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elni REVIEW

‘Better Regulation’ with ‘Make it Work’: An assessment of the Make it Work’s Drafting Principles on Compliance Assurance

Lorenzo Squintani

Environmental modernization and administrative simplification in Portugal

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The Non-Regression Principle under EU and German Water Law ‘on the Ground’

Eckard Rehbinder

Evidence based legislation? Adequate protection of EU citizens against aircraft noise

Franziska Heß and Martin Führ

Statement on the Circular Economy concept

Franz Fiala and Michela Vuerich (ANEC)

Recent Developments

CONTENTS

Editorial 1
ELNI Forum: Assessing CETA's Impact on Environmental Law

'Better Regulation' with 'Make it Work':
An assessment of the Make it Work's Drafting Principles on Compliance Assurance 2
Lorenzo Squintani

Environmental modernization and administrative simplification in Portugal 10
Alexandra Aragão

The Non-Regression Principle under EU and German Water Law 'on the Ground':
A landmark decision of the European Court of Justice that leaves many questions open 18
Eckard Rehbinder

Evidence based legislation? Adequate protection of EU citizens against aircraft noise –
Discussion of current scientific knowledge on aircraft noise
with respect to EU legislation concerning noise protection 26
Franziska Heß and Martin Führ

Statement

The circular economy concept needs to be geared to a resource-saving economic model
to avoid running in circles 33
Franz Fiala and Michela Vuerich (ANEC, the European consumer voice in standardisation)

Recent developments

Environment and free trade: Environmentally sound design of TTIP 40
Miriam Dross (German Advisory Council on the Environment)

Imprint 43

Authors of this issue 43

elni Membership 44

Editorial

The aim of simplifying environmental law persists; it rekindled with the European Commission 2015 update of the Better Regulation Strategy and the related 'Regulatory Fitness and Performance programme' (REFIT) striving for "making EU law lighter, simpler and less costly". At the same time, the 'Make it Work' initiative launched by several EU Member States adds some dynamics to the debate by providing first implementation experiences.

Against this background, *elni Review 1/2016* throws a spotlight on the simplification of environmental law. *Lorenzo Squintani* analyses the first 'Make it Work' Drafting Principles on compliance assurance with particular attention given to simplification matters, but also taking into account regulatory burdens and the EU's objective of a high level of environmental protection. Subsequently, *Alexandra Aragão* reports on environmental modernization and administrative simplification experiences in Portugal and gives critical analysis of recent legal changes that took place in 2015.

Besides, *Eckard Rehbinder* assesses the landmark 1st July 2015 decision of the European Court of Justice on the Non-Regression Principle and specifically addresses remaining open questions not answered by the court. *Franziska Heß* and *Martin Führ* discuss the current body of scientific knowledge on aircraft and based on this evidence derive legal implications with respect to EU legislation aiming at adequate protection of EU citizens against aircraft noise.

Furthermore, in a *Statement* contribution *Franz Fiala* and *Michela Vuerich* articulate *ANEC's* perspective on the circular economy concept presented by the European Commission in December 2015. Finally, in the recent developments section *Miriam Dross* sums up highlights from a recent statement by the *German Advisory Council on the Environment* as regards the impacts that the planned TTIP agreement could have on German and European environmental protection standards.

We hope you enjoy reading of *elni Review 1/2016.*

Contributions for the next issue, in particular with respect to CETA's impact on environmental eaw (see the ELNI Forum announcement), are very welcome. Please send contributions to the editors by mid-September 2016.

Julian Schenten/ Martin Führ

June 2016

ELNI Forum:

8 September 2016

Brussels, Belgium

"Assessing CETA's Impact on Environmental Law"

ELNI in cooperation with the Centre d'Etude du Droit de l'Environnement (CEDRE) is organising the 2016 ELNI Forum on "Assessing CETA's impact on Environmental Law". The Forum will take place at the **Saint-Louis Universit**y in Brussels, Belgium between 2pm and 5.30pm.

The following topics, among others, will be discussed between law scholars and practitioners as well as representatives from the NGO and political/administrative scenes:

- The nature (a mixed agreement?) and validity of CETA
- The impact of CETA on existing environmental legislation and application
- The impact of CETA on future environmental legislation

Further details will soon be available on www.elni.org and on http://www.usaintlouis.be (CEDRE)

‘Better Regulation’ with ‘Make it Work’: An assessment of the Make it Work’s Drafting Principles on Compliance Assurance

Lorenzo Squintani

1 Introduction

Cutting ‘red-tape’ has been on the regulatory agenda of national politicians in the UK and other member states for decades.[1] After a period of cross-fertilization between some member states on this issue,[2] the ‘better regulation’ agenda developed as a follow-up to the 2000 Lisbon Strategy.[3] Especially after the 2002 ‘Better Law-Making’ Communication,[4] the subsequent initiatives on ‘better’ and ‘smart’ regulation have added to simplification a fairly strong emphasis on reducing administrative burdens.[5] In the context of EU law, environmental legislation is considered one of the sectors that is suitable for simplification and a reduction of administrative burdens.[6] While mainly focusing on the European Environmental acquis, the Better Regulation programme has highlighted on several occasions that the lack of simplification and the presence of burdens may actually derive from national (environmental) law.[7] It has been explicitly suggested that ‘gold-plating’ is an obstacle to both simplification of regulation and reduction of administrative burdens.[8]

