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REVIEW

EU Enforcement Policy of Community Environmental law
as presented in the Commission Communication
on implementing European Community Environmental law

Marta Ballesteros

The direct effect of the Aarhus Convention
as seen by the French 'Conseil d'Etat'

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Practical application of Article 9 of the Aarhus Convention
in EU countries: Some comparative remarks

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Environmental Inspections at the EU:
The imperative to move forward

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Current discussions on the proposal for an Industrial Emissions
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Why patents are crucial for the access of developing countries
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Editorial

It has been nearly ten years now since the *Aarhus Convention* entered into force and imposed on parties and public administrations obligations regarding access to information, public participation in decision-making and access to justice. Since then, practitioners have gained diverse experiences on the practical application of the three pillars' provisions, and their implementation into national laws and related issues, e.g. enforcement. This issue of the *elni Review* includes valuable insights into this matter.

Special focus in this issue is placed on the currently discussed revision of the *IPPC Directive* takes a special place in this issue of the *elni Review*. This topic will also be continued in the next issue of the journal to reflect the ongoing discussion. As previously announced, *elni* is planning an *elni Conference* (see page 46 of this journal), a major event by the end of 2010, on the Industrial Emissions Directive. Therefore, you are invited to send us your contribution for the *elni Review* and, if you are willing to discuss it with others, you are naturally welcome to submit a proposal for the event, too. Soon, there will be an official call on our webpage (www.elni.org) providing further information on the conference.

This issue 2/2009 of the *elni Review* offers the following contributions:

In her article on the Conference "EU Enforcement Policy of Community Environmental law as presented in the Commission Communication on implementing European Community Environmental law" which took place on 8 July 2009 in Brussels, *Marta Ballesteros* discusses the implementation of European Community Environmental Law enforcement and its interaction with the Aarhus Convention and other European Laws.

"The direct effect of the Aarhus Convention as seen by the French 'Conseil d'Etat'" is the subject of the article by *Julien Bétaille*. His article provides detailed insights on the implementation and practical application of the Aarhus Convention in France.

"Practical application of Article 9 of the Aarhus Convention in EU countries: Some comparative remarks" by *Pavel Černý* discusses several specific topics from this field which can be considered crucial to legal protection of the environment in practice. The article also addresses the contributions and discussions presented at the „International conference on the implementation of the Aarhus Convention in practice“.

The article "Environmental Inspections at the EU: The imperative to move forward" by *Ana Barreira* reflects the point of view of the EEB on compliance and enforcement of European Environmental Law.

Further *Christian Schaible* addresses the EEB's position on the revision of the IPPC Directive in his article "Current discussions on the proposal for an Industrial Emis-

sions Directive: Stronger role for Best Available Techniques?".

National specifics of the IPPC Directive in practice are shown from a British point of view by *Lesley James*. She comments on the "Aberthaw Power Station: An IPPC case study".

"Why patents are crucial for the access of developing countries to Environmentally Sound Technologies" is explained by *Michael Benske*.

This issue of *elni Review* also provides two conference reports:

Nicola Below reports on the *elni forum 2009* "The Directive on Industrial Emissions and its implementation in national law – key issues and practical experiences", which took place at CEDRE in Brussels on 14th May 2009.

The contribution by *Marie-Catharine van Engelen* reports on the congress "European Environmental Law in Belgium and the Netherlands", which took place in Rotterdam on 15th May 2009.

Moreover, this edition of *elni Review* covers some interesting news on the German failure to codify its fragmented environmental law, a special edition of *elni Review*, which will be published next year, the *elni Conference 2010*, recent EIA developments, and positive developments in Slovakian access to justice.

The next issue of the *elni review* will not have an overarching focus. Contributions on the IED/IPPC revision process are nevertheless very welcome. Please send contributions on this topic as well as other interesting articles to the editors by mid-January 2009.

Nicolas Below/Martin Führ

October 2009

Conference on Environmental Law and Policy in the European Union

on Thursday 19th of November 2009

at the *University of Amsterdam, The Netherlands*

***"Environmental Law and Policy in the
European Union:
The Legacy of the Treaty of Amsterdam"***

On the occasion of the inaugural lecture of Professor Marc Pallemarts on 20 November 2009, the Centre for Environmental Law is organising a conference.

Please confirm your participation under:
<http://www.jur.uva.nl/cel>

EU Enforcement Policy of Community Environmental law as presented in the Commission Communication on implementing European Community Environmental law

Marta Ballesteros

1 Introduction

On 18 November 2008, the European Commission issued a Communication on Implementing European Community Environmental Law.¹ It was accompanied by a more detailed Commission Staff Working Document.² The current paper is a ClientEarth³ legal assessment of the enforcement and implementation policy for Community Environmental law as proposed by the Commission in this Communication.

The Communication reflects the extremely good work that the legal unit in DG Environment has been undertaking for years now in the implementation of enforcement actions. It also represents a new step⁴ in establishing a coherent enforcement policy for European Community environmental law in response to new challenges. However, the Communication and the underlying enforcement policy described are incomplete and are not sufficient for achieving overall compliance with Community environmental law in Member States.

