual rights and EU legislative emission limits (see e.g. Cases C-131/88 *Commission v Germany* [1991] ECR I-825, C-361/88 *Commission v Germany* [1991] ECR I-257, and C-59/89 *Commission v Germany* [1991] ECR I-2607.

[57] 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.

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

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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*[59] and *Danielsson*.[60] 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.[61] 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 critical of the strict legal standing requirements for judicial review under EU law.[62] 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 Tapiirit Kanatami* litigation.[63] This case involved an annulment action brought by a number of natural and legal persons in 2010 which challenged the legality of an EU regulation adopted jointly by the European Parliament and Council of the EU imposing restrictions on trade in seal products within the Union.[64] 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 which 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.[65] The CJEU[66] 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.[67] 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[68] 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 NGEO meeting certain criteria[69] 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".[70] The litigation in

[59] Case C-321/95P *Stichting Greenpeace et al v Commission* [1998] ECR I-1651.
[60] Case T-219/95R *Danielsson et al v Commission* [1995] ECR II-3051.
[61] The EU treaty change has been incorporated within Art. 263 (4) TFEU.
[62] 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 e.g. Marsden S, "Direct Public Access to EU Courts: Upholding Public International Law via the Aarhus Convention Compliance Committee" (2012) 81 *Nordic Journal of International Law* 175.
[63] 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.
[64] Regulation 1007/09 (OJ 2009 L216/1).
[65] Case T-18/10 *Inuit Tapiriit Kanatami*, *supra* note 64.
[66] Case C-583/11P *Inuit Tapiriit Kanatami and Others*, *supra* note 64.
[67] Para.73 of judgment, *ibid.*
[68] Judgments of the General Court in Case T-396/09 *Vereniging Milieudefensie, 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).
[69] As set out in Art. 11 of the Århus Regulation 1367/06 *op cit* fn.40.
[70] Art. 2 (1) (g) *ibid.*

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question concerned the requests from two NGEOs 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 NGEOs 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[71] which contravene provisions of the environmental law of the contracting party.

The General Court issued its judgments in 2012,[72] finding in favour of the plaintiffs. It annulled the Commission's decisions refusing 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. 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 had not lead to the vitiation 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[73] 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.[74] 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.[75] 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 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[76] and

[71] "Public authority" is defined in Art. 2 (2) (d) of the ?rhus Convention as including the institutions of any regional economic organisation party to the international agreement.
[72] Judgments of the General Court in Case T-396/09 and Case C-338/08 *op cit* fn.63.
[73] Such as CJEU judgments in Case 70/87 *Fediol* [1989] ECR 1781 and Case C-69/89 *Nakajima* [1991] ECR 2069.
[74] Macrory R, "European Court backs down on Aarhus ruling" *ENDS Report* (March 2015) Issue 481 at p.24.
[75] Decision 1/7 *Review of Compliance* adopted by the Meeting of the Parties, Lucca, Italy (2002).
[76] 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

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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. Moreover, the European Commission hardly assists matters by failing to publish any detailed updates on the state of national legislative conformity with Union environmental legislation sector by sector (such as updated correlation tables, commissioned studies on transposition).[77] Each of 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.[78]

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[79]), 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.[80] 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 vigilance in detecting breaches of EU law as with national law;[81] the duty to ensure that EU infringements are penalised with effective, proportionate and dissuasive sanctions;[82] and the duty of due diligence to review decision-making so as to ensure conformity with EU law.[83]

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

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undertaking in damages covering any loss of profits to 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 HM Inspectorate of Pollution [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).

[77] Since 2006 DG ENV no longer compiles general annual monitoring reports regarding the state of member state compliance with each sector of Union environmental law. The Commission reports that are still published on EU environmental legislative implementation, as required to be done by particular EU directives (e.g. in the waste, air, water and nature-protection sectors) are only periodically published and belatedly so, whilst being heavily reliant on data provided by member state authorities.

[78] For an analysis of key challenges confronting private entities considering engaging in public interest environmental litigants, see e.g. Ch.10 of Bell, S., McGillivray, D., Pedersen, O., *Environmental Law* 8th edn (2013 Oxford) at pp.336–353.

[79] See e.g. the 2011 COWI and 2015 IMPEL reports on implementation of EU environmental law cited in fn.13–14.

[80] 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."

[81] See e.g. Case C-68/88 *Commission v Greece* [1989] ECR 2965 (esp. paras.23–24 of judgment).

[82] See e.g. Case C-354/99 *Commission v Ireland* [2001] ECR I-7657 (at para.46 of judgment).

[83] Case C-72/95 *Aannemersbedriff P K Kraaijeveld BV* [1996] ECR I-5403.

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in Article 5(3) TEU,[84] 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)[85] and the 2008 EU Environmental Crimes Directive (ECD).[86] 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[87] 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. Varies studies (such as those sponsored by the European Commission[88] or by undertaken by IMPEL[89]) 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 (e.g. 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 [90] that common guidelines be developed for national inspectorate systems, in a 1997 resolution[91] 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[92] providing for min criteria for environmental

[84] 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."

[85] Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L143/56).

[86] Directive 2008/99 on the protection of the environment through criminal law (OJ 2008 L328/28).

[87] On the ELD, see, for example: Ch.12 of Hedemann-Robinson (2015), *supra* note 29; 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* 2nd edn (2013, Wolters Kluwer). On the ECD, see, for example: Ch.13 of Hedemann-Robinson (2015), *supra* note 29; Cardwell, P., French, D., Hall, M., "Tackling Environmental Crime in the EU: The Case of the Missing Victim?" (2011) 1 *Environmental 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.

[88] See e.g. 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).

[89] See e.g. 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/

[90] COM (96)500 Commission Communication *Implementing Community Environmental Law*, 22.10.1996.

[91] Council Resolution of 7 October 1997 on the drafting, implementation and enforcement of Community environmental law (OJ 1997 C321/1).

[92] Recommendation 2001/331 providing for minimum criteria of environmental inspections in the member states (OJ 2001 L118/41).

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inspections (RMCEI) under the aegis of the Union's Sixth Environment Action Programme[93] (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[94] 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.[95] Essentially, this concerns installations subject to integrated pollution prevention and control requirements, now regulated primarily by the Industrial Emissions Directive 2010/75.[96] The EU instrument stipulates that member states should observe a range of minimum criteria regarding the planning of inspections,[97] organisation of routine and non-routine site visits,[98] investigations into suspected serious breaches,[99] as well as filing reports on and evaluating next steps with respect to site visits.[100] Accordingly, the RMCEI constituted 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[101] 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.[102] The Commission reported that implementation of the instrument was unclear or partially complete in most member states, with only five countries[103] assessed as having reached a high level" of implementation.[104] The Commission also found that the RMCEI had been interpreted differently between member states so as 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,[105] major accident hazards involving dangerous substances,[106] waste management,[107] ozone depleting substance management,[108] geological storage of carbon,[109] scientific experimentation on animals,[110] the civil nuclear industry[111] as well as the common fisheries policy (CFP).[112] 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

[93] Decision 1600/2002 (OJ 2002 L242/1).

[94] 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.

[95] Paragraph II (1) (a) RMCEI.

[96] 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).

[97] Paragraph IV RMCEI.

[98] Paragraph V RMCEI.

[99] Paragraph VII RMCEI.

[100] Paragraph VI RMCEI.

[101] SEC (2007)1493 *Commission Report on implementation of Recommendation 2001/331 providing for minimum criteria for environmental inspections*, 14.11.2007.

[102] Paragraph X RMCEI.

[103] Belgium, Germany, Ireland, the Netherlands, Sweden and the UK.

[104] See p.20 of SEC (2007)1493 *op cit.* fn.95.

[105] Directive 2010/75 on industrial emissions (integrated pollution prevention and control) (recast) (OJ 2010 L334/17).

[106] 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").

[107] 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).

[108] Regulation 1005/2009 on substances that deplete the ozone layer (recast) (OJ 2009 L286/1).

[109] Directive 2009/31 on the geological storage of carbon dioxide and amending various Directives (OJ 2009 L140/114).

[110] Directive 2010/63 on the protection of animals used for scientific purposes (OJ 2010 L276/33).

[111] Art. 35 EAEC (Euratom Treaty).

[112] 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).

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instruments were adopted. The pursuit of a "sectoral track" approach to inspection regulation has been followed for essentially pragmatic reasons. Particular environmental 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)[113] the EU's position on the issue of environmental inspections appears at first sight to have become significantly more ambitious.[114] Notably, an express commitment has been enshrined within EAP7 Priority Objective 4[115] on developing "binding criteria" 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 signalled the Union's interest in developing 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. However, whilst the EAP7 arguably implies the way forward for the development of Union policy concerning national environmental inspections to be by way of (horizontal) legislative initiative, this is not expressly set out in paragraph 65(iii) as a firm commitment. The EAP wording is rather ambiguous and tentative.

To date, the Commission services (within the Commission's Environment Directorate-General (DG ENV)) have 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[116] as well as a stakeholder consultation which delivered strong support for strengthening the existing EU legal framework,[117] DG ENV has signalled in principle being in favour of recommending a horizontal framework directive be proposed by the Commission to promote coherence to the existing state of EU legislation on member state environmental inspections.[118] The initiative would accordingly be intended to be legally binding, in contrast to the RMCEI and would cover the 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 legislative 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[119] 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

[113] Decision 1386/2013 on a General Union Environment Action Programme to 2020 – *Living well, within the limits of our planet* (OJ 2013 L354/171).

[114] 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.

[115] Priority Objective 4 (*To maximise the benefits of Union environmental legislation by improving implementation*) within Dec.1386/2013, *op cit.* fn.116.

[116] 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

[117] 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

[118] 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

[119] See fn.7.

any new initiative to be (potentially) included within the Commission's work programme,[120] 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.[121] Given that environmental policy, other than in respect to climate change, barely features in the Political Guidelines,[122] 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.[123]

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 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. Perhaps most worryingly of all, there appear to be (beneath the surface of publicly available information) shifts within the new Juncker Commission (hierarchy) providing resistance to the roll-out of certain enforcement-related policy commitments set down in the EAP7. 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. This is bound to continue to have adverse impacts on the state of implementation of EU environmental legislation across the member states.

[120] 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.

[121] 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

[122] 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.

[123] Informal soundings from staff within DG ENV obtained by the author confirm that there is currently a distinct lack of interest within the Commission hierarchy for legislative innovation in the area of environmental inspections.

SELECTED PUBLISHED WORK 7

Selected Journal Article

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ARTICLE

Environmental Inspections and the EU: Securing an Effective Role for a Supranational Union Legal Framework

Martin Hedemann-Robinson*

Abstract
Over several years, the European Union (EU) has gradually developed its legal framework to assist in the proper application of EU environmental protection rules, both at Member State as well as at EU institutional levels. This article focuses on one particular and relatively recent emerging element of that supranational framework, namely the range of EU secondary legislative measures and provisions concerning the management of environmental inspections. In addition to appraising the extent of EU legislative engagement in relation to environmental inspections, this article reflects on certain challenges of a constitutional nature that the EU will need to address in the future if its intervention in this particular policy field is to continue to develop.