The importance of the national dimension to the Better Regulation programme could explain why the early involvement of member states in the preparation of new EU legislation has been called for.[9]

Whether the Commission could have predicted how the member states answered to this call is unknown. Led by the Netherlands, the United Kingdom and Germany, a group of about 14 member states created the so-called Make it Work (MiW) Project.[10] This project is a form of international cooperation between states, but, at the same time, it aims at influencing the functioning of the European Union. Indeed, this network of states “*wants to open an ongoing debate on how the clarity, coherence and structure of EU environmental legislation can be improved, making it simpler for Member States to implement and easier for businesses and others to comply.*”[11] Whether the initiators of the MiW Project interpret the concept of ‘making it simpler for the member states’ in the same manner is unclear. From the Dutch perspective, the ongoing reform of the whole of the national environmental acquis aiming at lower regulatory burdens upon industry plays, most probably, an important role.[12] The United Kingdom could see in this initiative a way to claim back competences in this area of law, a topic dear to the British in view of the renewed Euro-

1 For the UK, see P. Hampton, Reducing Administrative Burdens: Effective Inspection and Enforcement, HM Treasury, March 2005, available at: www.hm-treasury.gov.uk/hampton (accessed April 2016). In the Netherlands a similar movement started in the 1970s, see W. Voermans, Objects trouvés, Adviscollege toetsing administrative lasten (Actal), in RegelMaat, (2001) 6, 24-228, at 225; see also R. Arendsen, Geen bericht, goed bericht, (PhD Thesis, Amsterdam 2008), 137. For a more general analysis, see R. Haythornthwaite, Better Regulation in Europe, in Weatherill (2007), Better Regulation, SOIECL, 2007, pp. 19-26 (21).

2 See L. Squintani, Gold-Plating of EU Environmental Law (PhD Thesis, Groningen 2013), Chapter 3, focusing on the United Kingdom and the Netherlands.

3 In 2010, the Lisbon Strategy was followed by European Commission, ‘Europe 2020. Strategy for smart, sustainable and inclusive growth’ COM(2010)2020 final.

4 COM (2002) 275 final following the Mandelkern Group on Better Regulation, Final Report, 2001 and White Paper on European Governance, COM(2001)428. See also the Communication on European Governance: Better Lawmaking COM(2005)97 final; the Communication on Smart Regulation, COM(2010)543 final; and the Communication on EU Regulatory Fitness, COM(2012)746 final. Recently the so-called Better Regulation Package was added to this list, see Better Regulation for better results – An EU agenda, COM(2015)215; the REFIT Platform, C(2015)3260 & C(2015)3261; the Regulatory Scrutiny Board, C(2015)3262 & C(2015)3263; the REFIT Scoreboard, SWD(2015)110; Better Regulation Guidelines, SWD(2015)111; the Proposal for an Inter-Institutional Agreement COM(2015)216; and the Better Regulation Toolbox, available at: http://ec.europa.eu/smart-regulation/guidelines/toc_tool_en.htm (accessed April 2016).

5 *E.g.* P. Hjerp and others The Impact of Better Regulation on EU Environmental Policy under the Sixth Environment Action Programme (IEEP 2010).

6 *E.g* European Commission, Better Regulation and Thematic Strategies for the Environment: European Commission Working document, COM(2005) 466 final.

7 *E.g.* European Commission, The Fitness Check of EU Freshwater Policy, SWD(2012)393.

8 *E.g.* Smart regulation in the European Union, *supra* note 4, at 5 and European Commission Working Document, Second progress report on the strategy for simplifying the regulatory environment, COM(2008)33 final, 10. In the context of reducing administrative burdens, the Commission developed the ‘European Standard Cost Model’ (EU SCM) that specifically takes ‘gold-plating’ into account in order to establish whether administrative burdens derive from national or EU legislation, European Commission, Measuring administrative costs and reducing administrative burdens in the European Union, COM(2006)691 final, 6 and 7. See also European Parliament, Resolution of 4 September 2007 on Better Regulation in the European Union, 2007/2095(INI); and Council of the European Union, Press Release 2836th Economic and Financial Affairs Council meeting, Brussels, 4 December 2007.

9 EU Regulatory Fitness, *supra* note 4.

10 The number of states participating to the project is growing rapidly. More than twenty states are participating now, although no official record is kept and participation to specific meetings fluctuates.

11 MiW Strategy Note, July 2015, available on IEEP site, http://www.ieep.eu/work-areas/environmental-governance/better-regulation/make-it-work/home/ (accessed April 2016).