On first view, the Commission's proposals seem to constitute efforts to tackle the problem of insufficient resources so that they can be used more efficiently and greater compliance can be achieved with Community environmental law. However, it might also signal the Commission's unstated plan, or even a strategic decision, to retreat from enforcement activities and rely more heavily on Member States to enforce Community environmental law. Any such retreat would be a derogation of the Commission's obligations under Art. 211 of the Treaty.

This article is based on a ClientEarth discussion paper presented at a round table organised by Ecosphere⁵ on the 8th of July 2009 and takes into account the information and ideas exchanged in the debate. Representatives from different services of the Euro-

pean Commission including the legal unit of DG Environment, and the Legal Service, as well as from consultancies, think tanks and Environmental NGOs attended the meeting⁶.

2 The Commission's role on enforcement

Under Art. 211 of the Treaty establishing the European Community, the Commission has the responsibility to "ensure that the provisions of [the EC] Treaty and the measures taken by the institutions thereto are applied."⁷ Regarding enforcement policy, this provision should be read alongside Art. 226 of the EC Treaty which gives the Commission the capacity to bring Member States before the Court of Justice for failing to fulfil an obligation under the Treaty or resulting from the action taken by the institutions of the Community.

Under Art. 10 of the EC Treaty, Member States are responsible for taking all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the Institutions of the Community. They shall facilitate the achievement of the Community's tasks. Art. 249 of the EC Treaty lists the different acts the EU Institutions can adopt and their binding force to Member States.

On this basis, Member States are responsible for implementing Community law and enforcing the secondary legislation in their national systems. They are responsible for taking action against all actors breaching obligations under national law but derived from Community law. However, Member States' responsibility does not affect the institutional structure and legal obligation established by the EC Treaty under which the European Commission has the primary responsibility for ensuring that the provisions of the Treaty and the measures taken by the institutions are applied.

For that reason, this paper does not aim at analysing the whole enforcement capacity in the EU but the obligation of the European Commission, as Guardian of the Treaty, to ensure implementation of Community environmental law.

¹ Commission Communication on Implementing European Community Environmental Law, COM (2008) 773 final, 18 November 2008.

² Commission Staff Working Document accompanying the Commission Communication on Implementing European Community Environmental Law, SEC (2008) 2876, 18 November 2008.

³ ClientEarth is a non-profit environmental law and policy organisation composed of activist lawyers that provide dedicated public interest legal counselling and advocacy and work independently as legal advocates for the environment.

⁴ An earlier Communication by the Commission initially addressed some of these issues more generally, but it was not limited to enforcement of Community environmental law. Commission Communication, A Europe of Results: Applying Community Law, COM (2007) 502 final, 5 September 2007.

⁵ Ecosphere is a European non-profit association which links environmental protection with citizens' rights.

⁶ The author would like to acknowledge the contribution of ClientEarth's experienced intern for environmental law, Charles de Saillan (lawyer in the US), whose contribution has helped shape this article.

⁷ Treaty Establishing the European Community, Art. 211, 10 November 1997, 1997 O.J. (C 340) 3 [hereafter EC Treaty].

3 Scope of the legal analysis

The Communication's stated purpose is to explain how the Commission will implement and enforce environmental law in the European Community. It proposes 'solutions' to several implementation challenges, including "*a better combination of*": 1) legislative and post-legislative work aimed at the prevention of breaches; 2) responding to the specific concerns of the European public; 3) more immediate and intensive treatment of the most important infringements; 4) enhanced dialogue with the European Parliament; and 5) enhanced transparency, communication and dialogue with the public and interested parties.⁸

ClientEarth analyses these solutions and presents concrete proposals to improve the EU implementation and enforcement policy of EC environmental legislation including the need for more Commission resources in this field which is not considered at all by the Commission Communication.

4 Prevention of breaches

The first 'solution' the Commission discusses is its 'strategy' for preventing breaches. The tools mentioned to ensure that environmental legislation is followed include: effective information gathering, public 'performance scoreboards' to rank Member States' compliance, use of European Community funds to promote environmentally beneficial projects, development of interpretive guidance documents, amongst others.⁹

Certainly, these tools, among others, can help prevent breaches of Community environmental law. But the Commission only presents them in general terms and does not explain how these tools will be used differently in future. The Commission has been drawing upon some of these tools for years, but not in an efficient manner and, therefore, as it recognises, widespread breaches of Community environmental law persist.

For example, how differently will Art. 3 of the EC Regulation 1083/2006¹⁰ on the general provisions for Regional Funds be implemented when it is required that actions under the funds aim at protecting and improving the quality of the environment? Is there a strategy to implement Art. 89 allowing the Commission to refuse final payment of funds in cases where a reasoned opinion on the breach of environmental legislation exist?

⁸ Commission Communication on Implementing European Community Environmental Law, *supra* note 1, p. 2.