Keywords: Environmental inspections, European Union law, Implementation, Subsidiarity, Administrative cooperation

1. INTRODUCTION

A significant long-standing and well-known challenge to the authority of European Union (EU or Union) environmental law has been how best to enhance the relatively poor state of implementation of its norms in the Union's Member States. Reports over the years from bodies that monitor the application of EU environmental policy, such as the European Commission[1] and the European Environment Agency

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1 E.g., annual reports completed by the European Commission in monitoring compliance with EU environmental law confirmed that between 2002 and 2013 the environmental sector constituted the largest proportion of infringement actions pursued by the Commission in all but one of those years: see analysis by M. Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges*, 2nd edn (Routledge, 2015) pp. 247–8. European Commission annual monitoring reports are available for inspection at: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm. In its 2011 study on implementation of EU environmental legislation for the European Commission, the Danish environmental consultancy COWI estimated that the annual cost of non-implementation of the EU's environmental *acquis* amounted to some €50 billion: COWI et al., 'The Costs of Not Implementing the Environmental Acquis', Final Report for the

(EEA),[2] have repeatedly shown that EU Member States – which are made primarily responsible for the implementation of Union environmental policy at national level under the Union's principal foundational treaties (the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU))[3] – have on many occasions fallen short when it comes to securing the proper application of their EU environmental statutory responsibilities. The informal EU network of environmental authorities, known as IMPEL,[4] has recently reported its concerns regarding the wide variation in the quality and effectiveness of national competent authority structures across the EU Member States in the environmental sector.[5] Problems concerning the state of implementation of EU environmental law have also been the subject of substantial and long-standing academic commentary.[6] This article focuses on one particular area of implementation of EU environmental protection rules, namely inspection controls. It assesses and reflects upon the extent to which the EU has developed a supranational legal framework for the management of environmental inspections for the purpose of assisting in overseeing compliance with EU environmental legislation.

Inspection systems constitute an integral and vital part of regulatory frameworks constructed for the purpose of overseeing compliance with minimum standards of conduct prescribed by public law. As noted generally by Baldwin, Cave and Lodge, 'uncovering undesirable behaviour through detection is a first step in regulatory enforcement'.[7] Environmental regulation is no different in this respect. The establishment of an efficient system of inspection controls is crucial for regulators to be in a position to supervise compliance with environmental protection rules effectively. For several

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European Commission – Directorate-General Environment (DG ENV), ENV.G.1/FRA/2006/0073, Sept. 2011, available at: http://ec.europa.eu/environment/enveco/economics_policy/pdf/report_sept2011.pdf.

2 E.g., in 2014 the EEA reported that approximately 21%, 14% and 8% of the EU-28 urban population reside in areas where the exposure to particulate matter (PM_{10}), ozone (O_3) and nitrogen dioxide (NO_2) respectively exceeds maximum EU limit values: EEA, *Air Quality in Europe: 2014 Report*, Report No. 5/2014, 19 Nov. 2014, available at: http://www.eea.europa.eu/publications/air-quality-in-europe-2014.

3 Art. 192(4) TFEU stipulates that 'without prejudice to certain measures adopted by the Union, Member States shall [...] implement the environment policy'. See also the general obligations of Member States set out in the TEU and TFEU on implementing EU law: Art. 4(3) TEU and Arts 197(1) and 291(1) TFEU.

4 EU Network for the Implementation and Enforcement of Environmental Law (IMPEL), available at: http://impel.eu.

5 IMPEL, 'Challenges in the Practical Implementation of EU Environmental Law and How IMPEL Could Help Overcome Them', Final Report, 23 Mar. 2015, available at: http://impel.eu/wp-content/uploads/2015/03/Implementation-Challenge-Report-23-March-2015.pdf. A 2009 IMPEL study assessed that approximately 19% of transboundary waste shipments in the EU were illegal: BiPRO GmbH, 'IMPEL-TFS Enforcement Actions II: Enforcement of EU Waste Shipment Regulation "Learning by Doing"', Final Report', 28 Apr. 2011, available at: https://zoek.officielebekendmakingen.nl/blg-126323.pdf.

6 See, e.g., L. Borzsák, *The Impact of Environmental Concerns on the Public Enforcement Mechanism under EU Law: Environmental Protection in the 25th Hour* (Kluwer Law International, 2011); P. Davies, *EU Environmental Law: An Introduction to Selected Issues* (Ashgate, 2004); Hedemann-Robinson, n. 1 above; M. Hedemann-Robinson, 'Enforcement of EU Environmental Law: Taking Stock of the Evolving Union Legal Framework' (2015) 24(5) *European Energy and Environmental Law Review*, pp. 115–29; L. Krämer, *EU Environmental Law*, 7th edn (Sweet & Maxwell, 2011); K. Lenaerts & J. Gutierrez-Fons, 'The General System of EU Environmental Law Enforcement' (2011) 30(1) *Yearbook of European Law*, pp. 3–41; P. Wennerås, *The Enforcement of EC Environmental Law* (Oxford University Press, 2007).

7 R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation: Theory Strategy and Practice*, 2nd edn (Oxford University Press, 2012), p. 228.

years, though, the quality and effectiveness of national environmental inspectorate systems across the EU has varied considerably, which undermines the uniformity of application as well as the integrity of EU environmental legislative commitments. While initially the Union was reluctant to intervene in areas concerned with national administrative supervision of EU environmental policy, over time this stance has changed considerably. A range of EU legislative measures has been adopted, principally since the early 2000s, with a view to involving the Union more closely in supervising the way in which the implementation of EU environmental law is administered at the national level, including the area of inspections. Most recently, the adoption of the Union's Seventh Environment Action Programme 2013–20 (EAP7) has placed the issue of EU-level engagement in environmental inspections in the political foreground by virtue of a specific commitment to introduce 'binding criteria' for effective Member State inspections, as well as the development of inspection support capacity at the EU level.[8] This political stimulus injected by EAP7 follows on from a series of relatively recent EU environmental legislative instruments which contain minimum inspection standards. Such measures, though, have been politically controversial among several Member State governments keen to reserve implementation tasks, as far as possible, as matters of national sovereign competence. The policy area of environmental inspections remains a heavily contested terrain from an EU constitutional perspective, in which the balance of power and responsibilities between EU federal and national levels has yet to be settled with adequate clarity or certainty.

In exploring the Union's engagement with the subject of environmental inspections management, this article is divided into two principal parts. Section 2 focuses in detail on the extent to which specific EU measures have been introduced to enhance systems of environmental inspection, both in terms of inspections carried out by national authorities as well as by Union bodies. In addition, it considers the potential impact of EAP7, taking into account the most recent EU institutional involvement in policy development on inspections. Section 3 places the issue of an emerging EU inspections policy in a broader regulatory context. It reflects upon the political and legal challenges that are liable to affect the degree to which future EU-level intervention in this area may be readily accommodated within the current system of decentralized administration of EU environmental law. It takes into account certain new constraints on Union competence to intervene in implementation issues, introduced by virtue of the amendments to the 2007 Lisbon Treaty[9] to the Union's foundational legal architecture.[10] These concern recent EU Treaty changes regarding the application of the subsidiarity principle as well as new Treaty provisions concerning administrative cooperation with Member State authorities. The final part of the article offers concluding remarks on the nature and state of legal evolution concerning EU policy involvement in environmental inspection matters.

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[8] Decision 1386/2013/EU on a General Union Environment Action Programme to 2020 'Living Well, Within the Limits of Our Planet' [2013] OJ L 354/171, Annex, para. 65(iii).

[9] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon (Portugal), 17 Dec. 2007, in force 1 Dec. 2009, [2007] OJ C 306/1.

[10] Composed of the TEU and TFEU, consolidated versions of which are published in [2012] OJ C 326/13-390; see also: http://eur-lex.europa.eu/collection/eu-law/treaties.html.

2. ENVIRONMENTAL INSPECTIONS AND EU LAW

The area of environmental inspections is a policy topic that the EU has only relatively recently begun to address in some degree of earnest. 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 Commission[11] or undertaken by IMPEL[12]) have revealed, or otherwise confirmed, the existence of widely differing types of environmental inspection system across Member States with varying degrees of quality. Differences are often marked in terms of resourcing and the number of agencies involved, as well as supervision strategies employed. Environmental inspection is a key element in the law enforcement toolbox, not least given its preventative dimension in assisting in efforts to minimize instances of non-compliance.

As a result of political resistance and sensitivities on the part of several Member States, EU engagement in the area of inspections initially proceeded rather tentatively. In a 1996 Communication on implementation of EU Law,[13] the European Commission proposed that common guidelines be developed for national inspectorate systems. In response, the Council of Ministers of the EU, in a 1997 Resolution,[14] invited the Commission to propose guidelines on the basis of work carried out by IMPEL. The decision to place IMPEL as a pivotal player in the construction of EU policy in this area meant, at least initially, that emergent common guidance would essentially lean towards an intergovernmental and consensual approach, one based on voluntary participation and non-binding recommendations. The work on common guidance ultimately culminated in the adoption of a non-binding instrument in 2001, as discussed below.

2.1. *Recommendation 2001/331/EC on Minimum Criteria for Environmental Inspections*

Under the aegis of the EU's Sixth Environment Action Programme (2001–12) (EAP6),[15] the EU adopted a non-binding soft law instrument on national environmental inspection

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11 See, e.g., COWI et al., 'Impact Assessment Study into Possible Options for Revising Recommendation 2001/331 providing for Minimum Criteria for Environmental Inspections', Final Report for the European Commission – DG ENV, ENV.G.1/FRA/2006/0073, June 2011, available at: http://ec.europa.eu/environment/legal/law/pdf/Env%20inspections_report.pdf; IEEP, BIOIS & ECOLOGIC. 'Study on Inspection Requirements for Waste Shipments', Final Report for the European Commission – DG ENV, ENV G.4/FRA/2007/0067, available at: http://ec.europa.eu/environment/waste/shipments/pdf/report_august09.pdf.

12 See, e.g., IMPEL Secretariat. 'Short Overview of the Organisation of Inspection in the EU Member States, Norway and Acceding and Candidate Countries', 2003. 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 on the IMPEL website at: http://impel.eu/cluster-2.

13 Commission Communication, 'Implementing Community Environmental Law', COM(96) 500 final, 22 Oct. 1996.

14 Council Resolution of 7 Oct. 1997 on the Drafting, Implementation and Enforcement of Community Environmental Law [1997] OJ C 321/1.