12 For Dutch literature on the proposed reform, K.J. de Graaf & H. Tolsma, The Netherlands – Country Report, IUCN Academy of Environmental Law E Journal (2015)6, pp. 293-302, with further references.

sceptic attitude pervading Great Britain since the effects of the 2008 economic crisis began to be perceived in Europe. As regards Germany, it is not unreasonable to assume that it actually wants to act as a moderator between the wishes of these two member states and the wish to maintain a high level of protection of the environment. These three interests are easily recognisable in the list of principles adopted by the MiW Project in 2014.[13] Yet, only close scrutiny of the MiW Project meetings and proceedings can help in better understanding the meaning of the simplification goal.

To this extent, the MiW Project works on the basis of topics,[14] which are discussed in meetings presided by civil servants at ministerial level with expertise on the subject matter of the discussion. The meetings occur more or less regularly during each calendar year, and can be fully or partially open to stakeholders, which are at times explicitly invited to participate. The main output of these meetings is the drafting principles on making EU environmental legislation smarter, both generally and for specific policies, tools and procedures. According to the MiW Project, "*[t]he drafting principles should enjoy support from the broad range of actors, including the Commission, Member States and the European Parliament. They should feed in to evaluations of EU environmental legislation, in particular through the REFIT process, be taken into account by the Commission when it is drafting legislative proposals and be used by the Council and the Parliament when considering Commission proposals.*"[15] This passage shows the *sui generis* nature of the guiding principles. On the one hand, they serve to establish best practices which are then used to lobby the EU legislature; on the other hand, they are a form of self-regulation. Although they do not pretend to have binding force upon the members of the project and towards the EU institutions, they aim at influencing their functioning by means of self-bindingness. Eventually they could lead to an EU common frame of reference similar to that introduced by Decision 768/2008 laying down common principles and reference provisions intended to apply across sectoral legislation in the field of the internal market, in order to provide a coherent basis for revision or recasts of that legislation.[16] In July 2015, the first of these drafting principles, concerning compliance assurance,[17] was published.

Given that the Commission has acknowledged that cooperation with the member states is the best way to achieve the Better Regulation goals,[18] explicitly mentioning the MiW Project initiative in this context, and that DG Environment participated in all expert meetings and project conferences,[19] this paper will analyse the first MiW Drafting Principles on Compliance Assurance from the perspective of simplification, regulatory burdens and a high level of environmental protection. Given the use of a legal approach, the main focus is on simplification. Simplification is looked at from the perspective of whether the drafting principles, if implemented, can lead to clarity as regards the obligations upon states and individuals, *i.e.* legal certainty. Regulatory burdens and the effectiveness of EU environmental law are considered only to the extent that manifest breaches of the EU proportionality principle or a (EU) environmental standard can be recognised without the need of further economic or sociologic studies. This contribution, is mainly based on desk study, using a hermeneutic approach to the law, a literature review and a case law analysis, which are integrated by my personal experience as participant to the MiW Project meeting held in February 2005 in London, and my collaboration with the Dutch Ministry for Infrastructure and Environment in the period 2005/2006 on issues related to this project.[20]

Given the limited space available for this article, only a selection of drafting principles will be discussed in Section 3. In order to provide a context to this selection, Section 2 will provide an overall description of the MiW Guiding Principles of Compliance Assurance.

13 MiW, Towards a roadmap for future EU environmental regulation. Background paper for Expert Meeting, March 2014. These principles are: a) Pursuing a high level of coherence in objectives and approach across the acquis, b) Ensuring the acquis delivers Treaty objectives for the environment and single market, c) Ensuring the subsidiarity principle is addressed, d) Removal of any unnecessary requirements in the acquis, e) Maximising win-wins for the environment and society, and e) Allowing, as far as possible, member states to implement the acquis in the accordance with their national administrative context.

14 These topics are: 1) Environmental objectives and standards; 2) Plans and programs; 3) Environmental (impact) assessments; 4) Permit, licensing and authorisation requirements; 5) Inspection and enforcement; 7) Monitoring and Reporting; and 8) Access to justice and information and public consultation/participation, see Jan Teekens's presentation for the Vereniging van Milieurecht hemamiddag: The EU Agenda for Environmental Law hold in Den Hagues on 25 June 2015, available at http://www.milieurecht.nl/ (accessed April 2016).

15 Background paper, *supra* note 13.

16 Decision No 768/2008/EC of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, [2008] OJ L218/82.

17 Compliance assurance encompasses compliance promotion (helping the regulated community understand its obligations), compliance monitoring (including inspections, surveillance, etc.) and enforcement (actions taken when non-compliant activities are identified).

18 Better regulation for better results, *supra* note 4.

19 This statement is based on the minutes of the various MiW meetings as published on the IEEP webpage on the MiW Project.

20 I am thankful to the Dutch Ministry for having provided me with documents relating to the MiW Project's proceedings as regards compliance assurance which are not yet available to the public.

2 The MiW Guiding Principles on Compliance Assurance

The MiW Guiding Principles of Compliance Assurance (GPCA) is a 17-page long document, divided in three parts. In the first part, called 'Introduction', the GPCA provides the reader with a brief overview of the MiW Project initiative, goals and proceedings. As regards this latter aspect, the GPCA was based on an initial analysis of the actual acquis performed by the Institute for European Environmental Policy (IEEP).[21] Further, the GPCA built upon the IMPEL's experience on this issue.[22] The GPCA was then drafted following an expert meeting held in Lisbon in October 2014, in which 15 member states and the European Commission were present,[23] and further discussed in a follow-up meeting in Brussels that same year.