⁹ Commission Communication on Implementing European Community Environmental Law, *supra* note 1, p. 5.

¹⁰ Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999 (OJ L 210, 31 July 2006, p. 36).

4.1 European inspectors

The Commission could greatly improve its information gathering capability by having well-trained staff conduct environmental inspections in Member States. European inspectors would be in charge of investigating compliance with EU environmental legislation by those responsible for its implementation. Inspections are discussed in more detail in section 7 of this article.

4.2 Monitoring scoreboards

The Commission should expand the use of performance 'scoreboards' to publicise compliance, and lack of compliance, with environmental laws. Currently, the Directorate General for Environment posts on its website the Natura 2000 'barometer' illustrating Member States' progress in designating a network of protected areas under the Birds and Habitat Directives. The Commission should systematically develop similar information to illustrate compliance with the whole spectrum of Community environmental legislation. The scoreboards can be an effective tool for improving information as well as the monitoring of EU legislation.

Scoreboards should not only include information about Member States' compliance but also on the relevant implementing actors such as local authorities, individual companies, facilities or other undertakings, when this information is held by the Commission. In terms of environmental policy the Community only has the competence to pursue Member States before the European Court of Justice for breaching environmental law. However, nothing prevents the Commission from including information received from different sources (such as the management of complaints) in its scoreboards. Posting environmental scoreboards which specifically identify those entities breaching environmental laws would greatly enhance transparency and accountability in implementing Community environmental law.

5 Transparency and dialogue with the public

The second 'solution' the Commission discusses is responding to European public concern, which we analyse together with the fifth solution on enhanced transparency, communication and dialogue with the public. The enforcement policy should be based on the understanding of the Commission as a public service which implements its role in a transparent way, ensuring broad public awareness and participation. However in the present situation the enforcement policy is based on the understanding of the Commission as an EU Institution promoting a close relationship with Member States and following a number of formalities in the name of transparency.

5.1 *The complaint and infringement procedure*

The main tool which the public has to express its concerns on EU environmental law is the sending of a complaint to the Commission. The complaint procedure started as an initiative in internal market and the free circulation of goods. When the Treaty was reformed by the Single European Act in 1986 and the environmental policy recognised as a Community policy, the European Commission established a service, which, on the insistence of the EP, included a unit in charge of monitoring implementation of environmental law. The Commission services took the lead and announced the possibility for any person or body to send complaints to DG Environment whenever a breach of environmental legislation was identified. The Commission's 8th Annual report on the monitoring application of Community law published in the OJ 1991 referred to the Commission's commitment to examine all complaints, new internal instructions and a complaint form to facilitate the introduction of complaints issued in 1989. The Commission established a registration procedure which required decisions on each of the cases to be taken by the Commission as a college and not by individual officials who might be subject to national interest.

5.2 *The success of the complaint procedure*

The monitoring system developed by the Commission was very successful and the cases increased quickly. The complaint procedure is one of the best examples of a successful strategic policy bringing citizens closer to the EU on issues of public concern. However, attempts to consolidate the complaint procedure in the environment policy have failed, including the attempt to develop rules on the handling of complaints requested many times by the European Parliament (European Parliament Resolution 16 May 2006 on the 21st and 22nd Annual Report on monitoring the implementation of Community law in 2003 and 2004) and existing under other Community policies such as the competitions policy. Indeed, since the beginning of the new century, the European Commission has been taking measures to reduce the number of cases as an answer to Member States' requests to limit legal action against them. Yet, under the EC Treaty the European Commission is the EU Institution responsible for defending the Community interest and not national interests.

Under this context, the Commission Communication reflects most of the above-mentioned problems. The Communication briefly discusses the need for Member States to respond adequately to citizens' complaints.¹¹ However, the Commission scarcely tackles its own deficiencies in responding to citizens' com-

¹¹ Commission Communication on Implementing European Community Environmental Law, *supra* note 1, p. 6.

plaints such as their management and need for more resources.

5.3 *The management of complaints*

The management of complaints on environmental cases must be improved in all cases, not just priority ones, and specific measures need to be taken such as allocating more resources. The Communication is silent on how the Commission should handle complaints which fall outside the priority case categories identified (see section 6 below). The Commission's unstated proposal is to reduce the number of complaints as a response to improve the management. It does not consider how the management of all complaints could be improved, and how different complaints could be treated differently. The Commission decision on whether the complaints are priorities or not will lead to non-priority complaints being neglected or ignored. Indeed, there are reports stating that the Commission is no longer registering complaints which fall outside its priorities. Such an approach would constitute an extremely bad public policy; it would ignore the European public's legitimate concerns and would ignore potentially harmful breaches of Community environmental law resulting in a failure to ensure that Community law is implemented.

The Commission should take actions to improve the management of all complaints including those falling outside priority categories. A citizen or NGO might submit a complaint to the Commission because the national or local government is unwilling or unable to take timely and appropriate action. Even modest action by the Commission can put pressure on a national or local government to ensure Community environmental law is respected. So it is important address all complaints in an appropriate manner, even if they do not fall in priority categories. The European Commission should set up priorities for more targeted action on strategic issues but should address all complaints, even if they are not priorities, out of respect for the public's concerns and to deal with potential important breaches of implementation.