15 Decision 1600/2002/EC laying down the Sixth Community Environment Action Programme [2002] OJ L 242/1.

systems, namely Recommendation 2001/331/EC,[16] which provides for minimum criteria for environmental inspections (RMCEI). The aim of the RMCEI, which is still in force, is to improve the level of effectiveness of Member State inspectorate systems for reasons of environmental protection as well as reasons concerned with distortion of competition[17] within the single market. The material scope of the RMCEI is limited and focuses principally on the industrial emissions sector. It covers the activities of installations of which the air emissions, water discharges or waste management activities are subject to authorization, permit or licensing requirements under EU law[18] – namely integrated pollution prevention and control, as now regulated primarily by Directive 2010/75/EU on Industrial Emissions (IED).[19] The RMCEI stipulates that Member States should observe a range of minimum criteria regarding the planning of inspections,[20] the organization of routine and non-routine site visits,[21] investigations into suspected serious breaches,[22] as well as filing reports on and evaluating next steps with respect to site visits.[23] It constitutes an important milestone for EU policy on environmental inspections and establishes some core benchmarks for national inspectorate systems.

In 2007 the Commission undertook a review[24] of the effectiveness of the RMCEI, a process foreseen in the instrument.[25] A number of significant shortcomings were identified. Several Member States had failed to implement its requirements by the 2002 deadline set in the Recommendation.[26] The Commission reported that implementation of the instrument was unclear or partially complete in most Member States, with only five countries[27] assessed as having reached a high level of implementation.[28] A notable shortcoming was the fact that the criteria identified in the RMCEI regarding inspection plan coverage had not been implemented in several Member States, so that many plans omitted to provide for strategic elements. The Commission also found that the material scope of the soft law instrument was too

16 Recommendation 2001/331/EC providing for Minimum Criteria of Environmental Inspections in the Member States [2001] OJ L 118/41 (RMCEI). Recommendations are non-binding measures under EU law: Art. 288(5) TFEU.

17 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.

18 RMCEI, n. 16 above, para. II(1)(a).

19 Directive 2010/75/EU on Industrial Emissions (Integrated Pollution Prevention and Control (IPCC)) (recast) [2010] OJ L 334/17, which succeeded the earlier IPPC legislation, namely former IPPC Directive 96/61 [1996] OJ L 257/26, as previously consolidated by Directive 2008/1/EC [2008] OJ L 24/8.

20 RMCEI, n. 16 above, para. IV.

21 Ibid., para. V.

22 Ibid., para. VII.

23 Ibid., para. VI.

24 Commission Report on Implementation of Recommendation 2001/331/EC providing for Minimum Criteria for Environmental Inspections. SEC(2007) 1493, 14 Nov. 2007.

25 RMCEI, n. 16 above, para. IX.

26 Ibid., para. X.

27 Belgium, Germany, Ireland, the Netherlands, Sweden and the United Kingdom (UK).

28 SEC(2007) 1493, n. 24 above, p. 20.

narrow in having excluded a range of activities and sectors with significant impacts that were also subject to EU environmental legislative controls (such as the areas of wildlife hunting and trade, habitat conservation, chemical use and transboundary waste shipment). It also noted in the 2007 review that various terms in the RMCEI had been interpreted differently by Member States, which had led to significant divergence in national implementation strategies. For instance, it reported that some Member States considered that the term 'inspection' meant only direct controls at installations, in contrast with the Recommendation's broader conceptualization of the term to include effectively any activity that aims to promote compliance by installations with EU environmental requirements.[29] There was also some degree of confusion over the meaning of the undefined concept of 'inspection plan' contained in the RMCEI. Some Member States considered that a plan simply amounted to a list of installations to be inspected over time, as opposed to the understanding of the Commission and other Member States that this term should mean a strategic document drawn up for the purpose of determining inspection priorities. Information supplied by Member States to the Commission about their implementation of the RMCEI was not always comparable, making it difficult at times for the latter to assess the relative quality and effectiveness of Member States' implementation of the instrument.

The Commission decided to aim for a revision of the RMCEI, coupled with steps to introduce targeted binding minimum inspection standards through sectoral legislation. It was somewhat surprising that the Commission initially rejected the idea of using a legally binding instrument to succeed the RMCEI, given that it was reasonable to conclude that the poor level of implementation of the Recommendation identified in the Commission's 2007 review was in substantial part as a result of its soft, non-binding legal status.

2.2. *Sectoral EU Environmental Legislation on Inspections*

In parallel with the adoption of the general horizontal framework instrument of the RMCEI, the EU has steadily built up a range of sectoral legislative provisions in relation to minimum standards on environmental inspections carried out by national competent authorities. The following environmental sectors are now subject to minimum inspection obligations under EU legislation:

- industrial emissions;[30]
- major accident hazards involving dangerous substances;[31]
- waste management;[32]

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29 RMCEI, n. 16 above, para. II.2.

30 IED, n. 19 above.

31 Directive 2012/18/EU on the Control of Major Accident Hazards Involving Dangerous Substances, amending and subsequently repealing Directive 96/82/EC [2012] OJ L 197/1 (Seveso III Directive).

32 Directive 2008/98/EC on Waste and repealing certain Directives [2008] OJ L 312/3 (Waste Framework Directive or WFD); Directive 1999/31/EC on the Landfill of Waste [1999] OJ L 182/1 (Landfill Directive); Directive 2006/21/EC on the Management of Waste from Extractive Industries and amending Directive 2004/35/EC [2006] OJ L 102/15 (Mining Waste Directive); Directive 2012/19/EU on Waste Electrical and Electronic Equipment (recast) [2012] OJ L 197/38 (WEEE Directive); and

- ozone depleting substance management;[33]
- geological storage of carbon dioxide (CO_2);[34]
- scientific experimentation on animals;[35]
- the civil nuclear industry;[36] and
- the common fisheries policy (CFP).[37]

The Union has also established some distinct audit and inspection control frameworks in relation to particular areas of EU climate policy, specifically in relation to the sectors concerning greenhouse gas (GHG) emissions trading as well as CO_2 emissions from shipping. These particular monitoring controls in the climate policy sector, underpinned by EU secondary legislation, do not centre or focus directly on national competent authority engagement in inspections and accordingly are considered separately at the end of this section.

The EU legislative provisions on environmental inspections carried out by national competent authorities vary in detail and stringency. This is partly a result of tailoring according to the perceived requirements of an individual sector and partly a result of timing. The earliest generation of instruments with provisions concerning inspections tended to contain relatively general and brief clauses on inspection standards, indicative of a preference on the part of the EU legislature to defer essentially to Member States over the detailed operational requirements of national inspectorate systems. A notable example is the EU Waste Framework Directive,[38] which contains only a few general provisions on inspection requirements. Its key stipulation on inspections is enshrined in Article 34(1), which requires Member States to subject waste operators to 'appropriate periodic inspections by the competent authorities'. In contrast, the most recent generation of EU environmental legislative instruments contains far more detailed inspection provisions, exemplified by the IED,[39] the Seveso III Directive,[40] and recent amendments introduced to the Waste Shipments Regulation.[41] They flesh out and adapt

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Regulation (EU) No. 660/2014 amending Regulation (EC) No. 1013/2006 on Shipments of Waste [2014] OJ L 189/135 (Waste Shipments Regulation or WSR).

33 Regulation 1005/2009/EC on Substances that Deplete the Ozone Layer (recast) [2009] OJ L 286/1 (Ozone Depleting Substances Regulation or ODSR).

34 Directive 2009/31/EC on the Geological Storage of Carbon Dioxide and amending various Directives [2009] OJ L 140/114 (CO_2 Storage Directive).

35 Directive 2010/63/EU on the Protection of Animals Used for Scientific Purposes [2010] OJ L 276/33 (Animal Experimentation Directive).

36 See Art. 35 of the Treaty establishing the European Atomic Energy Community (Euratom), Rome (Italy), 25 Mar. 1957, in force 1 Jan. 1958, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012A%2FTXT; and Directive 2009/71/Euratom establishing a Community Framework for the Nuclear Safety of Nuclear Installations [2009] OJ L 172/18 (Civil Nuclear Directive), as amended by Directive 2014/87/Euratom [2014] OJ L 219/42.

37 Regulation (EC) No. 768/2005 establishing a Community Fisheries Control Agency and amending Regulation (EC) No. 2847/93 [2005] OJ L 347, in conjunction with Regulation (EC) No. 1224/2009 establishing a Community Control System for Ensuring Compliance with the Rules of the CFP [2009] OJ L 343.

38 N. 32 above. The 2008 Directive does little to add to provisions on inspections contained in earlier versions of the Waste Framework Directive.

39 N. 19 above.

40 Seveso III Directive, n. 31 above.

41 Regulation (EC) No. 1013/2006 on Shipments of Waste [2006] OJ L 190/1, as amended by Regulation (EU) No. 660/2014, n. 32 above.

the core stipulations of the RMCEI to the particular sectoral requirements at hand, and contain minimum standards with respect to inspection planning, inspection visits (routine and non-routine), recording and reporting of inspections as well as inter-authority cooperation.[42] Table 2.2.1 provides an overview of the variegation of obligations with regard to environmental inspection requirements contained in current EU legislation.

The pursuit of a 'sectoral track' approach to inspection regulation in the EU environmental policy sector has been justified principally on pragmatic grounds. Particular environmental sectors have been prioritized for EU legislative attention according to the perceived level of environmental risk of specific activities and in light of the overall record among Member States on implementation. This pragmatic and piecemeal approach to policy development has led to a great variation in terms of range, specificity and intensity of inspection obligations across sectors, sometimes difficult to justify.

To take but one example, widely differing approaches exist among legislative instruments regarding the updating of inspection plans. The EU's waste shipment rules require Member States, as from the beginning of 2017, to update inspection plans every three years.[43] The inspection plans of installations covered by industrial emissions and major accident hazard controls regulations are subject to the looser, more vague requirement of having to be 'regularly reviewed'.[44] In other areas (waste management other than shipment, ozone depleting substances (ODS), and animal experimentation) no specific inspection planning review requirements are stipulated. While it might be argued that the sectoral approach has certain advantages (notably, by tailoring inspection standards according to the particular identified needs of a regulated area), in practice this had led to a lack of coordination between sectors and to some inconsistency between the sectoral instruments. Notably, national (and sub-national) environmental inspectorate systems charged with overseeing the correct implementation of EU environmental law are confronted with complex technical and managerial challenges as they have to take on board the multiplicity of legislative instruments and the diversity of obligations at Union level in respect of inspection standards. An additional problem is presented by the significant gaps regarding the current material scope of EU environmental inspection standards legislation. Notably, the nature protection, water and air quality sectors have not yet been made subject to any specific minimum standards provision. Moreover, there are no binding requirements on minimum levels of resourcing for inspectorates[45] and only a very few instruments foresee a role for EU-level inspections.