The introduction also explains the rationale beyond the study, namely the great diversity in the manner in which various EU environmental acts regulate compliance assurance. The GPCA synthetises this aspect as follows:

"*Some of the acquis has relatively detailed provisions [on compliance assurance, LS] (e.g. Seveso III Directive, WEEE Directive, Waste Shipment Regulation), some has elaborated detailed supporting guidance (e.g. REACH Regulation), some has detailed supporting Recommendations (e.g. RMCEI and CITES Recommendation on enforcement). Some other areas have almost no specified compliance assurance requirements (e.g. water law). Further, even where there are provisions these are not necessarily on the same issues. Examples of details on compliance assurance requirements in the current acquis include definitions of 'inspection' (e.g. IED, Seveso, CITES), requirements for inspection planning (e.g. IED, Seveso, CCS Directive, the proposed WSR revision), minimum frequencies for inspection (e.g. IED, CCS Directive) and promotion of risk-based approaches (e.g. the ODS Regulation, IED, Seveso).*"[24]

According to the MiW, such diversity leads to problems as regards their application during compliance assurance activities. However, no concrete example of problems encountered by enforcement agencies is provided to substantiate this statement. Similarly, there is no quantification of the regulatory burdens caused by the alleged incoherence. In light of the fact that under the Treaties, environmental protection remains mainly a member states' responsibility,[25] empirical evidence would have provided a welcome counterbalance for a theoretical assumption that somehow departs from the main structure embedded in the Treaties. Indeed, the assumption that diversity leads to shortcomings implies that uniformity should be pursued. Yet, uniformity of environmental standards, including procedural standards, was not, and is still not, envisaged by the Treaties.[26] Besides, diversity does not mean incoherence, given that objective justifications could exist. For example, the statement concerning the lack of compliance assurance requirements under water law falls short in terms of acknowledging that this sector of EU environmental law, similarly to that of air quality law, is mainly based on setting quality standards to be achieved by the member states in the first instance. In this field of environmental law, compliance assurance provisions make most sense at national level once the member states have decided how environmental quality standards should be achieved and obligations have been established upon natural and legal persons. The monitoring requirements addressed to the member states are the most sensible provisions from the perspective of ensuring compliance with the directives in these two environmental sectors.[27]

In arguing this, I do not meant to imply that legal certainty, seen as coherence as regards compliance assurance requirements under the EU environmental acquis, cannot be improved at all. The lack of coherence in the EU environmental acquis is a known fact.[28] A quest to strengthen compliance assurance provisions is shared by various EU institutions.[29] My

21 The GPCA refers on this regard to a IEEP publication called 'Discussion Note on Provisions Regulating Compliance Assurance (Inspections) by MS in EU Environmental Directives and Regulations for the MiW Expert Meeting on 9 and 10 October in Lisbon'. The hyperlink in the GPCA does not longer work properly. I am thankful to the Dutch Ministry for Infrastructure and Environment for providing me with this document.

22 The GPCA refers in particular to the IMPEL's 'Doing The Right Things II' guidance document from 2008, see http://www.fwr.org/WQreg/Appendices/2007-11-dtrt2-step-by-step-guidance-book-FINAL-REPORT.pdf (accessed April 2016).

23 Belgium, Denmark, Finland, Germany, Hungary, Ireland, Latvia, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain, Switzerland, and the United Kingdom.

24 GPCA, 5.

25 L. Krämer, EC Environmental Law, 7th Edition (London: Sweet & Maxwell, 2011), p. 440.

26 L. Krämer, The European Communities and environmental policy: the system of legislation, in P.C. Gilhuis and others (eds), Milieu als wetgevingsvraagstuk, (Zwolle: W.E.J. Tjeenk Willink 1991), pp. 79-88.

27 On this topic see, B.A. Beijen, H.F.M.W. van Rijswick and H. Tegner Anker, The Importance of Monitoring for the Effectiveness of Environmental Directives. A Comparison of Monitoring Obligations in European Environmental Directives, 2014 (10)2 Utrecht Law Review, pp. 126-135.

28 *E.g.* B.A. Beijen, The Implementation of European Environmental Directives: Are Problems Caused by the Quality of the Directives?, 2011 (20)4 European Energy and Environmental Law Review, pp. 150–163.

