

elni

REVIEW

Environmental penalties in Italy

Paola Brambilla

Enforcing EU environmental law outside Europe? The case of
ship dismantling

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Directive 2008/99/EC: A new start for criminal law in the
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A survey of the Vietnamese environmental legislation on water

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Editorial

The main topics of this issue are the *enforcement of EU law*, and *criminal law and the environment*. Enforcement of EU law is often prescribed by the national legal framework and therefore depends strongly on national definitions of the findings of the facts. When focusing on criminal environmental law one of the main hurdles to the effectiveness results from the different national implementation practices of European Directives. In this respect, the problems also differ between the different EU Member States. This issue of elni Review provides valuable insights into selected national law frameworks:

“Environmental penalties in Italy” by Paola Brambilla focuses on the history and actual issues of criminal environmental law in Italy.

“Enforcing EU environmental law outside Europe? The case of ship dismantling” by Thomas Ormond provides a special view on EU law enforcement from an international perspective.

Armelle Gouritin and Paul De Hert critically discuss the recent developments of European environmental criminal law in their article “Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law: A new start for criminal law in the European Community?”

Topics which focus on actual EU-law issues:

The viewpoint of environmental organisations towards the setting of standards of emissions is provided in “Development of harmonised European standards for measuring emissions from construction products in CEN from the perspective of environmental organisations – Part 1” by Michael Riess and Ralf Lottes.

The article “Regulation of nanomaterials under present and future Chemicals legislation - Analysis and regulative options” by Stefanie Merenyi, Martin Führ and Kathleen Ordnung critically reviews REACH under the perspectives of nanomaterials. It also contains information on recent developments on EU level.

Other topics focus on national laws of non-EU countries:

In his article Eugene A. Wystorobets focuses on the “Principle of public participation in environmental law of the Russian Federation” and provides general insights into Russian law.

“A survey of the Vietnamese environmental legislation on water” by Michael Zschesche and Duong Thanh An focuses on Vietnamese water law and the organisational background of administrative institutions in this context.

The next issue of the *elni review* will focus on the Industrial Emissions Directive (IED). Please send contributions on this topic as well as other interesting articles to the editors by the end of June 2009.

Nicolas Below/Gerhard Roller

March 2009

elni Forum 2009

on 14th May 2009

at FUSL, Facultés universitaires Saint-Louis in
Brussels, Belgium.

***“The Directive on Industrial Emissions
and its implementation in national law -
key issues and practical experiences”***

The elni Forum 2009 will offer the opportunity to discuss implementation issues of the upcoming European Directive on Industrial Emissions (IED). European and national environmental law experts will comment on this issue.

The **Annual Meeting of the elni Association 2009** will take place before the elni Forum.

More information is available at:
www.elni.org

Special Announcement

The representative for interested parties of the ECHA Management Board and co-founder of the *Environmental Law Network International* – Marc Pallemmaerts – is now member of the ECHA Board of Appeal.

The editors wish him all the best and every success in the future!

In his place Martin Führ, also co-founder of *elni* and editor of the *elni Review* was nominated at 18 December 2008 by the Commission as a new member of the Management Board of the ECHA (European Chemicals Agency) to represent interested parties.

Development of harmonised European standards for measuring emissions from construction products in CEN from the perspective of environmental organisations

(CEN TC 351 – Assessment of release of dangerous substances under the Construction Products Directive (CPD) – Emission into indoor air and release to soil, surface water and ground water)

Michael Riess and Ralf Lottes

Many construction materials contain substances that are classified as dangerous according to European chemicals legislation. A number of dangerous substances have already been banned for various reasons. For example, PCB and PCP were banned after causing significant health problems for building users as a result of being released from construction materials into indoor air. Both heavy metals and organic substances such as wood preservatives have been found to leach out of construction products, a finding that is associated with the undesirable input of these substances into water, soil and ground water.

Other dangerous substances include reaction products such as prepolymers, for example, which only fully develop into a final reaction product through the action of atmospheric oxygen or curing agents, for example. In these cases, it is necessary to demonstrate that the dangerous substances will not leach out or be released in gaseous form, or that the levels which are in fact emitted do not pose any serious health concerns.

