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CONTENTS

Editorial

Brexit is definitively making the headlines in Europe and so too shall it be in the current issue of the *elni Review*.

How the United Kingdom will one day really be able to leave the EU is still very uncertain. But whatever the proposed scenarios, one cannot avoid the fact that such a rupture, necessarily, will also concern environmental law and policy. An impact that has not escaped many key actors, including Commissioner Barnier and the House of Lords (report on *Brexit: Environment and Climate Change, February 2017*). It will have an impact both in the UK but also possibly in the EU, as will be developed in the current issue.

The reader certainly knows that UK Environmental Law, like the law of every Member State, is very deeply europeanised. Its ambition, as brilliantly demonstrated in the recent case law on air pollution (*CJEU, Client Earth, 2014*), is decisively bound to the control of the CJEU. But the UK wants to quit the realm of the CJEU, according to the Great Repeal Bill White Paper, while 'keeping' the current acquis. What does this possibly mean, as far as environmental protection is concerned?

As to the other side of the coin, the rupture will also possibly affect, somehow, environmental law and policy in the EU. In the rich encounter of various conceptual approaches, the UK has indeed brought a wave of challenging new ideas, in the 'big bowl' in which EU law is being processed. And this not least because the UK is a country abiding by a strong common law tradition.

The two first contributions of this issue, one on the 'UK Environmental Law Post Brexit' and the other on 'The Implications of Brexit for Future EU Environmental Law and Policy', are the written tracks of presentations that were given by *Prof. Veerle Heyvaert* (LSE, London) and *Céline Charveriat* (IEEP, Brussels), on 11 May 2017 in Brussels, at the occasion of a new elni forum. That forum on Brexit and Environmental Law took place at the Université Saint-Louis Bruxelles, at the joint invitation of CEDRE and ELNI, under the chair of Prof. Delphine Misonne and Prof. Gerhard Roller.

In their contribution on UK Environmental Law Post Brexit, *Veerle Heyvaert* and *Aleksandra Cavoski* go beyond assumptions and investigate what a gradual repatriation of EU law might mean, for specific areas (climate, ETS, biodiversity, air and water), for public authorities but also for civil society – where will be the guarantees civil society shall still need in order to challenge domestic policies? The authors also envisage how cooperation between the UK and the EU could actually proceed in the future, on environmental law issues. Because there is actually no escape, or rather "*an inescapable physical reality*": environmental problems will continue to require concerted action.

In their paper on 'The Implications of Brexit for Future EU Environmental Law and Policy', *Céline Charveriat* and *Andrew Farmer* present their thoughts on the possible consequences of Brexit for EU environmental policy in a, by necessity, quite speculative context. But they actually demonstrate that the first effects of Brexit on EU policy are already at work. There is a "*general atmosphere of environmental policy making*", that should not be underestimated. The context might further lead to a 'distraction' from important issues and even impede crucial discussions, such as on the possible renewed interest in an EU carbon tax.

Thomas Ormond in his programmatically entitled article 'The EU as guarantor of environmental protection in Germany' adds another perspective as to how the EU shapes Member State environmental law and policy, highlighting inter alia "*innovation from Brussels*" such as EIA, access to environmental information and climate protection, as well as the systematic and risk-based approach as hallmark of EU legislation.

Next, *Ludwig Krämer* comments on ECJ C-442/14 and C-673/13P (see already the case report in *elni Review* 2016/2) which concern the diverging interests of disclosing environmental information on the one hand, and protecting confidential business information on the other – two judgments which according to *Krämer* are likely to have a far-reaching influence on the disclosure of product information.

Finally, *Fatima Arib* in 'Promoting the Green Economy in Morocco' analyses the main contextual features, including socio-economic, environmental as well as regulatory aspects and identifies progress made by Morocco and the challenges lying ahead.

We hope you enjoy reading.

The editors welcome submissions of contributions addressing current national and international environmental law issues (e.g. transboundary EIA) for *elni Review* 2017/2 by 15 September 2017.