29 See Committee of the Regions, DRAFT OPINION – Commission for the Environment, Climate Change and Energy EU environment law: improving reporting and compliance, ENVE-VI/008, 2016, in particular recommendations 40, 45 and 46. See also European Commission, General Union environment action programme to 2020 Living well, within the limits of our planet (7th Environmental Action Programme), 56 and 57 and Communication from the Commission to the European Parliament, the Council, the European

point is that the room for improving legal certainty has to be analysed on a case-by-case basis. To this extent, in its second part, the GPCA organises the various EU law provisions on compliance assurance into four groups: 1) provisions on conducing compliance assurance, 2) provisions on compliance assurance activities, 3) provisions on member states authorities responsible for compliance assurance, and 4) provisions on the organisation of compliance assurance. To these categories of provisions, the GPCA adds a general definition of 'compliance assurance',[30] covering 'compliance promotion',[31] compliance monitoring'[32] and enforcement'.[33] Further it specifies that compliance assurance provisions shall aim at ensuring the effectiveness of EU environmental law and that such provisions should be limited to cases in which EU environmental directives and regulations impose direct obligations upon natural and legal persons.[34] No general discussion on compliance theories is provided.[35]

Finally, the third part of the GPCA focuses on the approaches to establish compliance assurance provisions in the EU environmental acquis. Two approaches are presented. Firstly, sectoral environmental measures could be amended to incorporate the guiding principles formulated under the GPCA. To this extent, the GPCA states that compliance assurance provisions in the EU environmental acquis *"must allow for those actions to be determined within the wider context of compliance assurance priorities for environmental law to deliver an effective and coherent cross sectoral approach."*[36] Further, it clarifies that the GPCA's guiding principles are only a minimum set of provisions. Additional specific provisions on compliance assurance can be justified in sectoral environmental law, to deal with issue-specific concerns.[37] The second approach is that of issuing a horizontal directive on compliance assurance. This last option is, at the moment of writing, under scrutiny by the Commission.[38] It goes without saying that a horizontal directive has a greater chance, at least from an efficiency perspective, of enhancing coherence as regards compliance assurance provisions in the EU environmental acquis, than the an ad-hoc recast of all EU environmental measures including compliance assurance provisions. Tailor-made provisions can then still be inserted into sectoral legislation, as recognised by the GPCA as well. The *lex specialis derogat legi generali* principle would serve to coordinate the provisions in the horizontal act with those in the specific acts.

3 The Make it Work's Drafting Principles on Compliance Assurance: Capita Selecta

As stated under section 2, specific elements of provisions on compliance assurance are categorised in four groups. Given the limited space at my disposal, I will only focus on the first two categories of measures, *i.e.* 1) provisions on conducing compliance assurance, and 2) provisions on compliance assurance activities. Guiding principles dealt with under the other two categories, *i.e.* provisions on member states authorities responsible for compliance assurance and provisions on the organisation of compliance assurance, will be integrated in the analysis where necessary.

3.1 Aspects conducing compliance assurance

When focusing on the specific compliance assurance provisions established under the GPCA in more detail as regards *conducing compliance assurance*, it becomes evident that they turn around the principle of 'risk-based compliance assurance'.[39] This principle refers to an approach by which competent authorities set priorities regarding the compliance assurance activities that they will undertake.[40] Basically, competent authorities should develop compliance assurance policy plans and programmes. This approach is not new to EU environmental law, as it is already envis-

Economic and Social Committee and the Committee of the Regions on implementing European Community Environmental Law, COM(2008)773final.

30 *I.e.* activities aimed at ensuring that natural and legal persons comply with their obligations under law. Compliance assurance includes compliance promotion, compliance monitoring and enforcement.

31 *I.e.* activities aimed at supporting natural and legal persons to comply with obligations under law by enhancing their awareness, knowledge and understanding of these obligations.

32 *I.e.* activities to determine whether natural and legal persons comply with their obligations under law. Such activities may include [surveillance, inspections, investigations and verifying self-monitoring].

33 *I.e.* action by a competent authority under civil, administrative or criminal law in response to detected or notified non-compliances with obligations under law.

34 Respectively, Principle 1 and Principle 3.

35 On compliance theories, D. Zaelke, D. Kaniaru, and E. Kružíková (eds.), Making Law Work, (Volumes I and II) – Environmental Compliance & Sustainable Development, Chapter 2 – Compliance Theories, International Network for Environmental Compliance and Enforcement (INECE), 2005 pp. 53-62, available at INECE website, http://inece.org/resource/making-law-work/ (last accessed April 2016). More broadly on compliance assurance OECD, Ensuring Environmental Compliance – TRENDS AND GOOD PRACTICES, May 2009, available at OECD Library, http://www.oecd-ilibrary.org/environment/ensuring-environmental-compliance_9789264059597-en (Accessed April 2016).

36 GPCA, 17.

37 *Id.*

38 A summary of a Commission's draft proposal on a horizontal directive on environmental inspections and other compliance assurance measures is available in Discussion Note, *supra* note 21. For a reference to such an option, Committee of the Regions, *supra* note 28, recommendation 46.

39 GPCA, Principle 5.

40 On this approach, see M.M. Stahl, Doing What's Important: Setting Priorities for Environmental Compliance and Enforcment Programs, in L. Paddock and others (eds.), Compliance and Enforcement in Environmental Law – Toward More Effective Implementation, IUCN Academy of Environmental Law Series (Cheltenham: Edward Elgar 2011), pp. 159-166; M.K. Sparrow, The Regulation Craft: Controlling Risk, Solving Problems, Managing Compliance, (Washington D.C.: The Brookings Institution Press 2000).

aged by, most notably,[41] the Industrial Emissions Directive (IED)[42] and the Seveso III Directive.[43] By setting priorities, competent authorities can streamline compliance assurance activities and, if properly implemented, enhance the cost-effectiveness of such activities.[44] If applied to the whole of the EU environmental acquis that requires compliance assurance, it is difficult to doubt that coherence and cost-effectiveness of the EU compliance assurance requirements will be enhanced.

