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# elni

## REVIEW

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## Application of European Environmental Law by National Courts

Luc Lavrysen

*Some twelve years ago, during the second training programme on environmental law for judicial officers in Belgium, I was asked to introduce the officers to European Environmental Law in half a day. In this training session I spoke also of the possible direct effect of Directives which were transposed late or not correctly in domestic law, on the obligation to interpret domestic law as much as possible in accordance with European law, and about Francovich liability. At the end of my presentation there was a discussion and one judge from a smaller Court of First Instance in Flanders said that these were all very nice theories, but he had a far more basic problem. In his Court library they had no subscription to the Official Journal or to the European Court Reports, so the basic sources of European Environmental Law were just not accessible to him. It was of course the time before the internet was used intensively to make known information of a legal nature and judges in Belgium had certainly no professional access to it yet. Nevertheless this judge was regularly confronted with questions of European Environmental Law. In Belgium we do have a very active Bird Protection Organisation, which systematically intervenes in criminal proceedings against infringers of bird protection legislation. And the judge told us that the lawyer of this organisation very often spoke about the Birds and Habitat Directives in such cases, but he was unable to verify if all that he was talking about was correct or not. So what was he to do? He found a very pragmatic solution. On the one hand, he did not impose too stiff penalties on the perpetrators, so that they didn't feel the need to appeal against his judgments. On the other hand, he recognized the right of the Bird Protection Organisation to claim damages and accorded the organisation each time a symbolic 1 Belgian Franc – that is around 2.5 eurocent – by way of moral damages, so that they were happy too. None of his judgments were appealed, so he could also avoid going into European Environmental Law in its judgments.*

I think since then, the situation may have changed considerably. Although the situation in the new Member States may still be similar, in the older member states important progress seems to have been made. Judges and public prosecutors who are appointed now have normally had some courses in European Law during their basic training at the University. Some of them might have even followed courses in Environmental Law or European Environmental Law during their studies. There are now, as we all know, very good textbooks on European Environmental Law available. The specialised legal journals are paying much attention to developments in European legislation and case law. Thanks to the development of internet, the primary sources can be accessed more easily. We see of course the same evolution amongst the other legal professions, especially the lawyers. So, judges are more and more confronted with problems of European Environmental law, as the parties raise

such issues before them and the courts are far better equipped to tackle them than a decade ago.

The role of the national courts in the application of European Environmental Law is not more complicated than in the application of domestic law in the ideal situation that Directives are transposed timely and correctly in domestic law by legally binding rules in a way that is consistent with both provisions of primary European law, taking into account the latest case law of the ECJ, and with other pieces of domestic law, and that the Member States have adopted in time the necessary complementary provisions to Regulations. However, such an ideal situation does not seem realistic. It is sufficient to look at the statistics of DG Environment to realise that the transposition of European environmental law in domestic law is not a success story. According to the *Seventh Annual Survey on the implementation and enforcement of Community environmental law 2005*,<sup>1</sup> DG Environment still has the highest number of open cases in the Commission. In 2005, the environment sector accounted for about one-fourth of the total number of open cases concerning non-compliance with Community law under investigation by the Commission.<sup>2</sup> Also the high number of condemnations of Member States by the ECJ for poor application of European Environmental law shows that the situation is far from ideal.

So the reality seems to be that in the vast majority of Member States one is confronted with relatively poor or delayed transposition of an important number of Environmental Directives and poor application of certain Environmental Regulations. In such circumstances the role of the national judges in upholding European Environmental Law is crucial,<sup>3</sup> but at the

<sup>1</sup> SEC(2006)1143 – Brussels 8/9/2006.

<sup>2</sup> *Ibid.*, p. 5.

<sup>3</sup> See on this point the contribution of Gil Carlos Rodríguez Iglesias, the former President of the ECJ, to the Global Judges Symposium held in Johannesburg in August 2002: *'All national judges – tens of thousands of them – are competent to apply EC law on an everyday basis. They apply it directly; they interpret their national laws in conformity with it, if at all possible; if not, they must leave aside national laws that are contrary to EC law, because it is the duty of national judges to guarantee the rights provided for in the treaty and in EC legislation. In other words, individuals may rely upon provisions of Community law before national courts without any implementing element of domestic law, the only requirement being that the provisions relied upon should be sufficiently clear and unconditional to create such rights. The co-operation between the Court of Justice and the national courts through the preliminary reference procedure has been decisive to ensure the proper application of Community law and the protection of individual rights created by the Community legal order. The Court's jurisprudence in the area of environmental protection shows particularly well the important role that national judges play in the implementation and enforcement of obligations created by Community directives.'*

For a report on the Global Judges Symposium, see Paul L. Stein, *Environmental Policy and Law*, 33/2 (2003), p. 56.