Delphine Misonne/ Julian Schenten
June 2017

The EU as guarantor of environmental protection in Germany

Thomas Ormond

1 Introduction

In recent years it has become fashionable again among politicians and publicists across Europe to practice 'Brussels bashing' and make the EU responsible for many ills of globalisation and modern society.* In Germany, the well-known ex-leftist writer *Hans Magnus Enzensberger*, in a book of 2011, coined the term "*Brussels, the soft monster*" and complained about the "*incapacitation of Europe*".[1] His criticisms of the "*dictatorship*" of Commission bureaucrats who lacked democratic legitimacy and ignored the cultural diversities of the Continent set the tone for various political attacks and proposals to divest the Union again, under the catchword "*subsidiarity principle*", of some of its acquired powers. This applies in particular to the field of environmental law. *Horst Seehofer*, for instance, the conservative head of government of the German state of Bavaria, took the English Brexit vote as an opportunity to criticize the EU for not focusing on the "*big*" issues and problems and busying itself "*for example with fertilizer ordinances*" instead of international crime, youth unemployment or the crisis of agriculture.[2] It might be tempting to discuss in more detail the German Fertilizer Ordinance, which permitted (and even after its recent revision will continue to permit) the massive overfertilization of agricultural land and thus also the nitrate pollution of groundwater in Germany; it would shed an embarrassing light on the dominance of the farming lobby in that country, which can only be limited by vigorous EU intervention.[3] However, in this context it will suffice to note that the politician's choice of international crime prevention as primary field of action for the EU shows the lack of knowledge about the distribution of powers in Europe that can sometimes even be found in top political positions: In the field of internal security and crime control the competences for legislation and implementation lie almost exclusively with the Member States – and are stubbornly defended by them.

2 The legal framework of environmental protection in Europe

The European Union has been active in the field of environmental protection since the 1970s, i.e. since a time when there was no Union yet but a European Economic Community (EEC), a European Coal and Steel Community and a European Atomic Energy Community (Euratom). The EEC Treaty of 1957 did not know the term 'environmental protection' and for the next decades did not contain any explicit legislative competence for this subject matter. But because already at this time the effects of economic development and the movement of goods on the environment were evident, like vice versa the economic relevance of environmental regulations, the EEC grew to claim a competence for such legislation on the basis of general clauses on legal harmonisation and the implementation of the Common Market. Only with the Single European Act of 1986 were the Community's responsibilities extended to include environmental policy. Since the Lisbon Treaty of 2007 one can find numerous environmental objectives, principles and competence rules in the fundamental norms of the EU. Notably, the sustainable development of Europe, based on a high level of protection and improvement of the quality of the environment, is enshrined as one of the principal tasks of the EU in Article 3(3) of the Treaty on European Union (TEU), and Article 4(2)(e) of the Treaty on the Functioning of the European Union (TFEU) provides for 'environment' to be one of the shared competence areas of Union and Member States. Art. 11 TFEU, as a horizontal clause, lays down that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view of promoting sustainable development. Articles 191 and 192 TFEU specify in detail the environmental objectives and instruments of the Union and the applicable legislative procedure. Art. 191(2) TFEU also spells out the guiding principles of EU environmental policy and

* The German original of this article appeared under the title '*Die EU als Garantin des Umweltschutzes in Deutschland*" in issues no. 198 (Sept./Oct. 2016) and 199 (Nov./Dec. 2016) of the periodical "*Recht der Natur – Schnellbrief*", at pp. 50-54, 62-66. The article was translated by the author and its text slightly modified and updated.

1 H.M. Enzensberger, *Sanftes Monster Brüssel oder Die Entmündigung Europas* (Berlin: Edition Suhrkamp, 2011).

2 Quoted from the online edition of the CSU party organ "Bayernkurier" of 27.6.2016, https://www.bayernkurier.de/inland/14854-fuer-europa-aber-fuer-ein-besseres-europa

3 The EU Commission started infringement proceedings against Germany in April 2016 for failing to implement the Nitrates Directive, see http://europa.eu/rapid/press-release_IP-16-1453_en.htm. The final draft of the new German Fertilizer Ordinance *(Düngeverordnung)* has not been published yet but according to available reports the requirements of water suppliers and environmental authorities were not met; cf. e.g. press statement of the Environment Minister of the state Baden-Württemberg of 16.3.2017, http://um.baden-wuerttemberg.de/de/service/presse/pressemitteilung/pid/duengeverordnung-im-bundesrat-entschliessungsantrag-aus-baden-wuerttemberg-verabschiedet/.

law: the aim of a high level of protection (taking into account the diversity of situations in the various regions of the Union), the precautionary principle and the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

The main instrument of EU environmental policy is the directive. In the European context it means a framework law, as proposed by the EU Commission and adopted by the Council and the European Parliament, which the Member States have to transpose within certain deadlines into their national law, and specify and implement by their authorities into practice. The directive is binding as regards the objective (the result to be achieved) but leaves the choice of form and methods to the national authorities. Besides, there are also EU regulations which have a direct effect on the whole Union from their entry into force. Some of these regulations are 'delegated acts' adopted by the Commission, on the basis of powers delegated to it by the Council and Parliament, which concern mostly technical details.