Still, the effectiveness of such a principle would have benefited from an in-depth discussion on how risk-based compliance assurance should be implemented in practice. The GPCA only addresses this in part. Firstly, criteria are needed in order to streamline the data-gathering phase.[45] Secondly, criteria to take into account new insights and (unforeseen) developments, *i.e.* adaptiveness, should be regulated.[46] Finally, a risk-based approach should allow room for public participation and judicial protection.[47] These criteria are taken into account under the GPCA, although the latter one only marginally.

Firstly, risk-based compliance assurance builds upon information-based compliance assurance. Indeed, as underlined in the GPCA, the starting point for an effective compliance assurance programme is an understanding of the compliance problem. A complete and adequate data gathering phase is thus essential for a proper functioning of a risk-based compliance assurance approach and, in turn, for the effectiveness of EU environmental law. The IED recognises the relevance of this and indeed establishes that a risk-based approach is subject to a) the record of compliance with permit conditions, and b) the participation of the operator in the Union eco-management and audit scheme (EMAS).[48] The GPCA seems to go a step further. Alongside these two criteria, it suggests that the EU compliance assurance requirements should also indicated criteria on how to take the gathered information into account and for how long such information shall be maintained. These two requirements would be a welcome addition that will promote legal certainty, and, if properly implemented, the effectiveness of compliance assurance actions. Although in some cases the latter requirement could generate extra administrative burdens, for example by requiring a database to be maintained for a longer period than is now common practice, this potential negative aspect does not seem to weigh heavier than the positive features envisaged by a clear obligation of information maintenance.

The effectiveness of the guiding principle on information-based compliance assurance would have been further strengthened if the way in which information can be collected was not fully left to the member states to decide. Under the GPCA, member states can decide to use random checks, investigations, self-monitoring reports or other means to collect data. Allowing such a broad degree of discretion without setting boundaries could produce a situation in which information gathered in various member states cannot be compared, due to a substantive difference in their quantity and quality. More generally, reliability issues may arise. The GPCA's reference to the appropriateness criterion is too vague to ensure legal certainty.[49] An alternative could be to establish a benchmark at EU level, while leaving the member states free to develop alternative means to acquire information provided that they ensure that the quantity and quality of the data collected is, at least, as full and reliable as under the benchmark methodology.

Secondly, adaptability is regulated under Drafting Principle No. 15, which states:

"EU law can require competent authorities to have a formal incident procedure and complaint procedure as well as identify specific incidents that should be investigated (e.g. major accidents, incidents with risk to health, etc.). However, it should not require every complaint or incident to be investigated – authorities should be able to sift out trivial issues and abuse."

According to the GPCA, it is important that compliance assurance plans include rules on how to take account of issues that are unpredictable and cannot be planned. This is in line with the practice in force today

41 The Regulation on substances that deplete the ozone is based on risk-based compliance assurance as well, Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer, OJ [2009] L286/1, Article 28(1).

42 Directive 2010/75/EU on industrial emissions, OJ [2010] L334/17, Article 23(4).

43 Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, OJ [2012] L197/1, Article 20(4).

44 The Summary of the Commission's draft proposal on a horizontal directive on environmental inspections and other compliance assurance measures clearly states that a 'general prioritization strategy' shall be produced setting out the priorities of compliance assurance activities.

45 Stahl, *supra* note 40, 161 and 162.

46 As regards the relevance of adaptiveness in the context of planning, not specifically related to compliance assurance planning, see C. Folke and others, Adaptive governance of social-ecological systems, (2005)30 Annu. Rev. Environ. Resour., pp. 441-473. See also L. Squintani and H.F.M.W.van Rijswick van Rijswick, Improving legal certainty and adaptability in the programmatic approach, forthcoming (expected in Journal of Environmental Law 2016, issue 3).

47 As regards participation, Stahl, *supra* note 40, 161.

48 Article 23(4) IED, which also establishes that a risk-based approach shall be based on the potential and actual impacts of the installation concerned to human health and the environment.

49 GPCA, 9.

under the Seveso III Directive,[50] the CCS Directive[51] and the IED.[52] Yet it is left to the member states to regulate adaptability.[53] Similarly to what has been stated above in the context of the information-based approach, the formulation of EU criteria as regards adaptability would reduce the risk of a too great disparity among member states as regards this issue, hence, strengthening effectiveness and legal certainty in the EU compliance assurance acquis.