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42 For further discussion of the latest generation of inspection provisions, see Hedemann-Robinson, n. 1 above, Ch. 11.

43 Regulation (EC) No. 1013/2006, n. 41 above, Art. 50(2a).

44 IED, n. 19 above, Art. 23(2), and Seveso III Directive, n. 31 above, Art. 20(3).

45 The IED (n. 19 above) is one of the few pieces of sectoral legislation that broach the subject of resourcing of inspectorates, but does so in a weak fashion. Specifically, recital 26 of its Preamble exhorts Member States to 'ensure that sufficient staff are available with the skills and qualifications necessary to carry out [IED] inspections effectively'. The Directive does not contain any specific binding requirements on the matter, though.

EU legislation → Key inspection provisions↓	IED (Dir. 2010/75)	Seveso III (Dir. 2012/18)	WFD (Dir. 2008/98)	Landfill (Dir. 1999/31)	Mining Waste (Dir. 2006/21)	WEEE (Dir. 2012/19)	WSR (Reg. 1013/06)	ODSR (Reg. 1005/09)	CO_2 Storage (Dir. 2009/31)	Animal Experimentation (Dir. 2010/63)	Civil Nuclear (Dir. 2009/71)
General inspection duty	x	x	x	x	x	x	x	x	x	x	x
Inspection plan	x	x					x				x
Inspection programmes	x	x					x				
Non-routine inspections	x	x					x		x	x	
Follow-up inspections	x	x					x		x		
Records of inspections					x					x	x
Inspection cost charges						x					
Resourcing of inspectorate(s)	(x)	(x)					x				x
Internal cooperation	x	x					x				x
Interstate cooperation		x					x	x			x
EU Commission inspection/ supervisory powers								x		x	x

Table 2.2.1: EU Environmental Legislation on Inspections by National Authorities
Note: '(x)' denotes that the EU legislative instrument contains a relatively soft or weak provision.

All these gaps and inconsistencies underline the shortcomings of over-reliance on a sectoral track approach and identify a need for the EU to ensure that it has effective systems in place to ensure appropriate 'horizontal' coordination of inspections management across environmental sectors. As will be discussed in the next section, the Union has identified a need for improvement in this regard in its EAP7.

Brief mention must also be made of the distinct systems of audit control established by particular EU legislative instruments concerning Union climate policy, specifically in relation to GHG emissions trading and CO_2 emissions from maritime transport. In these areas the Union has developed control mechanisms which focus on actors other than national competent authorities directly engaged in inspection activity. Under the auspices of the EU legislation governing its Emissions Trading Scheme (ETS),[46] implementation assurance of its 'cap and trade' scheme on GHG emissions from industrial installations rests principally upon two control 'pillars': namely (i) oversight of monitoring and reporting by operators of emissions,[47] and (ii) verification of GHG emissions reports.[48] The combined function of these control systems is to ensure that at the end of each year installations surrender a correct amount of emission allowances corresponding with their emissions levels, so to ensure that the EU ETS system works effectively and is not subject to fraud or abuse. Under the first control pillar, national competent authorities are charged with the responsibility of checking that operators have in place appropriate emissions monitoring plans for the purpose of compiling accurate data on their GHG emissions. Under the second control pillar, Member States are to ensure that nationally accredited auditors (or 'verifiers') check to see that each installation's monitoring plan has been implemented correctly by the operator, a process that involves sampling and site visit inspection.[49] Verification is important for the operator, for without it the operator is barred from engaging in future emissions allowance trading and is also liable for payment of an excess emissions penalty if found to have failed to surrender a sufficient number of emission allowances.[50] In practice, inspections are carried out by private undertakings acting as verifiers,[51] authorized under the aegis of a national

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46 The main framework instrument is Directive 2003/87/EC establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and amending Directive 96/61/EC [2003] OJ L 275/32, as amended (most recently by Directive 2009/29/EC [2009] OJ L 140/63) (Emissions Trading Directive).

47 Regulation (EU) No. 601/2012 on the Monitoring and Reporting of Greenhouse Gas Emissions pursuant to Directive 2003/87 [2012] OJ L 181/30, as amended (most recently by Regulation (EU) No. 743/2014 [2014] OJ L 201/1).

48 Regulation (EU) No. 600/2012 on the Verification of Greenhouse Gas Emission Reports and Tonne-Kilometre Reports and the Accreditation of Verifiers pursuant to Directive 2003/87/EC [2012] OJ L 181/1.

49 Ibid., Arts 20–21.

50 Emissions Trading Directive, n. 46 above, Arts 15 and 16.

51 The EU legislation does not specifically rule out the possibility of officials of national competent authorities acting as verifiers where appropriately qualified, but it is unlikely that in practice authorities would have the requisite staff resources to do this. For comments on the use of private verifiers, see M. Peeters, 'The Enforcement of Greenhouse Gas Emissions Trading in Europe: Reliability Ensured?', in L. Paddock et al. (eds), *Compliance and Enforcement in Environmental Law: Toward More Effective Implementation* (Edward Elgar, 2011), pp. 407–30, at 417–8.

accreditation framework,[52] whose verification reports are subject to a system of prior independent review.[53] National competent authority input focuses essentially on the upstream control work of scrutinizing the propriety of operators' emissions monitoring plans.

Recently, the EU has also adopted legislation concerning the auditing of GHG emissions from the maritime transport sector, which is in broad alignment with the approach taken in respect of emissions trading. Regulation (EU) No. 2015/757[54] requires operators of ships of over 5,000 gross tonnage using EU ports to ensure that, with effect from January 2018, their monitoring and reporting of CO_2 emissions are subject to independent auditing from accredited verifiers, who may undertake spot checks to determine the reliability of operator reports.[55]

2.3. *Impact of the EU's Seventh Environment Action Programme (2013–20) (EAP7)*

With the adoption of EAP7[56] the EU's position on the issue of environmental inspections has evolved to become far more resolute and ambitious. Notably, an express commitment is enshrined within EAP7 to extend binding criteria on minimum inspection standards as well as to promote support capacity at EU level. This assurance followed an earlier 2012 Commission Communication[57]concerning ways and means of enhancing delivery of EU environmental measures, in which the Commission signalled its intention to push for Union legislative approval to broaden and upgrade the existing EU framework on inspections and surveillance.[58] The EU's recent drive to expand its work in the area of environmental inspections is enshrined within one of nine priority objectives of EAP7 – namely Priority Objective 4[59] concerning implementation. Within Priority Objective 4, inspections and surveillance coexist with three other implementation matters which the Union wishes to enhance.[60] The principal provision regarding the development of existing EU policy regarding inspections and surveillance is contained in paragraph 65(iii) of the Annex to the Decision adopting EAP7, which stipulates that the Union's environment policy programme requires:

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52 Regulation (EU) No. 600/2012, n. 48 above, Chs IV–V. The system of accreditation is developed from that used for accreditation for marketing of products under Regulation (EC) No. 765/2008 [2008] OJ L 218/30.

53 Ibid., Art. 25.

54 Regulation (EU) 2015/757 on the Monitoring, Reporting and Verification of Carbon Dioxide Emissions from Maritime Transport, and amending Directive 2009/16/EC [2015] OJ L 123/55.

55 See especially Regulation (EU) 2015/757, ibid., Art. 15.

56 Decision 1386/2013/EU, n. 8 above.

57 Commission Communication, 'Improving the Delivery of Benefits from EU Environmental Measures: Building Confidence through Better Knowledge and Responsiveness, COM(2012) 95 final, 7 Mar. 2012.

58 Ibid., pp. 7–8.

59 Decision 1386/2013/EU, n. 8 above, Annex, Priority Objective 4 to Maximise the Benefits of Union Environmental Legislation by Improving Implementation.

60 The three other matters concern: (i) improvements in information collection and dissemination on the state of implementation; (ii) national systems handling environmental complaints; and (iii) access to environmental justice (in accordance with the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/welcome.html), and EU law): see Decision 1386/2013/EU, n. 8 above, Annex, paras 58–65(a)–(e).

> 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 EAP7 provision accordingly committed to bolster EU engagement in the area of environmental inspections along two dimensions: (i) by enhancing the inspection systems of national competent authorities, and (ii) through the complementary development of inspection capability at EU institutional level. Both dimensions will be considered briefly below. To date, the Commission has only begun to focus in earnest on the first of the two dimensions, namely at the level of national inspectorates.

2.4. *National Environmental Inspections and EAP7*

Until very recently, the European Commission's services within its Directorate-General for the Environment (DG ENV) were actively working on a proposal for a general horizontal EU directive on national environmental inspection standards. This work followed a 2011 impact assessment study in which options for revision of the RMCEI were considered,[61] together with a stakeholder consultation which delivered strong support for strengthening the existing EU legal framework.[62] The Commission held a number of stakeholder meetings, including expert workshops, which revealed some broad contours of the initial thinking of its internal services (that is, within DG ENV). These indicated that the Commission services within DG ENV were minded to recommend a prospective horizontal framework directive to promote coherence within existing EU legislation on environmental inspections.[63] The initiative would be legally binding, in contrast to the RMCEI. It would cover the broad span of existing EU environmental legislation, some 40 measures concerning the sectors involved with water, industrial emissions, major accident hazards, air, waste, chemicals, nature and biodiversity, as well as certain cross-cutting aspects.[64] The draft legislative initiative envisaged by DG ENV would be based on a compliance assurance approach, which entails Member States utilizing risk assessment for the purpose of identifying

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61 COWI et al., 'Impact Assessment Study into Possible Options for Revising Recommendation 2001/331/EC providing for Minimum Criteria for Environmental Inspections', Final Report for the European Commission – DG ENV, ENV.G.1/FRA/2006/0073, June 2011, available at: http://ec.europa.eu/environment/legal/law/inspections.htm.

62 The details of the stakeholder consultation process and findings are available for inspection on the DG ENV website at: http://ec.europa.eu/environment/legal/law/inspections.htm.

63 These observations are based upon an Outline Paper and Explanatory Paper presented by DG ENV at a joint workshop between the Commission and IMPEL in Rome (Italy), Dec. 2014. The papers presented to the workshop are available at: http://ec.europa.eu/environment/legal/law/inspections.htm.

