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DE DROIT DE  
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INTERNATIONALES  
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# elni

## REVIEW

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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'

*Julien Bétaille*

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

*Pavel Černý*

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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*Christian Schaible*

Aberthaw Power Station: An IPPC case study

*Lesley James*

Why patents are crucial for the access of developing countries  
to Environmentally Sound Technologies

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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](http://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 14<sup>th</sup> 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 15<sup>th</sup> 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 19<sup>th</sup> 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 Pallemmaerts on 20 November 2009, the Centre for Environmental Law is organising a conference.

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

## Aberthaw Power Station: An IPPC case study

Lesley James

### 1 Introduction

*The UK's coal-fired power plants have a notorious history in the evolution of EU industrial policy, earning the UK the title of 'the Dirty Man of Europe'.*

*Prior to the introduction of the EU's Integrated Pollution Prevention and Control (IPPC) system of industrial management, the UK operated a very similar system but without the benefit of exposure to international standards. The first Large Combustion Plant (LCP) Directive was therefore a key driver in pushing up standards within the UK, closing the dirtiest plants and introducing some modest controls on SO<sub>2</sub> and NO<sub>x</sub>.*

### 2 National license system under IPC

When the coal-fired plants applied for their initial licences under the UK's predecessor Integrated Pollution Control (IPC) system in the early 1990s, UK environmentalists submitted evidence that Selective Catalytic Reduction (SCR) advanced NO<sub>x</sub> control technology should be BAT for these plants rather than the far more limited first generation low-NO<sub>x</sub> burners. However, this evidence was rejected, and attempts to force the wider application of flue gas desulphurisation (FGD) technology failed in the face of widespread claims by the operators that the existing plants had only a limited remaining life, until 2010 it was suggested.

Very soon after receiving their permits, it became clear that the plants would operate considerably beyond 2010, but it took the second LCP Directive to force the wider application of FGD. However, in the negotiations for that second Directive, the UK was instrumental in resisting a majority EU wish to set stricter NO<sub>x</sub> controls. Therefore the NO<sub>x</sub> emission limit value (ELV) of 200 mg/Nm<sup>3</sup> that would force the fitting of SCR to existing coal-fired plants was resisted until the end of 2015, and then only for plants > 500 MWth. Nevertheless, this has become an important date for UK coal-fired plants, as they all exceed this capacity threshold.

### 3 Licensing under IPPC

It is against this background that the UK power sector applied for its IPPC licences in the spring of 2006. Ironically, it was the 2015 LCP Directive NO<sub>x</sub> ELV that helped protect UK plants from having to fit SCR under IPPC. The expense of this technology could cause the UK's ageing plants to close or opt for peak load operation, and this uncertainty about their long-term future undermined any justification for an IPPC NO<sub>x</sub> BAT determination based on SCR. The BAT determinations were therefore based on Boosted Over

Fire Air and set at 500 mg/Nm<sup>3</sup>, the LCP Directive ELV for plants of this size.

### 4 The Aberthaw case

However, Aberthaw is distinctive among UK coal-fired plants in that it has a different type of boiler technology, designed to enable it to burn a particularly low volatility local coal. It is not technically possible to retrofit Boosted Over Fire Air to this type of boiler, so the regulator had to decide whether to require a less or more strict NO<sub>x</sub> ELV.

Everything in the plant's application suggested it should be stricter, and that Aberthaw should be required to fit SCR under IPPC. A key feature of this application that was of particular interest to NGOs was the fact that it clearly stated that if Aberthaw was required to fit SCR, it would stay open beyond its 2018 deadline for meeting an LCP Directive NO<sub>x</sub> ELV of 200 mg/Nm<sup>3</sup>.<sup>1</sup> This meant that it would easily have enough operating time to amortise the debt of fitting SCR, and limited remaining plant life could not be used to evade a BAT determination based on SCR, which is the basis of the LCP BREF NO<sub>x</sub> BAT standard for existing plants of this size. Further, the cost per tonne of NO<sub>x</sub> abated if Aberthaw fitted SCR was well within cost data set out in the Economic and Cross Media BREF as having been judged to be reasonable in other EU Member States.

However, despite all of this, Aberthaw managed to escape SCR, in part due to the UK's BAT assessment methodology. This methodology determines BAT as being the point on the cost curve where costs start to increase more rapidly, but this is a relative measure that takes no account of whether the costs are still reasonable in absolute terms beyond this point.

Further, the calculations presented in the application amortised the debt of fitting SCR over only 10 years, thereby overemphasising those costs. NGOs made representations to the regulator on this count, but the response was to benchmark a decision against SCR using a consultants' study produced for the regulator that argued that even if the costs were amortised over 15 years, there was no economic case for fitting SCR to any UK power plant. But this study only reached its conclusion by using a methodology that is clearly stated as being inadequate in the Economic and Cross

<sup>1</sup> The very few plants burning low volatility coal within the EU have a derogation under the LCP Directive delaying the requirement to fit SCR until 31<sup>st</sup> December 2017.