Thirdly, public participation and judicial protection are basically lacking under the GPCA. The promotion of an information-based approach and a risk-based approach, as well as of a mix of compliance assurance activities,[54] all point towards the adoption of plans and programmes on compliance assurance. This is understandable, given the importance attributed to plans and programmes under the Recommendation on Minimum Criteria for Environmental Inspection (RMCEI).[55] However, it should be noted that under the Aarhus Convention, plans and programmes relating to the environment must be open to public participation.[56] Given that there is no doubt that plans and programmes on compliance assurance must be considered as plans and programmes relating to the environment, a public participation procedure must be established in the context of the drawing of such plans and programmes, in compliance with three requirements:[57]

1) The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making;
2) Each Party shall provide for early public participation, when all options are open and effective public participation can take place; and
3) Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

Furthermore, plans and programmes on compliance assurance must be open to judicial review as required by Article 9(3), or in certain cases Article 9(2), of the Aarhus Convention.[58] In conclusion, the mere reference to the access to information requirements under Directive 2003/35/EC made by Principle 8 of the GPCA is not enough. As such, the GPCA does not ensure the fulfilment of the Aarhus Convention requirements, or hence an effective implementation of environmental standards.[59]

3.2 Compliance assurance activities

Compliance activities are the specific actions related to compliance promotion, compliance monitoring and enforcement. In line with Principle 7 of the GPCA, on the mix of compliance assurance activities, Principle 9 of the GPCA states that specific requirements related to compliance monitoring such as minimum frequencies, number of inspections or obligations to perform random inspections should only be included in EU environmental law when they are clearly necessary to manage specific relevant risks. This should serve the purpose of preventing the diversion of resources to less effective compliance assurance activities.[60] According to the GPCA, deviation from this principle should only be possible on the basis of 'compelling substantial reasons' such as the case of complex industrial installations with high safety risks.[61]

Requirements on minimum frequencies, number of inspections and whether inspections should be on site or otherwise can be read in several EU environmental measures prescribing compliance assurance.[62] It is

50 Articles 16 and 20(6) Seveso III Directive.
51 Article 15(4) CCS Directive.
52 Article 23(5) IED.
53 GPCA, 15.
54 CPCA, Principle 7 stating that provisions on compliance assurance may require competent authorities to apply a mix of compliance promotion, compliance monitoring and enforcement activities, which is appropriate to the specific type(s) of obligation(s) and the specific characteristics of the regulated community or activities they undertake.
55 Recommendation of the European Parliament and of the Council providing for minimum criteria for environmental inspections in the Member States, OJ [2001] L118/41.
56 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25 July 1998, Article 7.
57 Article 7 in conjunction with 6(3, 4 and 8) of the Aarhus Convention. If compliance assurance plans are part of an environmental plan, there is no need for an ad hoc participation procedure.
58 Article 9(2) of the Convention only applies to decisions subject to Article 6 of the Convention, concerning specific decisions. Yet, the case Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, paras. 23 and 28-38 shows that there are cases in which Article 9(2) Aarhus Convention can apply to plan programmes when they indicate the specific activity (eg. watch-making factory, construction of a diplomatic complex). If Article 9(2) does not apply, Article 9(3) applies. Cf. J. Jendrośka, Public Participation in Environmental Decision-Making, in M. Pallamaerts (ed), The Aarhus Convention at Ten, (Groningen: Europa Law Publishing 2011), pp. 91-148 (96).
59 The RMCEI and the EU environmental measures prescribing compliance assurance plans and programmes are also silent on this issue and should be amended accordingly. The Commission's proposal on a directive on compliance assurance explicitly states: "*The draft directive requires that the public is given the opportunity to participate in the general prioritization strategy and includes detail on how this is to be ensures.*" Yet is also states: "*Note this is not the inspection plans/programmes.*" In light of these two statements, it is unclear what the eventually adopted Commission proposal will regulate as regards public participation. No reference to access to justice are present in the summary. For the Summary of the Commission Draft horizontal directive on environmental inspection and other compliance assurance measures, see Annex 1 to the Discussion Note, *supra* note 21.
60 GCPA, 12.
61 *Id.*
62 *E.g.* Article 15(3) CCS Directive; Article 23(4) IED; Article 20(4) of the Seveso III Directive; and Article 5(1 and 2) of Directive 2009/126/EC on stage II petrol vapour recovery refuelling of motor vehicles at service stations and varnishes and vehicles refinishing products and amending Directive 1999/13/EC, OJ [2009] L285/36.

difficult to see how such requirements are not justified in light of compelling substantial reasons. IED installations and Seveso installations are complex installations. The concept of 'high safety risk', not further specified in the GPCA, is employed in, for example, the IED Directive and the Seveso III Directive, to justify a derogation from the requirements on the minimum frequency of inspections. It is therefore difficult to understand what the added value of Principle 9 of the GPCA is in comparison with existing practice. This principle seems to have more of a symbolic value than a practical meaning.

A partial lack of clarity can also be encountered as regards Principle 10 of the GPCA on specific requirements on follow-up compliance assurance activities. According to this principle:

"It is appropriate for EU law to include some general requirements regarding the follow-up of compliance monitoring, including preparation of reports and recording of activity. However, the details (including the timing of specific activities) must allow competent authorities to integrate compliance monitoring activity across several parts of the acquis."