64 Specifically, matters covered by Directive 2004/35/EC on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage [2004] OJ L 143/56 (Environmental Liability Directive); Directive 2007/2/EC establishing an Infrastructure for Spatial Information in the EC [2007] OJ L 108/1 (INSPIRE Directive); and Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment [2012] OJ L 26/1 (EIA Directive) as amended. The DG ENV Outline Paper contains an Annex listing the EU environmental legislation to be covered by the prospective EU framework inspections instrument.

strategically principal areas of non-compliance, before applying various risk mitigation techniques (compliance promotion, monitoring and enforcement) in order to enhance levels of adherence to EU environmental legislation. Specifically, it would oblige Member States to fulfil a range of duties beyond those in the RMCEI, including undertaking the following steps in a compliance assurance chain:

- *Risk assessment* (*Stage 1*): Each Member State is to undertake a strategic risk assessment of non-compliance within their respective territories, reviewable every four years. The strategic assessment would serve, inter alia, to identify sectors with notable compliance issues and would accordingly warrant greater inspection prioritization. This would be accompanied operationally by national surveillance and inspection plans along the lines of the RMCEI model as developed by the IED[65] and Seveso III Directive,[66] reviewable every two years. Such plans would incorporate a risk assessment approach, include appropriate levels of routine and non-routine inspections, and develop effective inter-agency coordination. In particular, national plans would be crafted in light of the results of the overall strategic assessment, which would appraise the relative state of non-compliance concerning EU environmental protection rules.
- *Risk mitigation* (*Stage 2*): EU Member States would take steps to mitigate against the non-compliance risks identified at the initial risk assessment stage by deploying three core tools or techniques: (i) compliance promotion, (ii) compliance monitoring (via surveillance, inspections and investigations), and (iii) enforcement.[67] The overall approach to risk mitigation would be to encourage Member States to consider deployment of the most effective risk mitigation technique appropriate for the particular non-compliance scenario, bearing in mind that recourse to softer compliance promotion initiatives (such as providing advice and assistance or securing undertakings from operators) may be more effective in practice in the long term in attaining better levels of implementation among operators other than persistent or intentional serious offenders. In terms of recourse to enforcement, national authorities would be encouraged to consider using one or more sanctions (informal or formal, light or heavy) in proportion to the incident of detected non-compliance with EU environmental rules. The Commission's thinking here resonates strongly with the United Kingdom (UK) approach with respect to supervisory operations of regulatory authorities. Other key aspects of risk mitigation signalled in the Commission's outline documentation include requiring Member States to ensure that (i) follow-up strategies are consistently drawn up in cases of detected non-compliance, and (ii) reporting and transparency underpins inspection and surveillance activities of national authorities.

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65 N. 19 above.

66 N. 31 above.

67 The DG ENV Explanatory Paper refers to these tools/techniques as being the 'three pillars' of risk mitigation.

The Commission has made considerable headway with the proposal, yet it may still be some way from being ready to recommend the launch of a formal draft initiative. There may be further need for informal discussion with stakeholders. Moreover, the DG ENV draft does not (yet) contain provisions to ensure that Member State implementation of the instrument is subject to sufficiently rigorous review and that the issue of adequate Member State resourcing of inspection systems is appropriately addressed.

As far as review is concerned, a number of requirements could be integrated within the draft legislative text, which would serve as useful checks to monitor Member State compliance with the prospective EU environmental inspection instrument. As a minimum, the draft instrument should incorporate the existing review provisions contained in the RMCEI – namely duties of Member States to report to the European Commission on their implementation experience, in conjunction with provision for a periodic Commission review of whether legislative amendments or additions need to be made to the EU measure. The inclusion of Member State reporting obligations to the Commission on the state of and experience gleaned from implementing the EU instrument is particularly important, given the current paucity of reliable data and information on national inspection systems provided to date under the aegis of the RMCEI and relevant sectoral EU environmental legislation. The non-binding status of the RMCEI has, no doubt, contributed to the poor quality of implementation feedback provided by Member States, while the various provisions on inspection requirements contained in EU environmental legislation have not typically been made the subject of a robust implementation review process.

Review procedures in a successor instrument to the RMCEI could be usefully supplemented with the inclusion of a duty on Member States to undergo periodic independent auditing of their inspection regimes to appraise the effectiveness of delivery of EU requirements. Independent auditing could be conducted by a range of actors, such as a private environmental consultancy, national audit authority, IMPEL, or the European Commission. Arguably, IMPEL would be a strong candidate to assume such a role, given its technical expertise (its membership is drawn from national environmental authorities), its wealth of accumulated information on Member State inspectorate structures, as well as long-standing experience in voluntary auditing of Member State environmental authorities. Other flanking review mechanisms could conceivably be used, such as the conferral of implementing powers on the Commission under the aegis of the 'comitology' process,[68] although this might be resisted by Member States as an overly centralizing move.

Adequate resourcing of national inspectorates is an important issue which lies at the heart of achieving an effective environmental monitoring system. At first glance, it might seem logical to expect that a general EU instrument on inspections

[68] Art. 291(2)–(4) TFEU and Regulation (EU) No. 182/2011 laying down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission's Exercise of Implementing Powers [2011] OJ L 55/13. Post-Lisbon, 'comitology' envisages the conferral of powers of implementation on the Commission in legally binding Union acts, where uniform conditions for their implementation are needed.

should incorporate minimum standards on resourcing aspects (including, notably, quantitative and qualitative aspects of personnel, training and equipment). However, for political, administrative-technical and legal reasons the European Commission has little room for manoeuvre. From a political perspective, the issue of administrative resourcing is highly sensitive, not least since it directly impinges upon national budgetary decisions concerning the financing of public services. The Council of the EU, too, is likely to have significant concerns about loss of national administrative autonomy if any Commission proposal seeks to introduce clauses on common minimum resourcing requirements. Secondly, it has proven problematic technically to establish agreement between environmental authorities within IMPEL over the use of resourcing benchmarks (in particular, regarding personnel numbers) as a common performance indicator criterion.[69] Thirdly, from a legal perspective, in the wake of amendments introduced by the Lisbon Treaty, the EU treaty framework excludes generally the possibility of the Union adopting harmonizing measures concerning improvements to national administrative 'capacity'.[70] The latter aspect is considered in more detail in Section 3 below.

Accordingly, it is not that surprising to find that most existing EU environmental inspection rules essentially side-step the subject of resourcing levels of inspectorates. On the very few occasions on which the issue of administrative resourcing has been incorporated in EU environmental legislative instrumentation, it has been done only in very general[71] or exhortatory[72] terms, thereby essentially deferring key decisions to Member States. However, this does not mean that the Commission should have to drop the issue of resourcing entirely from a draft general EU environmental inspections instrument; far from it – it does not need to remain the elephant in the room. In particular, it would be most useful if the draft legislative instrument were to include a provision requiring Member States to be transparent about the level of resources they invest in their inspectorate systems, with an obligation to report resource data regularly to the Commission. Such an obligation would enable the Commission to make publicly available a comparative report on Member State resourcing of their inspectorates. Such transparency would assist in shining a light on

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69 See, e.g., IMPEL, 'Developing Performance Indicators for Environmental Inspection Systems', Project Report 2009/03, Apr. 2010, especially the discussion on inspector numbers, pp. 8–9, available at: http://impel.eu/wp-content/uploads/2010/04/2009-03-Developing-performance-indicators-for-environmental-inspection-systems-FINAL-REPORT-.pdf.

70 Art. 197(2) TFEU.

71 Art. 50(2a)(f) and (g) Regulation (EC) No. 1013/2006 (n. 41 above), as amended by Regulation (EU) No. 660/2014 (n. 32 above), which requires Member States by 1 Jan. 2017 to ensure that their waste shipment inspection plans include information on 'the training of inspectors on matters relating to inspections' and 'the human, financial and other resources for that plan'. See also Art. 5(2)(c) Directive 2009/71/Euratom (n. 36 above), which requires that the competent national regulatory authority 'is given dedicated and appropriate budget allocations to allow for the delivery of its regulatory tasks as defined in the national framework'.

72 See recital 26 of the Preamble to the IED (n. 19 above), which states that 'Member States should ensure that sufficient staff are available with the skills and qualifications needed to carry out those inspections effectively'. See also recital 26 of the Seveso III Directive (n. 31 above), which additionally states that 'competent authorities should provide appropriate support using tools and mechanisms for exchanging experience and consolidating knowledge including at Union level'.

weak spots in national inspection systems as well as placing soft, indirect pressure on Member States to take remedial action, as appropriate. Moreover, a general provision requiring Member States to ensure that their inspection systems are effective in assisting them in the fulfilment of their implementation responsibilities could serve as a useful, albeit indirect, legal guarantee against manifestly deficient inspection systems. Specifically, where the level of investment by a Member State in its inspection system is clearly incapable of delivering effective compliance monitoring of EU environmental legislative requirements, the Commission could use this evidence in support of an infringement action under Articles 258–260 TFEU on the basis of non-compliance with the effectiveness requirement. Arguably, such a clause might receive sufficient support from all sides. From the perspective of most Member States, it would be likely to assuage concerns about undue supranational intrusion into the sphere of national administrative autonomy. At the same time, such a clause would have some teeth in upholding the collective Union interest of ensuring the effective application of EU law, which is attractive from the Commission's perspective.

Notwithstanding DG ENV's substantial interest and engagement invested in a successor initiative to the RMCEI, it is not clear when (or, indeed, if) the current college of Commissioners will be receptive to the adoption of a formal legislative proposal for a directive to replace the 2001 Recommendation. Enhancing the implementation of EU environmental law, including the issues of environmental inspections and access to environmental justice identified in EAP7, does not feature among the list of priorities identified in the Commission President's published mission letter[73] of November 2014 to Karmenu Vella, Commissioner for Environment, Maritime Affairs and Fisheries, for his five-year tenure. The new administrative structure within the Commission organized by the President also makes it difficult for a fresh legislative initiative to emerge. Notably, for any new legislative proposal to be included within the Commission's annual work programme,[74] one of the Commission Vice-Presidents must first recommend it on the basis that it seemingly fits within the 2014 Political Guidelines presented by the Commission President to the European Parliament.[75] Given that environmental policy, other than in respect of climate change, barely features among the ten priorities of the President's Political Guidelines,[76] it may prove a tough task for DG ENV to persuade the Commission hierarchy to adopt a legislative proposal on environmental inspections. The strongest argument in favour of a

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73 Available at: http://ec.europa.eu/commission/2014-2019/vella_en.

74 The Commission's Work Programme for 2015 is set out in Commission Communication, 'Commission Work Programme 2015 – A New Start', COM(2014) 910 final, 16 Dec. 2014, available at: http://ec.europa.eu/atwork/pdf/cwp_2015_en.pdf.

75 J.-C. Junker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change: Political Guidelines for the Next European Commission', 15 July 2014, available at: http://ec.europa.eu/priorities/docs/pg_en.pdf.