Country	Site	Capacity (MWe)	Current emissions estimate (kilotonnes)	Emissions estimate using BAT (kt)
UK	Drax	3960	58	7
Poland	Belchatow	4,340	40	2
Bulgaria	Maritsa II	1,450	39	2
Spain	Compostilla	1,312	35	2
Spain	Teruel	1,050	31	2
UK	Aberthaw	1,425	24	1
Portugal	Sines	1,256	23	2
UK	Ratcliffe	2,000	23	3
UK	West Burton	2,000	23	2
Bulgaria	Maritsa III	840	23	2
Spain	La Robla	620	23	1
UK	Cottam	2,008	22	3
Greece	Dimitrios	1,570	22	3
Spain	Velilla	-	21	-
UK	Kingsnorth	1,455	20	2
Ireland	Moneypoint	915	20	2
Greece	Kardia	1,200	20	1
UK	Ferrybridge	1,470	20	2
Romania	Turceni	2,310	20	1
UK	Longannet	2,400	19	2

Table 1: Top 20 NOx producing point sources in the EU-27 Member States<sup>2</sup>

Media BREF and, as such, should never be used for BAT assessments.<sup>3</sup>

Friends of the Earth (FoE) in the UK looked to challenge the BAT determination legally, but was unable to do so because the BREFs are not legally binding and Member States are free to choose their own BAT assessment methodologies. This meant that any remaining case would amount to simply one technical opinion up against another, and FoE's lawyers advised that the English courts do not like such cases. In addition, proceeding with such a case could prove very expensive as each side countered the other with additional technical experts. Friends of the Earth therefore regretfully decided against proceeding with any legal challenge of the Aberthaw NOx BAT determination.

## 5 Consequences of the Aberthaw case

However, having done a lot of preparatory work, FoE decided to use this issue as a case study to show that without additional legislation within a Member State, the provisions of the existing IPPC Directive are not sufficiently robust to allow a legal challenge to BAT determinations that ignore the BREFs without any

proper technical justification for doing so. This case study has been used widely within both the IPPC review process and the determination of the Parliament and Council positions on the new Industrial Emissions (IPPC) Directive.<sup>4</sup>

It is particularly ironic that this determination was made at the same time as international data was published showing the UK dominating tables of the EU-27 top point sources of NOx (see table 1).

Further, it is to the UK's shame that it does so amongst other Member States that have much lower GDPs per capita income than does the UK (see table 2).

EU-27	2005	2006	2007
Germany	115.0	114.0	113.2
Austria	128.7	127.4	128.2
Belgium	121.0	119.6	118.1
Bulgaria	35.3	36.7	38.1
Cyprus	92.5	91.8	92.7
Denmark	126.5	125.6	122.8
Slovakia	60.5	63.6	68.6
Slovenia	86.8	87.7	88.8
Spain	102.9	104.8	106.9
Estonia	62.8	68.3	72.1
Finland	115.1	116.8	116.2
France	112.3	111.8	111.3
Greece	96.1	97.2	97.9
Netherlands	131.0	130.4	130.9
Hungary	64.1	64.9	63.5
Ireland	143.6	145.3	146.3
Italy	105.1	103.2	101.4
Latvia	49.9	53.6	58.0
Lithuania	53.1	56.1	60.3
Luxembourg	264.0	278.9	276.4
Malta	77.4	76.9	77.1
Poland	51.2	52.4	53.6
Portugal	75.4	74.4	74.7
United Kingdom	119.1	117.8	116.2
Czech Republic	76.5	78.5	82.0
Romania	35.4	38.8	40.7
Sweden	123.6	124.4	126.2

Table 2: GDP per capita incomes of the EU-27 Member States<sup>5</sup>

<sup>2</sup> Source: The Swedish NGO Secretariat on Acid Rain/European Environmental Bureau.

<sup>3</sup> The study was based on a full cost benefit analysis. However, the Economic and Cross Media BREF states that this methodology should not be used for BAT assessments because of the problems of costing ecological damage – CBA studies therefore overemphasise the costs of fitting a technology. The ECM BREF states that instead, a simple cost effectiveness study should be undertaken, giving a cost/tonne of pollutant abated.

<sup>4</sup> At the time of writing, the IE(IPPC)D is part way through the legislative process, with the Council having agreed its position in response to the Parliament's First Reading position.

<sup>5</sup> Source: Eurostat and Eustat.

## Imprint

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Manuscripts should be submitted as files by email to the Editors using an IBM-compatible word processing system.

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*The views expressed in the articles are those of the authors and do not necessarily reflect those of elni.*

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### elni membership

If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the **elni Coordinating Bureau**, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

The membership fee is €52 per year for commercial users (consultants, law firms, government administration) and €21 per year for private users and libraries. The fee includes the bi-annual elni Review. Reduced membership fees will be considered on request.

Please transfer the amount to our account at **Nassauische Sparkasse** – Account no.: **146 060 611, BLZ 510 500 15**, IBAN: DE50 5105 0015 0146 0606 11; SWIFT NASSDE55XXX.

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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
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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

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- 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)
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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.

### 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. 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](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.