3 Innovation from Brussels: EIA, access to environmental information, climate protection

Like in Germany and many other countries, the first pieces of environmental legislation at European level were fragmentary and limited to particularly problematic issues.[4] Early beginnings can be found already in the 1960s, for instance the Dangerous Substances Directive (67/548/EEC) of 1967. A first wave of environmental regulations was then adopted in the mid-1970s, such as the directives on waste oil and waste disposal, on bathing waters and on the quality of drinking water derived from lakes and rivers. These rules often came later than the respective German laws and were sometimes copied from them. In the 1980s, however, the relationship began to turn around. Whereas in Germany all attempts failed to create a uniform Environmental Code *(Umweltgesetzbuch)* instead of the highly sectoral national legislation, the EEC (later European Community - EC) increasingly produced horizontal and cross-media regulations. These included in particular Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment ('EIA Directive') of 1985, Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, the so-called EMAS Regulation on a European eco-management and audit scheme of 1993, and the Environmental Liability Directive of 2004. These EU provisions were all implemented eventually into German law, but mostly with a delay of several years and some of them insufficiently, so that the European Court of Justice condemned Germany repeatedly for infringement of the Treaty.

Since the 1980s the EU has also participated increasingly in multilateral environmental agreements.[5] In concluding these treaties under international law – which are usually as 'mixed agreements' signed by the Union and its Member States together – the EU Commission has occasionally played a key role. Notably the success of the Montreal Protocol of 1987, which for the first time prohibited climate-damaging emissions of CFCs into the atmosphere, is not least due to the determination and skilful negotiation of the Commission's environmental lawyers. The Montreal Protocol is still today acclaimed as the model of an effective environmental agreement, also because it was the first to implement the precautionary principle and the principle of common but differentiated responsibilities (of industrial and developing countries), to determine a time schedule for the phasing-out of dangerous substances and to make financial arrangements for it.

4 Systematic and risk-based approach as hallmark of EU legislation

Already in the early stages of European environmental policy an effort was made to tackle problems in a systematic way. The first 'Environmental Action Programme' of the EEC, which the Council of the European Communities adopted in the 'oil crisis' autumn of 1973, was already based on the precautionary principle and aimed at improving the quality of life by, among other things, the prevention of pollution and by respecting ecological balances. A special emphasis was put on the need to explore the environmental and health hazards caused by pollution, to integrate environmental aspects into other Community policies, and to steer development by environmental quality objectives.[6]

After this, several consecutive action programmes were adopted for a period of four to seven years, which nowadays also have to undergo the ordinary legislative procedure and are binding for the EU Commission. Since early 2014 the Seventh Environmental Action Programme has been in force

4 For an account of EU environmental legal history see e.g. L. Krämer, *'Thirty Years of Environmental Governance in the European Union'*, in: R. Macrory (ed.), Reflections on 30 Years of EU Environmental Law, (2006) Groningen: Europa Law Publishing.

5 See the list at http://ec.europa.eu/environment/international_issues/pdf/agreements_en.pdf.

6 See summary of the first EAP at http://cordis.europa.eu/programme/rcn/239_en.html.

under the title 'Living well, within the limits of our planet'.[7] The Programme contains nine priority objectives for the period until 2020, from protection and enhancement of the Union's 'nature capital' via different thematic focuses (e.g. turning the Union into a resource-efficient, green and competitive low-carbon economy) and framework conditions (e.g. better implementation of environmental law) to enhancing the sustainability of the Union's cities and increasing the Union's effectiveness in addressing international environmental and climate-related challenges.

To specify the Sixth Environmental Action Programme, the Commission worked out six 'Thematic Strategies' in the fields of clean air, marine environment, waste prevention and recycling, sustainable use of natural resources, urban environment and soil protection. These were in turn the basis for specific proposals for measures and draft legislation. In this, a typical sequence of steps can be observed: At the beginning, a rough framework for an initiative is defined under the keyword 'roadmap'. Frequently, the Commission also launches a study to research and analyse the problem. The results of this analysis, together with options for a solution are then put together in a 'Green Paper' and published for discussion in hearings and on the internet. On the basis of the comments and discussion results, the Commission will move on to a 'White Paper', where it presents the preferred option and gives reasons for it. Already at this stage, the experts of the Commission's Directorate-General for the Environment (DG ENV) have to make a detailed assessment of the ecological, economic and social impacts of the proposed measures and submit it to the 'Impact Assessment Board', an interdepartmental institution associated with the coordinating Secretariat-General of the Commission. If the proposal passes the examination it will be published as a White Paper or 'Communication' from the Commission, together with the Impact Assessment. Out of this in a next step - and possibly after further studies and more specific impact assessments – the draft of an EU directive or regulation may be developed.

Scientific foundation and public participation are, as a rule, essential elements of EU environmental legislation. A good example for this is the Water Framework Directive, issued in the year 2000.[8] This fundamental norm changed German water law profoundly, not only through the novel approach of organizing water management in river basin districts and linking it to quality objectives and timetables, but also through the emphasis on transparency and involvement of the public in management planning. These last-mentioned instruments are used deliberately by the EU Commission to limit the influence of economic stakeholders on the implementation of environmental law as far as possible.