76 The Political Guidelines (ibid.) identify 10 priority policy areas for the Commission college appointed for the period 2015–20, which in broad terms may be highlighted as: jobs, growth and investment; digitalization of the single market; energy union in conjunction with climate change policy; strengthening of the 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 EU external relations; and strengthening of democratic structures of EU decision making.

new initiative to replace the RMCEI is the fact that the EU has specifically endorsed such a move under the auspices of EAP7, which is underpinned by a legally binding Union decision. Time will tell how these factors will play out politically. However, informal feedback from within the Commission's services suggests that a formal endorsement of any initiative is unlikely to be forthcoming soon. The Commission's Work Programme for 2015 did not include a proposal on environmental inspections among its list of Commission initiatives for the initial calendar year of the new Commission college. This suggests, perhaps rather ominously, that the Commission 'will not present proposals that do not contribute to [the] priorities' of the Political Guidelines, 'will apply [the practice of] political discontinuity',[77] and 'will take off the table pending proposals that do not match our objectives or which are going nowhere'.[78]

2.5. *Environmental Inspections at EU Institutional Level and EAP7*

For several years a debate has rumbled over whether environmental inspection capacity at EU institutional level should be developed. On the one hand, the European Parliament has registered its approval on a number of occasions of the establishment of an EU-level inspectorate capability.[79] On the other hand, EU Member States have traditionally been generally sceptical or resistant to the idea of endowing EU institutions with inspection powers in the environmental sector. Suggestions in the early 1990s to invest the EEA with inspection powers were shot down by Member States.[80] While the EU legislation that established the EEA specifically refers to the possible development of supervisory functions being assigned to the EEA at a later date,[81] the Commission did not take up this issue in subsequent years when submitting amendments to the EEA's statutes.[82] In 1997, the Council reaffirmed its clear disapproval of the establishment of a centrally and supranationally organized system of European environmental inspectors.[83] The resistance to the development of a supranational dimension for environmental inspections was also reiterated in the Preamble to the RMCEI.[84] Historically, Member

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77 In accordance with point 39 subpara 2 of the Framework Inter-Institutional Agreement on Relations between the European Parliament and Commission [2010] OJ L 304/47, which stipulates that '[t]he Commission shall proceed with a review of all pending proposals at the beginning of the Commission's term of office, in order to politically confirm or withdraw them, taking due account of the view expressed by Parliament'.

78 COM(2014) 910 final, n. 74 above

79 See, in particular, the European Parliament Resolution on the review of Recommendation 2001/331/EC, P6_TA(2008)0568, 10 Oct. 2008, para. 5, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0568+0+DOC+XML+V0//EN, and European Parliament Report on the Proposal for a Council Recommendation providing for Minimum Criteria for Environmental Inspections in the Member States, PE.229.97/fin A4-0251/99, 26 Apr. 1999, especially point B.2 of the Explanatory Statement, available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A4-1999-0251&language=EN.

80 Macrory has pointed out, though, that the UK government at the time initially appeared open to consider an auditing role for the Agency: R. Macrory, 'The Enforcement of Community Environmental Law: Some Critical Issues' (1992) 29(2) *Common Market Law Review*, pp. 347–69.

81 Art. 20 Regulation (EC) No. 1210/90 on the Establishment of the European Environment Agency and the European Environment Information and Observation Network [1990] OJ L 120/1, as amended by Regulation (EC) No. 93/1999 [1999] OJ L 117/1.

82 As published in [1997] OJ C 255/9 and [1998] OJ C 123/6.

83 [1997] OJ C 321/1.

States have resisted moves to establish a strong centralized inspection regime at Union level akin to that set up in other federal systems, such as the United States (US).[85]

More recently, however, EAP7 has revived political interest in this area, signalling potentially a more open-minded approach to the idea of EU institutional involvement in inspections. Paragraph 65(iii) of the Annex to the EAP7 Decision[86] stipulates that the Union's environment policy programme requires 'further developing inspection support capacity at Union level, drawing on existing structures'. DG ENV has indicated its interest in this area, having commissioned a study, published in 2013, to examine options for strengthening the EU-level role in environmental inspections and for strengthening the Commission's capacity to undertake effective investigations into alleged breaches of EU environmental law.[87] The study identified the following three options which potentially are available to develop the Commission's role in inspections:

(1) conferral of audit powers on the Commission to oversee national inspectorate systems;
(2) conferral of inspection powers on the Commission; and
(3) an enhanced peer review approach to inspections based on IMPEL's approach with potentially enhanced Commission oversight.

A particularly interesting feature of the study was that it underlined that the European Commission has already acquired a range of audit and inspection powers in some environmental policy areas. Specifically, such powers are conferred by EU legislation on the following environmental sectors: ozone depleting substances (ODS),[88] the CFP,[89] civil nuclear energy[90] and scientific experimentation on animals.[91] Under the Ozone Depleting Substances Regulation,[92] the Commission may request national authorities to carry out investigations which may conceivably involve Commission participation. Yet the direct involvement of Commission officials in ODS inspections is essentially theoretical and very rarely undertaken, not least given the limited number of staff available in DG ENV and the latter's recognition of superior knowledge of ODS sites held by national authorities.[93] The Commission also has the right to obtain all necessary information from Member States, competent authorities and undertakings.[94] The CFP regime endows the Commission with a stronger and

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84 RMCEI, n. 16 above, Preamble, recital 5.

85 See, e.g., E. Hall, 'Environmental Law in the EU: New Approach for Enforcement' (2007) 20(2) *Tulane Environmental Law Journal*, pp. 277–303, at 294–5. See also n. 116 below.

86 Decision 1386/2013/EU, n. 8 above.

87 BIO Intelligence Service et al., 'Study on Possible Options for Strengthening the EU Level Role in Environmental Inspections and Strengthening the Commission's Capacity to Undertake Effective Investigations of Alleged Breaches in EU Environmental Law', Final Report for the European Commission – DG ENV, 14 Jan. 2013, available at: http://ec.europa.eu/environment/legal/law/inspections.htm.

88 Ozone Depleting Substances Regulation, n. 33 above.

89 Regulations (EC) No. 768/2005 and 1224/09, n. 37 above.

90 EAEC Treaty, n. 36 above, Art. 35.

91 Animal Experimentation Directive, n. 35 above.

92 N. 33 above.

93 As indicated in the Study by BIO Intelligence Service et al., n. 87 above.

more established inspection role. The EU Fisheries Control Agency is entrusted with responsibility to coordinate fisheries control and inspections by national authorities for the purposes of supervising implementation of CFP rules.[95] In addition, inspectors at EU level (Commission officials) have powers to undertake verification and inspections of fishing vessels and premises of entities engaged in CFP activities.[96] Under the aegis of the EU's Animal Experimentation Directive,[97] the Commission is vested with an auditing (as opposed to an inspection) role. It has power to conduct audits of national control systems in relation to animal experimentation where there is due reason for concern that those systems are not functioning effectively. In the civil nuclear energy sector, EU law invests the Commission with auditing and inspection tasks in relation to civil nuclear installations for the purpose of radioactivity monitoring.[98] For several years, the Commission has organized periodic site inspections in order to verify compliance with EU safety requirements in this sector.[99]

It is also evident that the Commission is vested with a number of well-established inspection powers in non-environmental sectors. Notable examples include Commission controls in the EU policy domains relating to food and veterinary safety,[100] as well as competition.[101] The Union's Food and Veterinary Office (FVO), based within the Commission's Health and Food Safety Directorate General (DG SANTE),[102] has a range of supervisory controls to oversee appropriate implementation and enforcement of EU rules on food safety, animal health, animal welfare, plant health and medical devices. Established in the wake of the BSE crisis in the late 1990s, its principal role is to carry out audit checks on behalf of the Commission to appraise the effectiveness of Member State authority control and compliance systems. Auditing intensity is calibrated on a risk assessment analysis of national control systems. In addition, the FVO may carry out inspections of national authorities where specific problems have been identified or where otherwise specifically required. The FVO carries out some 150 audits annually, with some 170 staff. The FVO audit inspection model was considered as a potential model in the 2013 study commissioned by DG ENV to assess options for strengthening the

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94 Ozone Depleting Substances Regulation, n. 33 above, Art. 28.

95 Regulation (EC) No. 768/2005, n. 37 above.

96 Regulation (EC) No. 1224/2009, n. 37 above, Art. 97.

97 N. 35 above.

98 Euratom Treaty, n. 36 above, Art. 35.

99 European Commission report covering the period 2008–12: Commission Staff Working Document, 'On the Application of Article 35 of the Euratom Treaty: Verification of the Operation and Efficiency of Facilities for Continuous Monitoring of the Levels of Radioactivity in the Air, Water and Soil, SWD(2013) 226 final, 18 June 2013.

100 Regulation (EC) No. 882/2004 on Official Controls Performed to Ensure the Verification of Compliance with Feed and Food Law, Animal Health and Animal Welfare Rules [2004] OJ L 165/1, as amended.

101 Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 as amended, and Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings [2004] OJ L 24/1.

102 For information on the FVO see: http://ec.europa.eu/food/food_veterinary_office/index_en.htm.

EU-level role in environmental inspections.[103] The Commission had a strong inspection and sanctioning role in relation to the policing of EU competition policy for several years dating back to the early 1960s.[104] Since 2003, EU legislation[105] has vested the Commission, as well as national competition authorities, with joint powers for the purpose of supervising the application of EU competition rules to combat anti-competitive agreements and abuse of dominance.[106] The Commission has a range of significant powers in this field, including the power to request information, arrange unannounced investigations of business premises, seize equipment and records, and take witness statements.[107] Failure by corporations to comply with an investigation may attract significant financial penalties imposed by the Commission.[108]

To date, the European Commission has not indicated that it is likely to come forward with any new general initiative concerning inspection powers to be held at the EU institutional level. Its relatively recent interest in exploring this area further – as reflected in the 2013 study commissioned by DG ENV[109] as well as the reference to development of inspection support capacity at EU level in EAP7[110] – appears to have cooled within the context of the tenure of the current Commission college (2014–19). This is regrettable, given that an initiative to vest powers of investigation and auditing at supranational level in order to enhance the level of implementation of Union law would be beneficial. It would serve to strengthen the operation of the infringement procedure under Article 258 TFEU in relation to the appraisal of bad application cases and provide a framework for conducting more effective monitoring of the effectiveness of national authority environmental inspection systems.

3. ENVIRONMENTAL INSPECTION REGULATION AND THE EU ADMINISTRATIVE LEGAL CONTEXT

In addition to the initial cool reaction of the current Commission college towards EU-level action on inspections, it appears that other challenges lie in the way of Union policy development. Certain political and legal hurdles need yet to be overcome in order for the EU to be able to identify with adequate precision how a supranational inspection framework could be appropriately accommodated within the administrative architecture that services EU environmental policy. Notably, the EU legislature

103 BIO Intelligence Service et al., n. 87 above.

104 See former Regulation (EC) No. 17/62 First Regulation Implementing Articles 85 and 86 of the [former EEC] Treaty [1962] OJ L 13/204. For information on the Commission's investigatory role in EU competition policy see the website of the Commission's Competition Directorate-General (DG COMP) at: http://ec.europa.eu/competition/antitrust/procedures_101_en.html.