The authoritative basis for assessment of the environmental or health implications of emissions is essentially provided by national legislation such as the Chemicals Prohibition Regulation or pertinent environmental laws.

1 CPD and CEN: Recent Development

The European Construction Products Directive¹ (CPD) is designed to harmonise traditional technical requirements such as fire protection and structural stability as well as requirements which have tended previously to be neglected, relating to issues such as hygiene, health and environmental protection in a manner that enables the emergence of a common European market for construction products (i.e. ensuring that national bans on certain substances do not create trade barriers, for example).

To this end, the EU Commission issued around 30 mandates to CEN² and approximately 20 mandates to the European Organisation for Technical Approvals

(EOTA) between 1993 and 1999, instructing them to develop product standards (CEN) and technical approval guidelines (EOTA). Within the remit of CEN alone, this involved commissioning the development of around 500 harmonised construction product standards, though without due consideration being given to environmental and health aspects. These aspects have only begun to be addressed recently (see below). To date, more than 200 harmonised product standards have been developed.³

2 Essential requirements according to CPD

The construction material requirements to be taken into account according to Art. 3 and Art. 12 of the Construction Products Directive are defined in interpretative document No. 3 “Hygiene, Health and the Environment”. This document stipulates that construction products are to be subjected to appropriate testing to clarify which emissions of harmful substances are to be dealt with during the period of use of the building (i.e. solely during the phase of use). On the basis of this information, the member states can then define requirements and create product classes that must be fulfilled for specific applications. The relevant aspects are as follows:

- emission of dangerous substances to the indoor environment (e.g. VOC (volatile organic compounds), inorganic and organic particles and fibres, radioactive substances);
- release of dangerous substances into outdoor air, soil and water in the immediate vicinity of the building.

The European Commission’s Guidance Paper H, entitled “A harmonized approach relating to dangerous substances under the Construction Products Directive” is designed as an aid to the drafting of technical specifications when it comes to taking into account requirements regarding the emission of dangerous substances from construction products.⁴

¹ Council Directive 89/106/EEC of 21 December 1988, OJ L 40, 11 February 1989.

² Comité Européen de Normalisation – European Committee for Standardization

³ See: <http://ec.europa.eu/enterprise/newapproach/standardization/harmstds/reflist/construc.html>

⁴ See Health and Environmental Criteria in the Implementation of the EU Construction Products Directive (CPD), German Federal Environment Agency (UBA) texts 06.2005, p. 7 et seqq.

The stipulations for formaldehyde emissions from wooden materials are a good example of the regulations under discussion. In Germany, only so-called E1 boards are now approved for use in indoor environments. However, E2 boards may still be employed if the products they are used to create are destined to be used in industrial environments and exclusively outdoors. Although a number of European member states have similar regulations (such as Sweden and Austria, for example), this does not hold true for other member states.

In practice, the traditions of the building industry within the European member states, the very different tolerances developed in regard to the health and environmental aspects of construction materials and the lack of harmonised testing methods meant that the Essential Requirements 3 “Hygiene, health and the environment” of the CPD (ER 3) were not rendered in concrete terms for the first generation of the harmonised standards.

3 Harmonised standards according to CEN

Nevertheless, in conjunction with the European Commission (in order to ensure there are no further delays in implementing the Construction Products Directive), CEN has brought harmonised standards into force, supplemented by a standard formulation in Annex ZA. This formulation specifies that all European and national provisions on dangerous substances must additionally be taken into account. Annex ZA also makes reference to the database on dangerous substances in construction products, which is currently under construction (see below). Nonetheless, the question was left open as to how implementation should be effected. The fact is that the product specifications that have been developed to date contain virtually no guidelines on:

- which nationally regulated or prohibited dangerous substances (e.g. asbestos, PCB, carcinogenic mineral fibres) are contained in which product,
- whether these substances can be released at all during the period of use, and
- what measurement methods can be employed to check this.

This is a significant shortcoming when one considers that construction products have been tested for years on the basis of harmonised European standards and have received the CE mark without the emissions of dangerous substances to water, soil, air or indoor environments being determined on the basis of harmonised testing methods that would be comparable across Europe.