5.4 *The lack of transparency*

The European Community is a party to the Århus Convention on access to information, public participation, and access to justice^{12 13}. Yet European citizens and NGOs do not receive information on the status of the cases they participate by sending complaints and they are denied access to information under the Com-

¹² Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Art. 9, 25 June 1998, 38 I.L.M. 517.

¹³ Council Decision 2005/370/EC, 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, 2005 O.J. (L 124) 1 (EC).

mission's procedures for handling environmental complaints. The Commission argues that both the pre-contentious phase of the infringement procedure as well as the phase before the ECJ should be considered confidential in order to facilitate relations between the European Commission and the Member States to solve compliance problems or to ensure the 'serenity of the Judges'. However, the implementation of this view could be in contradiction with the Commission commitment to promote transparency and bring the EU closer to the citizens. Indeed, the European Commission is a public service invested with defending Community interests, including the public's right to information the need to have effective procedures and the respect to the independence of judges. The issue therefore is whether it could be possible to develop a more transparent policy within the complaint and infringement procedure without compromising other public interests.

It seems to us that there is nothing that could prevent the Commission acknowledging and supporting the important role of citizens and NGOs as the Commission's primary source of information on problems in implementing Community environmental law. Citizens should receive proper and timely information on the status of their complaints, the legal arguments involved in the breaches of Community environmental law related to their complaints. Disclosure of this information would very much improve effectiveness of the procedure. Art. 6 of the EC Treaty legally justifies the development of a proper transparency policy including proposals to secure citizens participation in implementing Community environmental law.

In addition, the Commission has kept secret the letters of formal notice and the reasoned opinions to Member States in infringement proceedings. There is no real reason for keeping those letters confidential since they are part of the infringement procedure prior to any action before the Courts and their disclosure does not undermine the protection of any court proceedings (as required by Art. 4(2) of Regulation 1049/2001). In addition these letters only present the legal basis for a potential Commission decision (at College level) to act on specific cases, which would be decided and does not undermine any legal advice or investigations as required by Art. 4(2) of Regulation 1049/2001. One critic has observed that this policy of secrecy "*is neither comprehensible nor justified.*"¹⁴ The ECJ has recognised the need to provide the widest access to documents possible and delete the words or sections in them that should be considered confidential.

By denying the public access to such important information, the Commission is breaching the Aarhus Convention. This policy makes it impossible for the public to follow the progress of the complaints procedure in

individual cases – the antithesis of transparency. It promotes the view that Community institutions are distant and out of touch with citizens.

For the same reason, the Commission should provide access to the database holding general information about the cases dealt with by the Commission in relation to implementation of EC environmental law.

5.5 NGOs right to have access to the ECJ

The Communication acknowledges that the Council and Parliament have not yet adopted the proposed directive on access to justice in environmental matters. The Commission will publish a Communication on access to Justice in the near future to reopen the debate. However, the Communication does not mention that the European Community itself does not provide Environmental NGOs with access to the European Courts. Environmental NGOs are frequently denied access to European Courts because they lack standing, thus undermining the Aarhus Convention's access to justice pillar.¹⁵ The Commission and the European Courts have interpreted standing requirements extremely narrowly. For an environmental NGO to have standing to challenge an act of an EU Institution or body or its failure to act, before the ECJ, the organisation must have "*a direct and individual concern*" in the act or omission. Such situations are rare in environmental cases since damages are done to the environment and not to individuals. For the plaintiff NGO to establish direct and individual concern, the ECJ has ruled that the act or omission "*must affect [the plaintiffs'] position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them in the same way as the addressee.*"¹⁶ The Commission has advanced this view before the Courts.¹⁷ This unreasonably strict standing requirement is effectively a breach of the Aarhus Convention.¹⁸ There are examples at national level where NGOs are considered individually concerned if their statutes recognise the protection of the environment as the primary objective of the organisation. Even more, on the competition policy, complainants have access to the European Court of Justice on the basis that the complaint has not been properly dealt with.

¹⁵ Aarhus Convention, Art. 9, *supra* note 12.

¹⁶ Case C-25/62, Plaumann v. Comm'n, 1963 E.C.R. 95; see also, Case T-585/93, Greenpeace v. Comm'n, 1995 E.C.R. II 2205.

¹⁷ Case T-585/93, ¶ 26, Greenpeace v. Comm'n, 1995 E.C.R. II 2205.

¹⁸ As Professor Ludwig Krämer points out, although Community directives provide a procedure for NGOs to seek review of Commission acts or omissions in environmental matters before the European courts, they are nevertheless denied access to the courts. Professor Krämer observes that this is "*not [...] compatible with the Aarhus Convention.*" Ludwig Krämer, EC Environmental Law, *supra* note Fehler! Textmarke nicht definiert., p. 161.