105 Regulation (EC) No. 1/2003, n. 101 above.

106 For a general overview of the operation of the joint supervisory arrangements (collectively the EU Competition Network), see Commission Communication, 'Ten Years of Antitrust Enforcement under Regulation (EC) No. 1/2003: Achievements and Future Perspectives', COM(2014) 453, 9 July 2014.

107 Regulation (EC) No. 1/2003, n. 101 above, Arts 18–21.

108 Ibid., Arts 23–24.

109 BIO Intelligence Service et al., n. 87 above.

110 Decision 1386/2013/EU, n. 8 above, Annex, para. 65(iii).

would have to ensure that it does not overstep the boundaries of policy competence set for the Union and thereby encroach unlawfully on matters reserved for Member State action. This is not as easy as one might think, notwithstanding the 2007 Lisbon Treaty, which had as a principal objective to introduce amendments to the Union's foundational treaty framework in order to provide clarity on the extent of EU competence.

Before considering specifically the issue of legal competence, it is worth considering in more general terms the broader context of the division of roles between Union institutions and Member State authorities regarding the delivery of EU policy decisions within what has been termed as an emerging European 'composite' or 'integrated' administrative space.[111] As is commonly recognized, the division of labour between Union institutions and national authorities concerning implementation of EU policy varies greatly across sectors. In areas such as competition policy, the Commission has historically (if no longer necessarily effectively) a leading role in administering EU law (so-called 'centralized' or 'direct administration'). In other common policy areas, such as the Common Agricultural Policy or EU Structural Funds, the Commission has administered Union policy jointly with national authorities ('shared administration'). Alternatively, as in the case of Union environmental policy and most EU common policy matters, the task of implementation has mainly been shouldered by Member States, with a largely indirect role for the Commission in overseeing due implementation of EU legal requirements via mechanisms such as the infringement procedure ('indirect administration' or 'executive federalism'[112]). This traditional triadic description of the balance of implementation responsibilities may now be criticized for being overstated,[113] in the sense that the balance of responsibilities between Union and Member States over implementation is now mostly shared,[114] but with varying degrees of intensity of supranational and national authority involvement based on hierarchical as well as heterarchical relationships.[115] The characteristic sharing of administrative responsibilities between Union and Member State institutional levels with respect to the delivery of EU policy is also reflected more generally in the multilevel constitutional system of governance within the EU legal order.[116] Nevertheless, the triadic model remains a useful starting point to appraise the state of administrative responsibilities in relation to EU environmental policy.

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111 See, e.g., J. Reichel, 'Communicating with the European Composite Administration' (2014) 15 *German Law Journal*, pp. 883–906, at 886; H. Hofmann & A. Türk, 'The Development of Integrated Administration in the EU and its Consequences' (2007) 13(2) *European Law Journal*, pp. 253–71, at 253–5.

112 See, e.g., R. Schütze, *European Union Law* (Cambridge University Press, 2015), p. 334.

113 C. Harlow, 'Three Phases in the Evolution of EU Administrative Law', in P. Craig & G. De Burca (eds), *The Evolution of EU Law*, 2nd edn (Oxford University Press, 2011), p. 443.

114 See, e.g., P. Craig, *EU Administrative Law*, 2nd edn (Oxford University Press, 2012), pp. 28–33.

115 See, e.g., E. Heidbreder, 'Structuring the European Administrative Space: Policy Instruments of Multi-Level Administration' (2011) 18(5) *Journal of European Public Policy*, pp. 709–27, at 709–10; Hofmann & Türk, n. 111 above, p. 263.

116 I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15(3) *Columbia Journal of European Law*, pp. 349–407, especially at 380–3.

Notwithstanding some changes over time, it is fair to depict EU environmental policy as heavily reliant upon Member States for implementation at national level.[117] Admittedly, since the EU's formal establishment of a common environmental policy in the mid-1980s under the aegis of the Single European Act (SEA) 1986, there has been an increased degree of organizational involvement at the European level in matters closely or directly relating to implementation, such as through the EEA in environmental data gathering, through IMPEL's facilitation of better implementation practice, as well as inspections by the European Commission services in a limited number of environmental policy matters. However, in substance these developments have not served to change the predominant involvement of Member State authorities in ensuring delivery of EU environmental policy on the ground. The administrative architecture underpinning the delivery of EU environmental policy remains an example of 'indirect administration'. This is not that surprising for both political and pragmatic reasons. From a political perspective, it has been evident that a majority of EU Member States have remained sceptical about the idea of direct supranational institutional supervision in the delivery of Union policy at local level outside areas perceived to be most directly connected with transnational commercial aspects of the internal market (such as competition and banking) or disbursement of EU funds.[118] From a pragmatic perspective, it has always been apparent that any direct involvement of the Commission (or other EU agency) in implementation supervision would necessarily be relatively limited owing to resource constraints.[119]

Notwithstanding the fact that implementation of EU environmental law has remained heavily decentralized, it is also clear that the Union has always maintained an interest in overseeing the proper application of EU environmental obligations across Member States. Administrative autonomy at national level has never been absolute. The Union's constitutional framework has acknowledged this from the outset in various foundational treaty obligations. This is underscored, in particular, 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 adherence to EU obligations as well as to engage in sincere cooperation with the Union for this purpose. The Court of Justice of the European Union (CJEU) has held that a number of implicit obligations incumbent on Member States (including their competent authorities) relevant to law enforcement flow from

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117 This decentralized state of affairs may be contrasted with the far more centralized administration of environmental protection policy in certain federal systems such as the US, in which the Environmental Protection Agency and Department of Justice have far-reaching powers to intervene in the states for the purpose of safeguarding compliance with federal environmental laws: see, e.g., C. Cruden & B. Gelber, 'Federal Civil Environmental Enforcement in the United States: Process, Players and Priorities', in Paddock et al., n. 51 above, pp. 197–222. Other federal systems of governance may, of course, adopt a more decentralized approach to the regulation of environmental protection such as the EU, the UK, Germany, Belgium and Australia.

118 For an overview of EU law in these centralized areas see, e.g., Craig, n. 114 above, Ch.3.

119 See, e.g., J. Pollak & S. Puntscher Riekmann, 'European Administration: Centralisation and Fragmentation as Means of Polity-Building?' (2008) 31(4) *West European Politics*, pp. 771–88, at 771.

Article 4(3) TEU, including the duty to proceed with the same degree of vigilance in detecting breaches of EU law as in the case of national law;[120] the duty to ensure that EU infringements are penalized with effective, proportionate and dissuasive sanctions;[121] and the duty of due diligence to review decision making in order to ensure conformity with EU law.[122] Union interest in implementation matters is also attested by the EU foundational treaty provisions that confirm the supervisory roles vested in the CJEU[123] and European Commission[124] to assist in ensuring the correct application of Union law in the Member States.

The Union has, in recent years, stepped up the level of its engagement with implementation supervision in the environmental sector, exemplified by a range of initiatives relating to environmental inspections. It has also passed measures stipulating a range of sanctions to be applied for non-compliance with EU environmental law.[125] These developments represent a response on the part of the Union to the challenge of upholding the effectiveness and the legitimacy of federally agreed environmental protection standards in the face of long-standing failures by Member States to secure binding EU legislative outcomes. Post-Lisbon, the Union's general constitutional mandate in relation to implementation has been consolidated through the introduction of Article 197(1) TFEU, which confirms that 'effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, *shall be regarded as a matter of common interest*'.[126]

However, countervailing forces exist in relation to these dynamics. Stubborn resistance expressed by several Member States towards greater levels of 'federal' (EU) involvement in matters of implementation concerning delivery of EU environmental policy has, if anything, intensified. Paradoxically, as the number of EU environmental measures on implementation (including inspection standards) has increased, Member States have placed greater constitutional checks and obstacles in the way of such developments. In particular, the 2007 Lisbon Treaty introduced two constitutional mechanisms that are liable to place potentially significant restraints on moves to increase federal (that is, Union) involvement in the area

120 See, e.g., Case C-68/88, *Commission* v. *Greece* [1989] ECR 2965, especially paras 23–24.

121 See, e.g., Case C-354/99, *Commission* v. *Ireland* [2001] ECR I-7657, para. 46.

122 Case C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV e.a.* v. *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

123 Notably Art. 19(1) TEU and Art. 267 TFEU.

124 Notably Art. 17 TEU and Arts 258–260 TFEU.

125 Notably by virtue of the Environmental Liability Directive, n. 64 above (criminal sanctions); Directive 2008/99/EC on the Protection of the Environment through Criminal Law [2008] OJ L 328/28 (administrative sanctions concerning environmental remediation); the Emissions Trading Directive, n. 46 above (financial penalty for excess emissions); Regulation (EC) No. 443/2009 setting Emission Performance Standards for New Passenger Cars as part of the Community's Integrated Approach to Reduce CO_2 Emissions from Light-Duty Vehicles [2009] OJ L 140/1 (as most recently amended by Regulation (EU) 2015/6 [2015] OJ L 3/1); and Regulation (EU) No. 510/2011 setting Emission Performance Standards for New Light Commercial Vehicles as part of the Community's Integrated Approach to Reduce CO_2 Emissions from Light-Duty Vehicles [2011] OJ L 145/1 (as most recently amended by Regulation (EU) No. 404/2014 [2014] OJ L 121/1) (excess emissions premium to be paid in the event of exceeding the CO_2 emissions target).

126 Emphasis added.

of environmental inspections: specifically, the treaty provisions concerning subsidiarity and the limits to administrative cooperation enshrined in the new Title XXIV of Part III TFEU.

Subsidiarity[127] was first introduced as a generally applicable constitutional principle in EU law by virtue of the 1992 Treaty on European Union (Maastricht Treaty), after having been first applied solely to the area of EU environmental policy under the SEA. The definition of subsidiarity is set out in Article 5(3) TEU, which builds in a rebuttable presumption that Member State action is to be preferred over Union intervention in policy fields in respect of which the Union and Member States share competence (such as environment policy).

By virtue of Lisbon, the principle of subsidiarity has been significantly strengthened with the establishment of particular powers vested in national parliaments to request or force a review of EU legislative proposals deemed by a minimum proportion of Member State parliamentary assemblies to breach the requirements of subsidiarity set out in Article 5(3) TEU (the so-called 'yellow card' and 'orange card' procedures).[128] Prior to Lisbon, the subsidiarity principle could be enforced under the EU treaty framework only by way of judicial review before the CJEU, the case law of which has confirmed that the principle affords a wide margin of appreciation to the EU legislature in determining whether the Union should be deemed competent to act.[129] While the conditions attached to the national parliamentary review procedures are challenging,[130] they are by no means impossible to fulfil. Since Lisbon's entry into force in December 2009, the yellow card procedure has been invoked twice – on one occasion, in September 2012, successfully leading the Commission to withdraw its proposal for a regulation concerning the exercise of the right of collective action within the context of the freedoms of establishment and service provisions.[131]

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127 For overviews on the evolution and impact of the subsidiarity principle in EU administrative law see, e.g., Craig, n. 114 above, Ch. 14; and Schütze, n. 112 above, Ch. 9.