Moreover, the EU rarely contents itself in the longer term with the legislative status quo. All recent environmental directives and regulations contain obligations on the Commission to report regularly, to evaluate the results and to review legislation as to its costs and benefits. Apart from this, the general political pressure for 'deregulation' and reducing bureaucracy has been translated, particularly in the field of environmental law, into various initiatives to eliminate unnecessary directives and regulations, streamline disparate legal provisions and generally move on to a more targeted, "intelligent" rulemaking. The key terms for these initiatives were in the last years 'Better Regulation', 'Smart Regulation', 'Make It Work', 'Fitness Check' and 'REFIT'.[9] In fact, environmental law (unlike some other policy areas) has already undergone some simplification exercises, e.g. in the context of the Industrial Emissions Directive (2010/75/EU) which replaced the earlier IPPC Directive and specific directives on large combustion plants, waste incineration as well as emissions and wastes from the titanium dioxide industry.

5 Foot draggers and pacemakers in environmental protection

When this article spoke of 'the EU' on the preceding pages it might easily create a simplistic image. Like the Union itself, with its currently 28 Member States and more than 500 million inhabitants, the EU institutions 'Council', 'Commission' and 'European Parliament' are in reality highly complex bodies with wide internal variations and also tensions. In the Council, which is made up of representatives of Member State governments (from numerous and permanent working groups of experts at the bottom, up to the level of ministers who meet four times a year), this diversity follows inevitably from the institutional structure. But also the European Commission, with its staff of about 33,000 permanent officials and experts seconded from the

7 Full text, short explanation and fact sheet at http://ec.europa.eu/environment/action-programme/.

8 Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1. For the Commission's implementation reports see http://ec.europa.eu/environment/water/water-framework/impl_reports.htm.

9 The reform initiatives started already around the year 2000. For the latest programme REFIT of 2015 (short for *Regulatory Fitness and Performance programme*) see the Commission website https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/evaluating-and-improving-existing-laws/reducing-burdens-and-simplifying-law/refit-making-eu-law-simpler-and-less-costly_en.

Member States, is not a homogeneous entity. The currently 31 Directorates-General (DGs) and 22 service departments or executive agencies[10] differ considerably - not unlike ministries at national level – in their size, influence and habitus of their staff. The Directorate-General Environment which is responsible for core areas of environmental protection (apart from it there exist DGs for, among other things, climate action, energy and maritime affairs) has a staff of less than 500 and is rated as one of the smaller and less prestigious departments. In shaping EU environmental policy and drafting the relevant directives and regulations, 'DG ENV' normally has the lead, but needs the agreement of other DGs concerned, such as Agriculture and Rural Development (AGRI), Mobility and Transport (MOVE) or notably the department for 'Internal Market, Industry, Entrepreneurship and SMEs' which was created in 2014 as a kind of strategic powerhouse under the significant acronym 'GROW'. The coordination inside the Commission, before a policy or legislative proposal is submitted to the 'College' of the Commissioners, is a matter for the Secretariat-General. Only after the powerful 'Sec-Gen' has given its approval does the actual legislative process start in Council and Parliament.

Against this background, the construction of an environmental directive or regulation must be seen as a complex interplay between numerous actors. In this process, various economic stakeholders make their appearance who may have considerable influence on some of the Commission services and the policies of certain Member States. On the other hand, non-profit NGOs and other active members of the public often manage to get attention, and relatively strict transparency rules limit the dominance of economic lobbyism to a greater degree than often at national level. In addition, the more constructive and compromise-oriented spirit of European institutions helps to find solutions in the public interest. But above all, the decision-making of the European Parliament has proved to be more open, less streamlined by party discipline and thus often more 'progressive', i.e. more responsive to environmental, consumer and worker interests than the German parliamentarism of the last decades.

The functioning of this system in practice may be illustrated by an example from the author's own experience. As a seconded expert in DG ENV, I was for some years responsible for the issue of environmentally-sound ship recycling. This issue arose in the 1990s when the dangerous and polluting practices of shipbreaking on beaches in India and Bangladesh became known to a wider international public. Criticism from environmental NGOs and some EC Member States (Denmark and the Netherlands) led to first studies launched by the Commission, and to internal policy papers. Still, no further steps were taken at Community level, also because the responsible Head of Unit in DG ENV, a neo-liberal, did not see a need for legislative action. Only in 2006, when the envisaged scrapping of the asbestos-ridden French aircraft carrier 'Clemenceau' in India caused a public outcry, did then Environment Commissioner Dimas order the drafting of a Green Paper on better ship dismantling. In parallel to an initiative in the International Maritime Organization which was mainly driven by Norway and led to the conclusion of the 'Hong Kong Convention' in 2009, the EU Commission adopted a Communication regarding a strategy for better ship dismantling and submitted some years later a legislative proposal which was then enacted as Regulation (EU) No. 1257/2013 on the recycling of ships.[11] Although the shipping lobby and its supporters in the departments for transport and industry and in the Council tried to prevent 'unilateral measures', this regulation laid down more stringent rules in some respects than the Hong Kong Convention, particularly because the advocates of more effective environmental and health protection managed to win a majority in the European Parliament.