This means de facto that the assessment of the product's conformance with the technical specifications of the harmonised standards and the granting of corresponding technical approvals are carried out without

actually putting into practice the requirements of ER 3.

Products tested in this way can accordingly be labelled with the CE mark, regardless of whether or not they emit dangerous substances, and can thus be launched and freely traded within the European internal market.

4 Adaptation of CEN

This shortcoming became increasingly apparent and resulted in 2003 in the adoption of the recommendations for implementing the essential requirements according to “Hygiene, health and the environment” of the CPD (“ER 3”) for the second generation of standards. The measures defined included the two key points outlined below.

Firstly, the development of harmonised methods of testing to identify the release of dangerous substances from construction products into indoor environments, water, ground water and soil.

These testing methods must fulfil a series of requirements regarding:

- practical applicability to the greatest possible range of product types (so-called horizontal test methods),
- meaningfulness and informative value with regard to the release of a multitude of different substances into the various environmental compartments and into indoor air (e.g. appropriate release scenarios must be defined), and
- their technical suitability (e.g. validity and reproducibility).

Secondly, it became clear that the mandates of the first generation of standards also largely lacked information on which dangerous substances are released from, or contained within, the various construction products. In order to compile this information along with national provisions on dangerous substances in construction products on a Europe-wide basis, thus making it available for the standardisation efforts, the EU Commission – with the involvement of relevant stakeholders (including ECOS⁵ since 2007) – commissioned a general advisory committee (“Commission Expert Group on Dangerous Substances in the Field of Construction Products - EGDS”) to develop the EU database for regulated substances in construction products.

The aim is to make available the provisions of the various member states and the EU on dangerous substances, the corresponding limit values, information on release behaviour and the related testing methods for each of the various construction products.

⁵ ECOS - European Environmental Citizens' Organisation for Standardisation, representing the environmental organisations in the European standardisation process.

Further clarification is required on the following points:

- Are there any provisions that create barriers to trade for the pan-European market? If so, which provisions?
- Are there any construction products that do not release any dangerous substances and that could therefore be excluded from regular emissions testing (Without Testing (WT), Without Further Testing (WFT) in order to limit the cost of testing and the economic burden faced by the European construction materials industry? If so, which products?

veloped by means of reading and commenting on the documents.⁷

5 Further requirements of the tasks at hand

In summary, we are faced with an extremely complex range of tasks that must largely be performed in tandem and that cover the following aspects:

1. Development of a list of relevant dangerous substances in construction products, both inorganic and organic, that must be covered by the testing procedures.
2. Definition of the product groups that are to be subject to regular testing and definition of the construction products for which testing is not required at all, or not required on a regular basis.
3. Development of release scenarios for emissions to environmental matrices and to indoor air, taking into account the specifics of the respective installations (e.g. contact to groundwater, open or sealed installation within the space).
4. Development of harmonised methods of testing for construction products to identify the release of dangerous substances relevant to construction materials into environmental matrices and indoor air.

While work on item 1 is being carried out by the EU Commission with the support of the EGDS, CEN was commissioned in the year 2005 to process items 2 to 4 on the basis of the mandate M 366⁶ elaborated by the EGDS.

In 2006, CEN/TC 351 was established under the title "Construction products: Assessment of release of dangerous substances under the Construction Products Directive (CPD) - Emission to indoor air, soil, surface water and ground water".

ECOS is represented as a stakeholder in both bodies by Dr. Michael Riess (BIU - Office of Integrated Environmental Protection). The representatives of the environmental organisations in Europe wish to encourage ECOS to become actively involved in this issue. To accompany Dr. Riess's work on these committees, it would be extremely beneficial if additional experts with appropriate, detailed technical knowledge were to participate in achieving the greatest possible level of protection in the standards that are to be de-

⁶ See: http://ec.europa.eu/enterprise/standards_policy/mandates/index.htm

⁷ For more information on how to become involved please contact the authors (see imprint for contact information)

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 co-operation 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.

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, Gebbers/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, Gebbers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilimowsky/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 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.