¹⁴ Ludwig Krämer, EC Environmental Law, 6th ed. 2007, p. 460.

5.6 Pilot programmes

The Commission Communication discusses two pilot programmes it is implementing so as to be more responsive to the public. The unstated aim of these pilot programmes is also to rely more heavily on the enforcement actions of the Member States.

The first is a 'pilot problem-solving mechanism' to be implemented in fifteen Member States.¹⁹ The second programme is a trial scheme to base Commission environment officials in four Member States, Spain, Portugal, Italy, and Poland, to provide environmental expertise more locally, closer to citizens.²⁰ The description of these programmes is unclear and it does not provide any information on how they will be implemented, how they might involve the public, or how its success will be measured. It does not discuss measures the Commission will take if the Member State's action is inadequate to ensure proper implementation of EC environmental law. It seems that the pilot projects are not responding to the expectations regarding effectiveness and problem-solving. The Commission report due by end of 2009 should address all these points.

6 Immediate and intensive enforcement action

The third 'solution' which the Commission discusses is the "more immediate and more intensive treatment of important infringements."²¹ This wording implies that important infringements would have a more intensive treatment and the rest of the cases would be dealt with in a less intensive manner. However, discussions with Commission officials and the analysis of the recent Commission practice show that the Commission's intention is to limit enforcement action to those priority cases and ignore cases that do not fall within the criteria.

We believe that the literal wording of the sentence should be respected and that the proposed prioritisation should be used to proactively develop more targeted and strategic enforcement actions (see below section 6.1). This would allow the Commission to carry out normal actions for non-priority cases. The meetings with NGOs to promote a strategic approach to complaints on priority issues could still continue. The announcement of a priority list in the Commission report on implementation of Community law could still be used. Nevertheless, all complaints should be responded to as a matter of principle and out of respect for citizens' concerns. This approach might require more resources for the DG Environment in this respect. The Commission should propose an increase

in resources (see section 7 below) for dealing with all complaints rather than establishing a hierarchy with negative consequences for compliance with EC environmental law.

The Communication identifies three categories of infringement cases that the Commission will address more immediately and more intensively:²²

1. *Non-communication of implementing measures for directives;*
2. *Failure to comply with European Court of Justice judgments within a reasonable period, e.g. 12 to 24 months;*
3. *Breaches of European Community law raising issues of principle or which have particularly far-reaching negative impact for citizens."*

The first two categories are more specific while the third is vague (i.e. issue of principle, far reaching impact), which creates unnecessary legal uncertainty. The Commission should clarify what measures it will take to ensure implementation of these criteria. The Communication states that this third category includes infringements which may cause people to be "exposed to direct harm or serious detriment to their quality of life."²³ However, the Commission again uses a general definition of this concept by saying it includes infringements "that fundamentally undermine the overall effectiveness of the EC environmental legislation," for example, by "failing to take obligatory measures".²⁴ It is not clear if the Commission intends to consider priority all cases where an obligatory measure has been breached.

The Communication identifies four criteria for the selection of infringement cases:²⁵

1. Non-conformity of key legislation viewed as presenting a significant risk for correct implementation of environmental rules and hence their overall effectiveness;
2. Systemic breaches of environmental quality or other environmental protection requirements presenting serious adverse consequences or risks to human health or well-being or aspects of nature that have high ecological value;
3. Breaches of core, strategic obligations on which fulfilment of other obligations depends; and
4. Breaches concerning big infrastructure projects or interventions involving EU funding or significant adverse impacts.

The wording of these criteria is again too vague. The meaning of concepts such as 'key legislation' or 'core,

¹⁹ Commission Communication on Implementing European Community Environmental Law, *supra* note 1, p. 7.

²⁰ See *supra* note 19.

²¹ Commission Communication on Implementing European Community Environmental Law, *supra* note 1, pp. 7-9.

²² Commission Communication on Implementing European Community Environmental Law, *supra* note 1, p. 8.

²³ See *supra* note 22.

²⁴ See *supra* note 22.

²⁵ Commission Communication on Implementing European Community Environmental Law, *supra* note 1, pp. 8-9.

strategic obligations' should be clarified. It is also not clear how the criteria will be used.

The Commission has also omitted several important considerations from its determination of categories and criteria for targeting enforcement actions as follows:

6.1 Deterrence: Enforcement and sanctions

First, there is no mention at all of deterrence in the Communication. Yet, this should be a critical consideration. An enforcement policy should consider how enforcement will be used to maximise a credible deterrence, especially given the Commission's limited resources for enforcement and compliance work. Enforcement action should be targeted to attain the maximum level of compliance, not only in the Member State in question, but in other Member States, too.

One of the most effective tools for creating a powerful deterrent to non-compliance with Community environmental law is *aggressive enforcement*. Strategic proactive enforcement actions should be carefully targeted to the Commission priorities. We believe that the priority setting proposed by the European Commission should be used as the basis to develop actions to increase compliance through deterrence.