128 Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality [2012] OJ C 326.

129 See, e.g., the judgment of the CJEU in Case C-508/13, *Estonia* v. *European Parliament and Commission* (Judgment of 18 June 2015, not yet reported), para. 29, in which the CJEU held that, with regard to judicial review of the application of Art. 5(3) TEU, 'the EU legislature must be allowed broad discretion' in areas which entail 'political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'. See also Case C-491/01, *The Queen* v. *Secretary of State for Health*, ex parte *British American Tobacco (Investments) Ltd* and *Imperial Tobacco Ltd* [2002] ECR I-11453, para. 123; Case C-58/08, *The Queen (on the application of Vodafone Ltd and Others)* v. *Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999, para. 52.

130 For the yellow card procedure to be triggered, at least one-third of the votes allocated to national parliaments must register a negative reasoned opinion within 8 weeks of the national assemblies being notified of the legislative proposal (in accordance with Protocol (No. 2), n. 128 above, Arts 6 and 7(2)). For the orange card procedure to operate, at a least a simple majority of votes allocated to national parliaments must register a negative reasoned opinion within the same time period (in accordance with Protocol (No. 2), Arts 6 and 7(3)).

131 The so-called 'Monti II' initiative: Commission, 'Proposal for a Regulation on the Exercise of the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services', COM(2012) 130 final, 21 Mar. 2012. On the other occasion on which the yellow card procedure has been invoked to date by national parliaments, the Commission decided not to

In addition to strengthening subsidiarity, the Lisbon Treaty introduced a novel treaty clause which expressly limits the Union's competence to take measures to shore up Member State administrative structures dealing with implementation matters. This limitation has been crystallized in Article 197(2) TFEU under Title XXIV (on Administrative Cooperation) of Part III TFEU, which rules out the possibility of the Union adopting harmonizing measures concerning improvements in the administrative capacity of Member States. Article 197(2) TFEU, which has thus far received relatively little attention in EU institutional practice and among academic legal commentators, states:

> *Article 197 TFEU*
>
> [...]
>
> 2. The Union may support the effort of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

Article 197(2) is complemented by Article 6(g) TFEU, which confirms that the Union has competence to carry out action in the field of administrative cooperation to support, coordinate or supplement the actions of Member States. Article 2(5) TFEU confirms that such supportive, complementary or supplementary competence does not supersede Member State competence (in that it has no pre-emptive effect). This stands in contrast with areas of Union policy competence shared with Member States (such as environmental policy).[132] The effect of Article 197(2) TFEU is to act as *lex specialis* to the general environmental treaty provisions set out in Articles 191–193 TFEU, so as to rule out the prospect of harmonized EU minimum standards regarding the administrative capacity of Member State national environmental protection authorities. The effect of Article 197(2) is to restrict the scope of Article 192 TFEU, which in light of CJEU case law might otherwise be construed as broad enough to provide a legal basis for measures intended to harmonize national rules on implementation which the EU legislature considers necessary to ensure the effectiveness of EU environmental protection rules.[133]

At first glance, it might seem that Article 197(2) TFEU raises a significant legal question mark concerning the legal validity of a Union legislative instrument

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withdraw its proposal: Commission, 'Proposal for a Regulation on the Establishment of the European Public Prosecutor's Office', COM(2013) 534 final, 17 July 2013.

132 Art. 4(2)(e) TFEU.

133 Notably, in its *Environmental Crimes* judgment (Case C-176/03, *Commission* v. *Council* [2005] ECR I-7879), para. 48, the CJEU confirmed that the predecessor to Art. 192 TFEU (ex. Art. 175 EC Treaty) provided the EU legislature with a legal basis to introduce a directive on environmental crime with a view to ensuring the application of effective, proportionate and dissuasive criminal penalties by competent national authorities, as a reflection of the EU legislature's view that such an instrument constitutes an essential measure for combating serious environmental offences.

that seeks to harmonize standards on environmental inspections. It is important to bear in mind, though, that the material scope of this treaty provision covers only measures that specifically address aspects concerning administrative *capacity*. Accordingly, the CJEU would be likely to regard as *ultra vires* legislative provisions in a Union environmental inspection directive that stipulates minimum numbers of personnel, training schemes, or communications equipment and networks to be used by national environmental inspection authorities on account of the harmonization exclusion clause in Article 197(2). However, legislative provisions that stipulate minimum operational standards for environmental inspections are not caught by Article 197(2).

A suitably narrow interpretation of the material coverage of Article 197(2) is supported when one considers its origins, which may be traced back to the European Convention process which culminated ultimately in the drawing up of the failed 2004 Treaty Establishing a Constitution for Europe.[134] Section 6 of Title III of Part III contained an equivalent provision to Article 197(2) TFEU, namely Article III-185. Working Group V of the European Convention process leading to the adoption of the European Constitution concerned itself with the area of 'complementary competencies'. In its final 2002 report[135] to the Convention Secretariat, the Working Group recommended that the Union be authorized to facilitate 'exchange of information and persons related to administration of EU law and to support common training and development programmes'.[136] The final report also refers to a document[137] of the Working Group containing the original proposal for the facilitation of administrative cooperation, which identifies its aim as the provision 'of a formal framework for Community actions aiming at further strengthening co-operation between and mobility among public administrations across the EU, and at stimulating exchanges and common activities on issues of common concern in the field of public administration, including common training and development activities', while also 'making such actions more sustainable and enduring, as well as more transparent and public'.[138]

These documents clarify that the intention behind the Working Group's initiative on administrative cooperation was, in essence, to facilitate the development of administrative cooperation between national authorities through networks (such as the IMPEL network established among environmental authorities) and to ensure that these would be established on a more formal and accountable footing. There is no evidence to suggest that the Member States came to change this purpose when

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134 [2004] OJ C 310/1.

135 European Convention Working Group V, 'Final Report of Working Group V to the European Convention', CONV 375/1/02 REV 1 (WG V 14), 4 Nov. 2002, available at: http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00375-re01.en02.pdf.

136 Ibid., p. 18.

137 European Convention Working Group V, Working Document 21: 'Proposal by G. Druesne on a New Article on Public Administration', 4 Sept. 2002, available at: http://european-convention.europa.eu/docs/wd5/2374.pdf.

138 Ibid., p. 4.

deliberating over the terms of the European Constitution, although it is evident that they did agree to incorporate clauses ruling out harmonization of such measures.

Accordingly, while Article 197(2) TFEU serves to restrict the material scope of an EU environmental inspections instrument, the effect of the 'no harmonization' clause is by no means fatal to its promulgation.[139] The introduction of Article 197(2) has raised the level of legal complexity in terms of identifying the boundaries of Union competence with regard to the area of national environmental inspections, and appears to introduce a limitation of Union competence previously not identified as a priority concern in the particular policy field. Yet, it would be an error to construe the purpose of Article 197(2) as being to secure the outright exclusion of Union measures intended to enhance the administrative capability of Member State authorities to secure delivery of EU policy decisions, including in the environmental sector. Indeed, Article 197(3) TFEU underpins the limited scope of Article 197(2) by emphasizing that the treaty article is without prejudice to the obligations of Member States to implement Union law. There is no doubt, though, that the EU legislature will have to tread with some caution and comply with the requirements of Article 197(2) if presented with the opportunity to deliberate upon a legislative proposal concerning the general management of national environmental inspection systems to oversee compliance with EU environmental law. Furthermore, given its uncertain parameters, it is highly likely that Article 197(2) TFEU would become a bone of legal contention in judicial review proceedings before the CJEU if Union political institutions and Member States fall out over the contents of any future general horizontal EU legislative instrument intended to supersede the RMCEI.

4. CONCLUDING REMARKS

Although the EU has managed to adopt a number of measures on environmental inspection management, it has so far not established a sufficiently coherent supranational federal framework upon which to develop Union policy in this area. While a number of key environmental sectors (such as water, nature protection, and air quality) have not yet been made subject to minimum Union standards concerning inspection management, the existing range of Union legislative provisions on environmental inspections appears to have developed with little regard for consistency. The process for developing a viable general framework instrument has so far proved to be tortuous. The RMCEI is not fit for purpose, being neither legally binding nor adequately broad in material scope. It remains unclear when a successor measure will be proposed, notwithstanding the adoption of a clear political mandate for legislative revision by EAP7. As a consequence of widespread Member State scepticism of moves to construct a broad and effective supranational framework on

[139] Schütze has cautioned that an ironic side effect of this treaty provision may be to favour indirectly more centralized intervention by the EU through the conferral of implementing powers on the Commission or Council of the EU under the aegis of Art. 291(2) TFEU (i.e. via 'comitology'): Schütze, n. 112 above, p. 339. In the context of EU environmental policy, though, such a development is unlikely given the long-standing resistance and scepticism of several Member States to the idea of a strong level of supranational institutional engagement in implementation matters.

environmental inspections – a view which appears also to resonate with the current European Commission college (2014–19) – Union policy on environmental inspections to date has remained incremental, unpredictable and uncoordinated.

The slow progress made by the Union towards a more effective system of shared management between the EU federal and Member State levels over inspections is reflective of the unclear and unsettled position of the EU on the issue of balance of power and responsibilities between each level of governance operating across the Union. In essence, the Union remains subject to contradictory influences regarding the question of federal involvement in the oversight and control of the administration of inspection systems. On the one hand, the poor record of implementation of EU environmental obligations has to some extent strengthened the hand of those who question the credibility of continuing with the traditional model of 'indirect administration', which favours a predominance of Member State administrative autonomy. Such questioning has emanated notably from the Commission's DG ENV as well as the European Parliament. The Lisbon Treaty has also underpinned the legitimacy of a role for the Union to concern itself with implementation matters in the form of Article 197(1) TFEU, in confirming that Member State implementation is to be regarded as a 'matter of common interest' and 'essential for the proper functioning of the Union'. On the other hand, countervailing political and constitutional dynamics within the Union continue to offer considerable resistance against increases in supranational engagement in policy. Political resistance is given expression in the form of Member State representation in the Council of the EU. Constitutional resistance is expressed in the form of Union treaty provisions on subsidiarity guarantees and an exclusion of harmonization regarding the area of national administrative capacity under Article 197(2) TFEU.

With these conflicting forces at play, it is not surprising that it remains problematic for headway to be made over future development of EU policy on environmental inspections management. In the absence of a clear(er) resolution of how federal and state roles should be defined, it is likely that the Union will be unable to achieve a genuinely integrated and effective form of shared administration within the European administrative space as far as environmental inspection management is concerned. Moreover, unless the Union establishes a more coherent supranational framework on environmental inspections, it is difficult to see how significant progress will be achieved in addressing the current poor state of implementation of EU environmental law.