same time complicated. The judge has to look at his or her domestic law with a critical eye. He or she has to make an in-depth analysis of European Environmental Law, taking into account the ever growing body of case law of the ECJ. Has the rule of European Environmental Law which is thought to be violated, a direct effect or not? Is, according to the domestic legal order, such an effect necessary in order that a rule of European Environmental law can be invoked before the national judge, or can such rules be invoked always when they are relevant for the outcome of the case, even when they have no “direct effect”<sup>4</sup>? Is the party who argues that the provisions of a directive are violated, entitled to raise this argument, taking into account that Directives do not produce horizontal or third-party effect, but can produce on the other hand horizontal side-effects or vertical direct effect? If there are certain differences between domestic and European Environmental Law he has to ask himself if such differences are allowed by European law. He must look at the nature of the Directive. Does the Directive provide for minimum or uniform harmonisation, or for a mixed or another form of harmonisation? Where the Directive provides for minimum harmonisation, does the domestic law comply with the minimum requirements of the Directive? If domestic law goes further than such a Directive, are those more far-reaching requirements compatible with primary European law? Where the Directive provides for uniform harmonisation, is there nevertheless room for more far-reaching requirements, on the basis of secondary or primary European law? If differences between domestic and European law are not allowed by European law, can these differences be smoothed out by interpreting domestic law in such a way that domestic law becomes consistent with European law? Can this be done within the boundaries set by the ECJ in its case law? If consistent interpretation is not possible, to what extent must domestic law be set aside or, if allowed by national law, annulled? In the case of annulment, what should be the scope of it and should this operate with a fully retroactive effect or not? Is there still room for balancing interests and to what extent? If there is question of poor application of European Environmental law, can the *Francovich liability* be applied, and how should it be applied within the domestic procedural framework?

Different types of questions on the validity and the interpretation of European Environmental Law may thus arise before national judges. Judges may feel that in such a situation it is necessary to refer such cases for a preliminary ruling to the ECJ, and, if such a

question arises before the highest national court, they may be obliged to refer the question. It seems however that the willingness for raising such questions varies considerably from one Member State to another. According to the data provided by the ECJ<sup>5</sup> the Court delivered, in the period up to 9 April 2008, 102 judgments on preliminary questions referred in environmental matters. Italian judges were most active in referring such questions, having a total of 25, followed by the Netherlands with 18, France with 17, Belgium with 11, Germany and the UK with 9 each, Austria with 6, Denmark with 3, Finland with 2, and finally Luxembourg and Sweden with 1 each. This means also that from the EU 15, there were no such cases from Greece, Spain, Ireland and Portugal.

I do not think that these figures can be interpreted as a sort of hit parade of Member States, starting with those Members States with the most problematic implementation status and ending with those where there are no such problems at all. It is sufficient to look at the infringement cases which are pending or that have already been decided<sup>6</sup> to discover that the record of Greece, Spain, Ireland and Portugal is far from brilliant in this respect.<sup>7</sup> At the same time, however, we cannot say that the figures say the opposite, because there is no clear match between these two statistics. Maybe these figures can, with some caution, be interpreted as an indicator of the willingness of national judges to give precedence to European environmental law over domestic law. Some caution is indeed recommended. The better the implementation situation is, the less the need to consult the ECJ. Furthermore, I have indicated in an earlier paper,<sup>8</sup> that not all of those references to the ECJ are pertinent to the adjudication of the cases pending before the referring judge. Quite a few Italian criminal courts have raised questions concerning limitations, contrary to European law, of the scope of national waste legislation and the decriminalisation resulting from those limitations. Although those questions are important indicators of problems with the application of European waste directives in certain Member States and the questions

<sup>4</sup> According to the case law of the Belgian Constitutional Court, every pertinent rule of international or European law can be invoked in combination with the provisions of the Belgian Constitution and the Special Acts for which the Court is competent, irrespective of whether such rules have direct effect or not. Of course, if they have no direct effect, the room for manoeuvre for the legislators will be much wider than if they do have such an effect.

<sup>5</sup> Thanks to Mr. Stefaan Van der Jeucht of the Press Service of the Court for providing these data.

<sup>6</sup> See Year Report of the ECJ 2007.

<sup>7</sup> According to the ECJ's 2007 general statistics on infringements cases, Greece occupies the second place (334) after Italy (582). Luxembourg ranks 6<sup>th</sup> (with 230), Spain 8<sup>th</sup> (with 187), Ireland 9<sup>th</sup> (with 176) and Portugal 10<sup>th</sup> (with 141). According to the *Seventh Annual Survey on the implementation and enforcement of Community environmental law 2005* (SEC(2006) 1143, Brussels 8.9.2006) Greece, Ireland, Portugal and Luxembourg occupy second place in the table of non-communication infringement proceedings (31/12/2005), with 8 open cases each, Spain occupies 4<sup>th</sup> place with 6 open cases. As far as the non-conformity infringement proceedings are concerned, there were 5 cases against Greece, 7 cases against Ireland, 6 against Spain, 2 against Portugal and 3 against Luxembourg.