Like the lobby organizations in Brussels, where public interest groups have far fewer personal and financial resources than major industry associations but can compensate this handicap partly through their idealism and ingenuity, the 'environmentalists' within the EU institutions are not necessarily weaker than their counterparts who focus on industry interests and economic growth. Due to the above-average commitment of its staff, DG Environment enjoys for instance the reputation of delivering the best impact assessments for envisaged measures and thus also particularly well-prepared legislative proposals.

In contrast to the Commission and the European Parliament, the Council, with its Member State representatives, typically acts as a brake on environmental policy initiatives. Here, the position of the Council is frequently shaped by Germany. While on the international scene Germany still has an image as a leader in environmental protection – which was justified to some extent by technical innovations and policies in the field of sustainable energies and waste management – its real role since the 1990s has been very different on many key

10 See https://ec.europa.eu/info/departments_en; for staff figures see http://ec.europa.eu/civil_service/docs/hr_key_figures_en.pdf; last downloaded on 26.5.2017.

11 Cf. http://ec.europa.eu/environment/waste/ships/eu_policy.htm.

issues of European environmental policy: Whether it is climate protection or the reduction of harmful car emissions or the ecological transformation of agriculture, the German Federal government and its *Länder* (states) have acted as foot-draggers rather than pacemakers in EU legislation.[12] Notably on procedural and horizontal issues of environmental law like public participation, free access to information and legal protection against pollution and environmental degradation, Germany frequently belongs to the rear-guard of most conservative EU countries. Not surprisingly, it was the German government which twice – in the mid-1990s and about 15 years later – blocked the Commission's draft proposals for a directive on 'Access to justice' for environmental NGOs and thereby tried to protect potentially illegal projects from judicial review.[13]

6 The role of the ECJ in the enforcement of environmental law

If EU environmental law has nevertheless made substantial progress over the last decades, it is largely due to one decisive factor: the European Court of Justice (ECJ) or, as it is now formally called, Court of Justice of the European Union (CJEU). The supreme court of the EU in Luxembourg has from the outset taken very seriously its function to give binding judgments on the interpretation and validity of Community or Union law, respectively, and thereby ensure compliance with European treaties. Legal cases reach the Court primarily in two ways: by reference from a national court for a preliminary ruling under Art. 267 TFEU or in infringement proceedings launched by the EU Commission against a Member State under Art. 258 TFEU. Environmental cases have by now become one of the main areas of the Court's jurisprudence. Already in 2006 the total number of judgments with an environmental focus was estimated at more than 700, to which about 50 new cases should be added every year.[14] Apart from clarifying competences and defining the scope of national legislation, the case-law of the ECJ has acquired major importance, especially as concerns the implementation of environmental directives by the Member States. In many infringement proceedings the Court specified the relevant requirements of Union law and condemned Member States to modify their implementing rules or administrative practices. Not infrequently, these judgments were issued against Germany for failure to comply with EU directives. Examples from the last five years are the decisions on the 'Trianel' power station in Lünen[15], the building plans for development within an urban area[16], access to government correspondence with the automotive industry[17], the environmental impact assessment for the 'Altrip' polder[18], the deepening of the river Weser[19], the 'Waldschlösschen' bridge in Dresden[20] and the preclusion rules for environmental lawsuits in general.[21]

An adverse judgment from the Court of Justice forces Member States to act, in view of the penalty payments that may be imposed in the next stage of the proceedings and which, as a lump sum or payment per day of infringement, can reach significant levels. To make sanctions more effective, the Treaty of Lisbon has introduced a new system under which the Commission may ask the Court of Justice to impose a penalty already during the main infringement proceedings (Art. 260.3 TFEU).

However, most important for the effective functioning of EU environmental law has been the Court's jurisprudence on the direct effect of directives. The rule that a Member State's failure to implement a directive in time may result in this directive becoming directly applicable was developed by the ECJ already in the 1970s. Its objective was to curb the tendency of some Member States to delay and circumvent their obligations under EU law. The Court confirmed this legal principle also in the field of environmental law, with a decision of 1995 concerning the EIA Directive in an infringement case against Germany.[22] These and other decisions earned the ECJ – quite rightly – the reputation as a 'motor of European integration'. The implementation of environmental law has profited immensely from this active and purpose-oriented role of the judges in Luxembourg.

12 For a recent example see "Handelsblatt Global" of 9.5.2017, https://global.handelsblatt.com/politics/germany-hits-the-brakes-on-eu-emissions-law-762984, and for German policy at UN level cf. S. Stübig, *Kein Anlass zum Schulterklopfen – Eine Bestandsaufnahme zur deutschen UN-Politik im Bereich Umwelt, Entwicklung und Nachhaltigkeit,* 24.9.2013, https://jungeunforschung.wordpress.com/tag/umweltpolitik/ (downloaded 26.5.2017).