For an enforcement regime to be effective, the Member State, company, or facility subject to compliance must be convinced that non-compliance with the law will place it in a worse position than compliance.²⁶ Non-compliance must result in *sanctions* or a significant risk of them. Sanctions must be severe enough to discourage violators from committing future violations (specific deterrence), and also severe enough to dissuade others from similar violations (general deterrence). Within the EU legal system the only sanction that the European Commission can decide upon in the environmental field is taking Member States before the European Court of Justice. The process under which the Commission decides to take a Member State to the Court of Justice should be swifter to ensure a deterrent effect. Similarly, the process under Art. 228(2) of the EC Treaty allowing the ECJ to impose economic sanctions against a Member State for non-implementation of the Court ruling should also be quicker. The Communication mentions the failure to comply with judgments of the ECJ within a reasonable period as a category of cases deserving more intense action. We welcome it but it should be complemented by a strategy for a quicker and systematic use of Art. 228(2) of the EC Treaty.

The deterrence effect should also require a systematic follow-up of the implementation of particular measures establishing sanctions such as 2008/99/EC Direc-

tive on Environmental crime²⁷ and the 2004/35/EC Environmental Liability Directive²⁸, to name a few. However, it is not clear whether those measures fall within the priorities identified by the Commission's Communication.

6.2 Issue of unfair economic advantage

The Communication does not address the question of economic benefit that certain sectors or Member States may derive from infringing Community environmental law. By not investing in appropriate pollution control equipment, for example, power stations in a given Member State which has not implemented Community requirements, may obtain an unfair economic advantage over those in more compliant countries. This results in a distortion of the market. A Community enforcement policy should take this problem into consideration in targeting actions for enforcement.

6.3 Additional enforcement criteria needed

To address some of these omissions, the Commission should add the following enforcement criteria:

- Breaches addressable through enforcement action that will have a major deterrent effect on other violators;
- Breaches having a high public profile, or resulting in a large number of citizens' complaints;
- Breaches which involve a large number of violations in a given Member State, group of countries, or regulated sector;
- Breaches which result in a significant economic advantage to a Member State or regulated sector in a Member State;

7 The need for more resources

7.1 Enforcement and handling of complaints

The Commission's attempts to rely more heavily on Member States to enforce Community environmental law, along with setting priority categories and not dealing with all complaints, could result in a failure to fulfil (or even a derogation of) the Commission's obligations under Art. 211 of the Treaty.

The Commission's main justification for the need of a strategic approach to deal with problems of implementation of Community environmental legislation seems to be the shortage of resources. However, the Communication does not consider reallocating resources or increasing the staff assigned to this task. Nor does the Communication assess the problems which might result

²⁶ See Case C-304/02, *Comm'n v. France*, ¶ 80, 2002 E.C.R. I-6263.

²⁷ Directive 2008/99/EC of the European Parliament and the Council of 19 November 2008 on the protection of the environment through criminal law.

²⁸ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

from devolving enforcement action to the Member State which is under review for potentially having breached environmental law. There are not only potential problems for the NGO at the outset of the complaint but also difficulties in ensuring an objective assessment.

The need for resources has led to the use of national experts working in DG Environment on temporary secondment by their governments. Member State experts on secondment, who will ultimately return to their countries to continue their careers as public servants, should not deal with complaints affecting their own countries. Experience has shown that they are placed under great pressure by their national governments to prioritise national interests over Community environmental objectives.

The European Commission should set up priorities for more targeted action but should address all complaints, even if they are not priorities because they respond to concerns from the public. This would require more resources. The Commission should consider reallocating resources and increasing the staff assigned to implementation and enforcement of EC Environmental law.

The DG Environment legal unit has seen its staff number increase in recent years. However, the reason for this lies in the need to cover all languages of the new EU Member States. Since the beginning of October 2009 the European Commission has divided the DG Environment legal unit in two in order to improve its management. But the European Commission has never presented a proposal for more resources in the DG Environment legal unit to the European Parliament so that enforcement and monitoring of the implementation of EC environmental legislation can be improved. It is clear that if the European Commission cannot deal with all complaints with existing resources a strategic approach would have to be applied. However, real efforts to increase available resources should first of all be made.

7.2 European environmental inspectors

An additional issue which the Communication fails to address is the inadequacy of current resources for monitoring and enforcing compliance with Community environmental law, and particularly the lack of inspectors. The Staff Working Document notes that “[t]he Commission does not currently have a formal inspectorate to assess implementation first-hand.”²⁹ But neither the Working Document, nor the Communication discusses this deficit. The Commission’s lack of resources makes it impossible for effective enforcement and compliance to be carried out. The Commission staff can rarely travel to verify cases or obtain information which is therefore requested from

the senders of the complaints. The Commission should seek greater resources, including a staff of community inspectors. The reasons behind the need for European inspectors are:

1) Information from citizens is not enough: the Communication mentions that citizens are often the first to discover breaches of Community environmental laws.³⁰ While this may be true of the most obvious breaches such as illegal landfill or acts against protected habitats or species, ordinary citizens are not able to detect less visible infringements, such as excess emissions of invisible gas, discharges into water courses above permit limits, or a failure to install best available pollution control techniques. They generally lack resources such as analytical laboratories, and access to facility premises. The Commission cannot rely primarily on private citizens to detect and report infringements of Community environmental law. The Commission should be able to develop its own strategy for monitoring the implementation of legislative measures falling outside citizen’s awareness.