<sup>8</sup> The Application of European Waste Law by the National Courts, Paper presented at the EUFJE Annual Conference, London, December 2005, [www.eufje.org](http://www.eufje.org).

referred for a preliminary ruling can contribute to a further clarification of European waste law by the Court of Justice, we may rightly question the relevance of such questions to the cases that have been submitted to the criminal courts. Indeed “a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, *inter alia*, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and Case C-168/95, *Arcaro* [1996] ECR I-4705, paragraph 37).”<sup>9</sup>

It may indeed be assumed that many cases are settled by national courts without it being necessary to refer questions to the European Court of Justice for a preliminary ruling, either because the court is of the opinion that there is no reasonable doubt about the validity or interpretation of the provisions of European law relied upon (the so-called “*acte claire*”), or because those questions could be solved on the basis of the existing case law of the Court of Justice (so-called “*acte éclairé*”). Although my Court together with the Austrian Constitutional Court, is the only constitutional court which regularly refers preliminary questions to the ECJ, we do so sparingly. In less than 10% of the cases in which the parties suggest making a referral to the ECJ, we actually do so. We try as much as possible to solve these questions ourselves. Only in cases where there may be serious doubt about the validity or the interpretation of European law do we refer those questions. We are aware that it takes time to get a reply from the ECJ – although we see a tendency that the ECJ is progressively reducing the time needed to give a ruling –, that one is incurring extra costs for the parties and the European institutions, and that respecting the reasonable time prescript of Art. 6 ECHR<sup>10</sup> is a real challenge in the majority of the Member States. I think our attitude is consistent with the expectations of the ECJ, which is rather anxious about being overloaded by cases and tries to avoid the problems encountered by the ECHR where tens of thousands of cases are waiting for judgment, by asking, e.g. during the annual meetings with representatives of national judiciaries, to try to solve as many questions of interpretation of European law as possible themselves, and to restrict references for preliminary rulings to cases where there may be serious doubt about the validity or the interpretation of European law, restricting the intervention of the ECJ to cases where this is needed to ensure the uniform application of European law throughout the Member States.

Of course, this also means that there is an important need for training national judges in European law in general and European environmental law in particular. With a view to enhancing the capabilities of national judges to tackle problems of *inter alia* European Environmental law, the *EU Forum of Judges for the Environment (EUFJE)* was established on 28 February 2004.<sup>11</sup> It is an international non-profit association established under Belgian law. The objective of the Forum is to promote the enforcement of national, European and international environmental law in a perspective of sustainable development. The aim of the Forum is in particular to exchange experiences in the area of training of the judiciary in environmental law, contribute to a better knowledge of environmental law, share experiences with environmental case law and contribute to a more effective enforcement of environmental law. Every judge in the European Union and the European Free Trade Association with a special interest in environmental law can become a member of the Forum. Judges from countries that have applied for membership of the European Union may be admitted as observers. Representatives of the United Nations Environment Programme (UNEP), the European Commission and the Council of Europe may attend the meetings as observers. The initiative is in keeping with a worldwide initiative that was taken by the United Nations Environmental Programme (UNEP).<sup>12</sup> During our annual conferences, which are supported by DG Environment of the European Commission, European Environmental law is mostly in the forefront of our agenda.

However, EUFJE reaches only a few judges per Member State directly with its activities. Of course, we hope that our members are spreading the message on the national level and we see effectively that in national training initiatives for the judiciary, there is growing attention to European Environmental law. In this respect too, however, we see that not in all Member States the issue is being addressed as it should be. Therefore we strongly support the initiative taken by the European Commission to set up, in the light of Communication COM(2007)502 of September 2007, a large-scale training programme for members of the judiciary on the national level. This programme will be launched on 9 and 10 October 2008 in Paris, during the Conference (“*The judge in Europe and European community environmental law*”) organised by the French Council of State, with the support of the European Commission and the French Presidency.

<sup>9</sup> ECJ, 15 January 2004, *Saetti and Frediani*, Case C-235/02, ECRh 2004, p. I-1005.

<sup>10</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms; see [www.echr.coe.int](http://www.echr.coe.int).

<sup>11</sup> [www.eufje.org](http://www.eufje.org).

<sup>12</sup> UNEP, UNEP Global Judges Programme, Nairobi, 2005, 73 p.

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

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.

#### **The Environmental Law Division of the Öko-Institut:**

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

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.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

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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.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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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, focussing 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 Brus-

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

### Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

### Elni Website: elni.org

On the elni website [www.elni.org](http://www.elni.org) one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.