Such a principle should be operationalised by means of a clause inserted in EU compliance assurance requirements stating that non-compliance reports may be integrated with reports of compliance monitoring for other environmental law obligations which may have been undertaken at the same time as that for this directive. At first glance, this principle seems logical and reasonable. Duplications of reports seems an unnecessary burden. Yet, it is not clear what is meant by the concept of 'integration'.[63] If integration means in this context simply procedural and organisational integration, Principle 10 of the GPCA can hardly be criticised.[64] Yet, if integration is meant to be substantive, this principle could carry with it a lowering of environmental standards. Substantive integration could take place by balancing the negative results of the non-compliance report with the positive results from the other environmental activities scrutinised as regards a particular polluter. The reference to the timing of specific activities, which would include the frequency of the inspections, links this principle back to Principle 9 of the GPCA, in which the MiW Project clearly did not show a favourable attitude as regards binding requirements on the timing of inspections. It could therefore be that, if implemented as indicated above, this principle will lead to the postponement of a follow-up inspection to make it fall on the same date as a routine inspection at the hand of an EU environmental requirement different from the one for which non-compliance had been established, possibly allowing a trespassing of the deadline for the follow-up inspection. This would be in clear divergence from the actual EU environmental acquis and would hardly be possible to consider this an improvement of the effectiveness of EU environmental law.

Given that the MiW Project clearly states that environmental standards should not be lowered,[65] the concept of integration under this principle should be limited to procedural and, if possible, organisational integration. Substantive integration should be allowed only if requirements on follow-up compliance assurance activities are not relaxed. To avoid confusion, the GPCA should be clarified, accordingly.

4 Conclusions

This first MiW guiding principles, the GPCA, is a welcome addition in the decision-making process of EU environmental legislation. The topic of the GPCA fits perfectly the agenda of DG Environment. This was, most probably, according to design. It builds upon existing practice and it tends to generalise trends explicitly recognisable under some of the existing EU environmental directives and regulations that regulate compliance assurance. It can therefore serve to streamline the EU environmental acquis on this issue, contributing to enhancing legal certainty, the reduction of administrative burdens and the effectiveness of EU environmental law. Yet, there are certain elements that could be improved in order to promote legal certainty and, in some cases, the effectiveness of EU environmental law.

Legal certainty could be improved by refraining to use national standards as a default rule to regulate the methodology to gather data during the information-based approach (Principle 4). A similar finding was reached as regards the regulation of the methodology to perform risk-based compliance assurance (Principle 5) and of the mix of compliance assurance activities (Principle 6). When taken together these three principles, as shaped today under the GCPA, can lead to a situation in which the reliability of national compliance assurance plans and programmes cannot be assured and a comparison of the national plans and pro-

63 On the concept of integration see in particular E. Bohne, The Quest for Environmental Regulatory Integration in the European Union. Integrated Pollution Prevention and Control, Environmental Impact Assessment and Major Accident Prevention, (Alphen aan den Rijn: Kluwer Law International 2006).

64 With procedural integration I refer here to the inclusion of the follow-up compliance assurance activities in a broader report. With organization integration I refer here to the possibility that the competent authority performing the follow-up compliance activities can also carry out compliance assurance activities based on other environmental requirements than those justifying the follow-up compliance assurance activities.

65 Strategy Note, *supra* note 11.

grammes from different member states would be meaningless.

Besides by clarifying the meaning of the concept of integration under Principle 10 of the GPCA, the effectiveness of EU environmental law can be improved by regulating public participation and access to justice. Despite clearly showing a preference for compliance assurance plans and programmes, the GCPA is completely silent on these last two issues. This is understandable considering that the GCPA builds on the compliance assurance requirements existing today under the EU environmental acquis. EU environmental law can also be criticised for not being fully in line with the Aarhus Convention on these two points. The difficulties of the European Union as regards the access to justice pillar of the Convention are well known and do not need to be addressed here. Indeed, the EU's difficulties with this issue can by no means justify the lack of consideration of the public participation and access to justice rights under the GPCA. Especially considering the potential self-regulatory force of the GPCA, the MiW Project should address public participation and judicial protection as regards the draft of compliance assurance plans and programmes explicitly, and not under a separate theme yet to be discussed.

Rather than a lack of political will, such a lacuna could be the consequence of the topic-based approach followed by the MiW Project. None of the documents in my possession showed that the GCPA was drafted by taking into consideration general EU environmental law. The IEEP 'Discussion Note' provided a very useful categorisation of all EU compliance assurance requirements. The specificity of the focus, however, has isolated the discussion on compliance assurance from general environmental law. To redress this issue, the MiW Project should develop an overarching vision on environmental law in the European Union, considering both national and EU environmental law. Such an overarching view would promote achievement of the MiW Project's goals, broadly speaking.

Academia and other stakeholders can provide a useful input to the process of creating such a view. In fact, the success of the MiW initiative depends on the ability of the MiW Project to master the complexity of environmental law. This titanic work can be better pursued by a community which is broader than one made up of regulators alone. The opening of parts of the proceedings of the MiW Project to stakeholders as regards specific issues is a first step in the creation of such a broader community. Yet, more needs to be done to develop an overarching view.

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sofia

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.
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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. 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

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. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

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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 researches, 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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