2) National inspectors are not enough: although, Member State inspectors need to play a key role in monitoring compliance with Community environmental law, national inspections alone are not adequate. In 2001, the Commission adopted its Recommendation for Minimum Criteria for Inspections in Member States.³¹ In 2007, the Commission issued a Communication on its review of the Recommendation’s implementation³² stating that most Member States are not fully implementing the minimum inspection criteria laid down in the Recommendation.³³ The Commission also stressed that “*there are still large disparities in the way environmental inspections are being carried out within the Community.*” **Consequently, “full implementation of environmental legislation in the Community cannot be assured.”**³⁴ The European Parliament has recognised these problems in its 2008 Resolution.³⁵ Thus, the Commission cannot rely solely on national inspections to detect and report infringements of Community environmental law.

3) The Commission needs to be able to gather information to support its arguments related to the infringement cases submitted to the ECJ. In several

²⁹ Commission Staff Working Document, SEC (2008) 2876, *supra* note 2, p. 3.

³⁰ Commission Communication on Implementing European Community Environmental Law, *supra* note 1, p. 6.

³¹ Commission Recommendation 2001/331/EC Providing for Minimum Criteria for Environmental Inspections in the Member States, 2001 O.J. (L 118), p. 41.

³² Commission Communication on the Review of Recommendation 2001/331/EC Providing for Minimum Criteria for Environmental Inspections in the Member States, COM (2008) 707 final, 14 November 2007.

³³ Commission Communication, *supra* note 32, p. 3.

³⁴ Commission Communication, *supra* note 32.

³⁵ European Parliament Resolution on the Review of Recommendation 2001/331/EC providing for Minimum Criteria for Environmental Inspections in the Member States, TA (2008) 0568, 20 November 2008.

occasions the Commission has been told by the Court of Justice that it has not proven its case. One could argue that the ECJ is asking the Commission to organise its resources to find proof for their arguments on cases which it has responsibility for.

To implement an effective and credible enforcement programme, the Commission needs a large, well-trained team of inspectors working alongside the lawyers and scientists to monitor compliance and take appropriate action over infringements. They should be part of DG Environment. They will need expertise in Community environmental law as well as the authority to gather information, examine or copy documents, and gain access to facilities, transport, and other private property to conduct inspections. They will need to work closely with national environmental inspectorates who will generally be more familiar with local conditions, ecosystems, and facilities. They will also be in a position to help educate local authorities about Community environmental law. The inspectors' role would be to complement and assist national inspectors, not to replace them.

The establishment of a task force of European Inspectors to monitor implementation of environmental legislation is a question of political will and not a problem of legal basis. Member States should have an interest in the creation of resources and authority for the Commission to conduct environmental inspections that would support their enforcement actions in this field. However, this is not the case. The establishment of a body with inspectors monitoring environmental cases has been discussed for a long time but Member States have been reluctant to support it. In 1989, the Commission suggested that the European Environmental Agency could have the task to monitor the application of environmental law. The initiative did not progress because of the opposition of Member States in the Council. The European Parliament pushed for it but at the end accepted to re-examine the EEA Regulation two years later with a view to associate the Agency in the monitoring of the implementation of Community environmental legislation, in cooperation with the Commission and existing bodies in Member States³⁶. But this was not raised by the European Parliament when the Regulation was reviewed.

In the Commission Communication on implementing Community environmental law in 1996 the Commission raised again the need for a body with auditing competences but it did not progress due to Council opposition to replace the system of inspection at Community level. However, the Commission could propose a system complementary to the existing at a national level.

In 1992, Member States set up IMPEL as an informal network of Member State authorities in charge of the

implementation of environmental legislation. But the reports on the review of the Commission Recommendations on minimum criteria for environmental inspections in the Member State show that this initiative does not ensure full implementation of Community environmental law. The Parliament resolutions on this issue which request the establishment of Community environmental inspection force also do not refer to the need for exclusive competence.

In 2005, the European Parliament urged the Commission to consider ways of improving environmental inspections, "including the establishment of a Community environmental inspection force."³⁷ The Parliament repeated this direction to the Commission in a Resolution on environmental inspections adopted in November 2008.³⁸ The Commission should follow through on this request, and propose appropriate measures.