13 The Commission's "Access to justice" proposal of 2003 – COM(2003)624 - was finally withdrawn in May 2014 as "*obsolete*"; cf. OJ C 153, 21.05.2014, p. 3.

14 F. Jacobs, *The Role of the European Court of Justice in the Protection of the Environment*, in: (2006) Journal of Environmental Law, at p. 185; cf. Meßerschmidt, *Europäisches Umweltrecht*, (2011), Munich: C.H. Beck, at p. 485.

15 CJEU, Case C-115/09, BUND NRW v. Bezirksregierung Arnsberg, ECLI:EU:C:2011:289.

16 CJEU, Case C-463/11, L. v. M., ECLI:EU:C:2013:247.

17 CJEU, Case C-515/11, Deutsche Umwelthilfe v. Germany, ECLI:EU:C:2013:523.

18 CJEU, Case C-72/12, Altrip et al. v. Rheinland-Pfalz, ECLI:EU:C:2013:712.

19 CJEU, Case C-461/13, BUND v. Germany, ECLI:EU:C:2015:433.

20 CJEU, Case C-399/14, Grüne Liga Sachsen v. Freistaat Sachsen, ECLI:EU:C:2016:10.

21 CJEU, Case C-137/14, Commission v. Germany, ECLI:EU:C:2015:683.

22 CJEU, Case C-431/92, Commission v. Germany („Grosskrotzenburg"), ECLI:EU:C:1995:260.

7 Aarhus, the EU and the environmental NGOs

The name of the Danish city of Aarhus has become in the last two decades a keyword for the enforcement of environmental information, participation and litigation rights. The Convention which was signed in this city in 1998 by member countries of the UN Economic Commission for Europe (UNECE) concerns the 'Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters'. It obliges the Parties to grant free access to environmental information for everybody, to allow the public and environmental NGOs to participate in licensing and planning procedures and in the preparation of executive regulations that may have significant effects on the environment, and to give members of the public with impaired rights or sufficient interests the right to challenge relevant decisions, acts or omissions in the courts. Articles 2(5) and 9(2) of the Convention provide explicitly that 'the public concerned' means also "*non-governmental organizations promoting environmental protection and meeting any requirements under national law*".

Today's 47 Parties to the Convention include all EU Member States and also the European Union itself. The treaty was transposed into the law of the then European Community by Directives 2001/42/EC (on the assessment of the effects of certain plans and programmes on the environment – 'SEA Directive'), 2003/4/EC (on public access to environmental information) and 2003/35/EC (known as the Public Participation Directive) as well as by Regulation (EC) No. 1367/2006 (on the application of the Aarhus Convention to Community institutions and bodies). The Public Participation Directive in turn modified the Environmental Impact Assessment (EIA) Directive and the Directive concerning integrated pollution prevention and control (so-called 'IPPC Directive'), and supplemented them with provisions on access to the courts within their field of application, i.e. in particular concerning industrial installations and projects requiring an EIA.[23]

The EU Commission had aimed at the full implementation of the Aarhus Convention's 'third pillar' by a directive on the access to justice in environmental matters but, as mentioned above, could not overcome the resistance of Germany and some other Member States who regarded this as an encroachment on their competences for national court procedures. Still, the provisions of the Convention on access to the courts and their partial transposition into EU law made it necessary for the German legislature – apart from modifying the Environmental Information Act and the rules on public participation - to pass an Environmental Appeals Act *(Umwelt-Rechtsbehelfsgesetz)* in 2006 which extended the rights of legal action for environmental associations. However, to appease right-wing and business concerns the German government opted for minimum solutions and questionable restrictions, so that the CJEU in three decisions of 2011, 2013 and 2015 held the German legislation to be in breach of EU law and required multiple changes to it.[24] The EU directives for the implementation of the Aarhus Convention have thus played a critical role in ensuring that German NGOs acquire the wider litigation rights that their counterparts in many other European countries had enjoyed already for a long time.[25]

8 Trade agreements and other international treaties

The merits of the EU in environmental protection are dwindling for many people in view of the Commission's fervent promotion of the trade and investment protection agreements TTIP, CETA and TiSA. These treaties which are meant to be concluded either bilaterally between the European Union and the United States (TTIP) or Canada (CETA), or multilaterally between the EU and 22 countries in America, Asia and Australia (the Trade in Services Agreement TiSA), were negotiated for a long time under extreme secrecy and go far beyond the traditional scope of free trade agreements, namely the removal or reduction of customs barriers. It is with an unprecedented breadth and depth that CETA (by now finalized) and TTIP (still under discussion) will regulate a large variety of policies and areas of life, from the movement of goods, services and capital, via technical product requirements, professional qualifications, public procurement, subsidies, investments, taxation, regulatory measures in general, to intellectual property and so-called 'cultural industries'. A critical issue is in particular the special right of investors to claim principally unlimited damages from governments in international arbitration courts, without the need to apply to national courts, if some policy measure,

23 The EIA Directive was originally enacted in 1985 as Council Directive 85/337/EEC, the IPPC Directive in 1996 as Council Directive 96/61/EC; the latter was replaced in 2010 by the Industrial Emissions Directive 2010/75/EU.