There is also ample precedent for inspectors at Community level. Community inspectors are deployed, for example, to investigate illegal mergers, and to check sanitary conditions of slaughterhouses.³⁹ Moreover, Commission officials or representatives can carry out on-the-spot audits to verify the effective functioning of the management and control systems of the use of Regional Funds.⁴⁰

Commission investigators from DG Competition are authorised to conduct inspections to detect activities which constitute a restriction or distortion of competition, or an abuse of a dominant position, contrary to the EC Treaty.⁴¹ Commission inspectors are authorised to inspect undertakings and associations of undertakings; to enter any premises, land, and means of transport; and to examine and obtain copies of books and other records.⁴² This capacity is based on Art. 85 of the EC Treaty which states that "the Commission shall investigate cases of suspected infringement" of the principles established in Art. 81 and 82 of the EC Treaty. The Commission can, on that basis, propose appropriate measures to halt infringements.

Another example is that Commission veterinary experts at DG Health and Consumers (SANCO) are authorised to check border inspection posts.⁴³ They

³⁶ Art. 19 of the Regulation 1210/90 on the establishment of the EEA.

³⁷ European Parliament Resolution on the Review of Recommendation 2001/331/EC, *supra* note 35.

³⁸ European Parliament Resolution on the Review of Recommendation 2001/331/EC *supra* note 35.

³⁹ Ludwig Krämer, EC Environmental Law, *supra* note 14, p. 461.

⁴⁰ Art. 72 of Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999 (OJ L 210, 31 July 2006)

⁴¹ Council Regulation 1/2003/EC on the Implementation of the Rules on Competition Laid Down in Art. 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, 16 December 2002.

⁴² Council Regulation 1/2003/EC, *supra* note 41, Art. 20.

⁴³ Commission Decision 2001/881/EC Drawing up a List of Border Inspection Posts for Veterinary Checks on Animals and Animal Products from Third

may also conduct on-the-spot checks to uncover potential health problems resulting from the intra-Community trade in animals and animal products.⁴⁴ These checks are carried out “to ensure that the provisions of Community legislation are complied with in a uniform manner.”⁴⁵ The Commission’s expert inspectors are allowed access, on the same basis as competent national authorities, information, documents, places, establishments, installations, and transport for the purpose of carrying out inspections.⁴⁶ Another example is the Council’s 2005 issue of a regulation which establishes a Community Fisheries Control Agency with the authority to deploy joint inspection programmes with ‘teams of Community inspectors’ pooled from Member States, but working in the territorial waters of other Member States.⁴⁷

Commission’s inspection capacity in tandem with national inspections does not need to be linked to a Community policy of exclusive competence, nor be expressly mentioned in the EC Treaty. Indeed, Art. 211 and 229 in relation to Art. 175 would be the legal basis for the Commission to establish an inspectors force that allows for monitoring and enforcement of EC environmental law within the Treaty’s provisions. A formal Commission internal decision establishing this body would be enough to decide the use of inspectors to support its actions under its competence and define the specific scope of work. The Commission is able to arrange its own resources and develop the structures it needs to fulfil its responsibility to enforce Community law with the necessary resources. Therefore, the Commission could establish a task force within DG Environment dedicated to inspecting infringement cases of EC Environmental law without submitting a legislative proposal to the other EU Institutions. The Commission decision should ensure that DG Environment inspectors have the authority to investigate infringement cases and acquire necessary proof, detect non-compliance with Community environmental law and to propose the adoption of appropriate enforcement action to address any non-compliance. They should also enable the Commission to start cases on its own initiative following a strategy based on priority setting. The inspectors should also

support the technical units that collaborate with the legal unit in the infringement cases.

8 Conclusion

The Commission should develop a strategy in which ensurance of the implementation and enforcement of environmental legislation is of higher priority in the EU agenda. The European Commission should improve compliance monitoring and information gathering through inspections and should develop an enforcement policy where strategic actions for priority cases are undertaken while citizen’s complaints are fully dealt with on the basis of the transparency principle. These actions are necessary to fulfil the Commission’s responsibility under Art. 211 of the EC Treaty. The European Parliament recently emphasised that “*enforcement of Community environmental law is essential and that anything less falls short of public expectations and undermines the reputation of the Community as an effective guardian of the environment.*”⁴⁸ Without effective compliance monitoring and credible enforcement of Community environmental law, the acquis of environmental directives and regulations becomes meaningless.

Countries and Updating the Detailed Rules Concerning the Checks to Be Carried out by the Experts of the Commission, 2001 O.J. (L 326) 44, 7 December 2001.

⁴⁴ Commission Decision 98/139/EC Laying Down Certain Detailed Rules Concerning On-the-Spot Checks Carried Out in the Veterinary Field by Commission Experts in the Member States, 1998 O.J. (L 38) 10, 4 February 1998.

⁴⁵ Commission Decision 98/139/EC, *supra* note 44, Art. 1(1).

⁴⁶ Commission Decision 98/139/EC, *supra* note 44, Art. 6.

⁴⁷ Council Regulation 768/2005/EC establishing a Community Fisheries Control Agency and amending Regulation (EEC) No. 2847/93 establishing a Control System Applicable to the Common Fisheries Policy, 2005 O.J. (L 128), 1.

⁴⁸ European Parliament Resolution on the Review of Recommendation 2001/331/EC, *supra* note 35.

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

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The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in

the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

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