24 For the "Trianel" and "Altrip" cases and the decision of 15.10.2015 in the infringement case brought by the Commission see *supra* notes 15, 18 and 22. Other impulses for a better implementation of the Aarhus Convention came from the CJEU decision of 8.3.2011 – Case C-240/09 ("Slovak brown bear") and the Decision V/9h of the Meeting of the Parties to the Aarhus Convention of 1.7.2014, following a report from the Compliance Committee on non-compliance by Germany.

25 Cf. de Sadeleer/Roller/Dross, *Access to Justice in Environmental Matters and the Role of NGOs*, (2005) Groningen: Europa Law Publishing.

legislation or court decision prejudices 'legitimate expectations' about future profits. Even though the CETA agreement has been modified somewhat, following widespread public protests, and now contains a number of complicated exemptions (e.g. for public water supply) and provisos for the multilateral environmental agreements that exist already, the consequences for future environmental and health policies are doubtful. Under CETA, TTIP and TiSA, the Parties are obliged to consult each other prior to any new legislation that may affect investors, and to avoid 'unnecessary regulatory differences'. These limitations and the scrutiny by a 'regulatory cooperation' body, together with many unclear and ambiguous terms in the treaties and the threat of high damage claims, may well deter governments and parliaments at the EU and national levels from pursuing an active environmental policy in the future. So there continues to be sufficient ground for political, but also legal (and constitutional) objections against the so-called free trade agreements.[26]

9 How democratic is the EU?

As can be seen from the quotations at the beginning of this article, some nationalist or populist politicians and publicists try to create the impression that 'Brussels', i.e. the EU institutions, have no or at least much less democratic legitimacy than the governments and parliaments of the Member States. The opponents argue here with the Commission President not being directly elected, with the size of the Commission bureaucracy or the distance of the 'spaceship Brussels' from ordinary people.[27] A typical summary comes to the conclusion: "*The real democratic deficit of the EU is the self-centredness of its institutions*".[28]

If one draws a comparison with the structure of other political entities, the distribution of powers between the EU Council, Parliament and Commission may seem out of the ordinary. However, the European Parliament is directly elected, just like the German *Bundestag*. The Council derives its democratic legitimacy from the appointment of representatives by its democratic Member States, similarly to the *Bundesrat*, the second chamber of the German Parliament which is composed of delegates from the 16 *Länder*. The European Commission finally, at its top level (the College of the Commissioners), is not only dependent on the Member State governments for its nomination but also on the newly elected European Parliament which confirms the nomination and elects the President of the Commission. This has been enhanced by the treaty interpretation of the former EP President Schulz who, after the last election of 2014, insisted that Article 17(7) TEU, under which the Council should take into account the elections to the European Parliament, is to be read as an obligation to choose the candidate of the strongest parliamentary party. While this does not constitute a direct election of the EU 'Head of Government' by the citizens of the Union, there is no direct election of the German Chancellor or the heads of the *Länder* governments either. The only persons with executive competences in Germany who are elected by direct vote work at the local level, such as mayors and county administrators *(Landräte)*. Nevertheless, no German politician or publicist (apart from left and right-wing extremists) would think to question the democratic legitimacy of Mrs. Merkel, her ministers, the Federal President, or their counterparts at state level. There is a common understanding here that indirect elections and the appointment by elected representatives are sufficient.

As regards the real life of democracy, the 'self-centredness' of political leaders is hardly a specific trait of the Brussels machinery. Similar observations can be made in any political or economic power centre, at least in larger countries and major companies or organizations – in particular if measured by the claim to adequate funding or by the willingness to renounce rights and privileges. For the functioning of democracy other criteria seem more appropriate: for example, the existence of a self-confident parliament which does not simply follow the instructions of the government or a small ruling circle; a consistent effort to establish transparency for voters and the general public; and not least elements of direct democracy which give citizens a frequent vote also in the decision of substantive issues. If these standards are applied, the comparison between the EU and Germany turns out rather in favour of the European Union: Whereas the European Parliament vigorously defends its rights vis-à-vis the other institutions and mostly makes substantial amendments to the legal pro-

26 For a more detailed appraisal see e.g. D. Misonne, *Exploring CETA's Relation to Environmental Law,* in: (2016) elni Review, pp. 46-53; Client Earth et al., *Joint analysis of CETA's Investment Court System (ICS),* http://documents.clientearth.org/wp-content/uploads/library/2016-06-27-analysis-of-ceta-investment-court-system-with-annex-coll-en.pdf. For a specific German viewpoint (arguing that TTIP violates democratic rights and judicial guarantees under the German Constitution): A. Flessner, *TTIP und das deutsche Grundgesetz*, https://www.mehr-demokratie.de/fileadmin/pdf/TTIP_und_das_deutsche_Grundgesetz__by_Axel_Flessner_.pdf (last downloaded 27.5.2017).

27 The German title of *"Raumschiff Brüssel"* was used already in 2003 for a book by A. Oldag and H.-M. Tillack, and frequently repeated in newspaper articles, e.g. by N. Busse, in: Frankfurter Allgemeine Zeitung of 26.11.2012, http://www.faz.net/aktuell/politik/europaeische-union/eu-raumschiff-bruessel-11971802.html.

28 Busse, *ibid.* The subtitle of the article continues with the sentence: "*In these hard times the Brussels leadership in all seriousness claims a higher administrative budget for itself*."

posals of the Commission (often in favour of environmental protection), the Members of the German *Bundestag* have increasingly degenerated during the last decades into 'rubber stamps' of the draft proposals and decisions that are worked out by a small group of ministers, party leaders and business representatives.[29] Concerning transparency, the EU can point to an already long record of publishing comprehensive information on legislative procedures with all pertaining documents on the internet; there is a detailed Transparency Register for interest groups and consultants and a Code of Conduct obliging Members of the European Parliament, among other things, to declare all their sources of income including irregular remunerations beyond 5,000 Euros per year; moreover, the public is consulted via internet and in hearings on their opinion regarding all legislative proposals and Commission communications. On all of these points the Federal and *Länder* parliaments lag behind, and hearings – as far as they are public at all – usually take place only in the capital and are tailored to the interests of 'interested parties', i.e. essentially the bigger lobby groups. There is still no direct democracy in Germany at federal level, and also in most of the states the quorums for referenda beyond the local level are prohibitively high. By contrast, the European Citizens' Initiative – i.e. the application of a Europe-wide referendum, as introduced by the Treaty of Lisbon – has reached the necessary quorum already in three cases since 2012, and several other initiatives are ongoing.[30] The proposal 'Right2Water', by which water and sanitation should be safeguarded as a human right and an essential public service for all and protected against privatization and internal market rules, was successful also on substance in so far as the Commission modified various directives and explicitly exempted the issue of water supply from the European Services Directive and the drafts of controversial trade agreements.[31]

10 The future of environmental protection in Germany and Europe

It is estimated that 80% of current environmental law in Germany (as well as probably in other Member States) is determined by the European Union.[32] Even official German government policy is based on the fact that many environmental challenges – from climate change via the cleaning-up of rivers and the prevention of air pollution to precautions against environmental disasters – cannot be dealt with any more at national level, since mostpollution does not stop at borders. As the prosperity and well-being of Europeans depend on a healthy, rich and diverse environment, and it is in the general interest to prevent unfair competition and a 'race to the bottom' which might be caused by low environmental standards in some states, the transfer of competences to the European Union is a logical conclusion.[33] Environmental protection in Germany has in fact profited from this transfer. One might feel nostalgic about the loss of momentum in German environmental policy that still existed in the 1970s and 1980s and seems to be replaced nowadays by the overmodest approach to implement EU law 'one-to-one'. But the initiatives from Brussels have ensured in the last 25 years a slow but steady progress, even in times when this did not seem politically opportune in Germany. The mechanisms of European law have in this way prevented the country from moving too much in reverse gear, out of supposed economic necessities, and that the rights of affected neighbours and environmental NGOs could be run over under the slogan of 'investment facilitation'.

This development will, in spite of calls for more 'subsidiarity', hardly be stopped or reversed, at least as long as environmental policy is pursued with a minimum level of common sense. It is tragic that the German government currently cripples its own successful model on precisely a field that is not regulated by EU law – the promotion of renewable energies – but this will probably enhance even more the significance of EU legislation for the functioning of environmental protection in Germany. That case ultimately shows the advantages of the European political model, which is less susceptible to populist hysteria and to the influence of a few powerful interest groups than German national politics. Anybody with an interest in environmental protection should therefore not let themselves be confused by scaremongering and rather continue to follow EU environmental policy with critical support.

29 See the book with the revealing title *"Wir Abnicker – Über Macht und Ohnmacht der Volksvertreter"*, published in 2010 by the Social Democratic MP and energy expert Marco Bülow.

30 See http://ec.europa.eu/citizens-initiative/public/initiatives/open.

31 Cf. http://ec.europa.eu/citizens-initiative/public/initiatives/successful/details/follow-up/2012/000003/de?lg=en (downloaded 27.5.2017) and above section 8.

32 Cf. website of the German Federal government: https://www.bundesregierung.de/Webs/Breg/DE/Themen/Europa/EUPolitikfelder/umwelt/_node.html (downloaded 27.5.2017).

33 German Federal government, *ibid.*

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

The elni Review 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).

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 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.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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