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REVIEW

Gene drives and the EU

Ludwig Krämer

The Hoge Raad judgment of 20 December 2019 in the Urgenda case: an overcautious policy for reducing GHG emissions breaches Articles 2 and 8 of the European Convention on Human Rights

Nicolas de Sadeleer

Better reporting of science to improve regulatory decision-making

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Editorial

2020 – it was a year of transformations. At its beginning, before the Corona Pandemic hit hard in March, the editors of *elni Review* decided to further develop the journal into an electronic resource. Since then, individual articles have been shared with elni members and subscribers to the *Review* on a rolling basis. These are now compiled in the Review issue at hand.

In parallel, the [online archive](#) of elni articles released since 2005 received a comprehensive update which is expected to be completed in 2021.

Another 2020 transformation regards the ‘elni FORUM’ conference series which, as is considered good form by now, took place online on a whole cycle of events under the umbrella topic ‘Green Deal – A way forward for EU environmental legislation?’. 2021 will see a new cycle of elni events. Details will be shared soon.

The Recent Developments section features a report of the 2020 elni event on ‘Product policies for a Circular Economy’. Further details on this and the other two fora (including recordings, slides) can be found [online](#).

The articles section of the *Review* comprises four highly topical pieces. *Ludwig Krämer* examines the legality of gene drive releases – that are an emerging issue since the discovery of the CRISPR/Cas9 method in 2012 – within the EU and describes the efforts to find some international consensus on gene drive releases.

Nicolas de Sadeleer addresses the Dutch Hoge Raad judgment of 20 December 2019 in the Urgenda case,

which triggered broad international response. He finds ‘An over-cautions policy for reducing GHG emissions breaches Articles 2 and 8 of the European Convention on Human Rights’.

At the interface of science and policy, *Marlene Ågerstrand* in her contribution ‘Better reporting of science to improve regulatory decision-making’ explains recommendations by The Society of Environmental Toxicology and Chemistry (SETAC) for reporting ecotoxicity studies to facilitate the use of these studies in research as well as regulatory assessments.

Finally, as trees and forests in Europe are entering centre stage in public opinion and the European Green Deal creates political impetus, *Marco Onida* is taking stock as regards ‘Forest and forestry policy between the EU and its Member States’.

We hope you enjoy reading.

Julian Schenten / Gerhard Roller
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Forest and forestry policy between the EU and its Member States

Marco Onida*

1 Introduction and context

Trees and forests in Europe have never been centre stage the way they are now. Until a couple of years ago, forest-related concerns of European citizens focused mainly on international deforestation in tropical forests¹. The aggravation of the double climate and biodiversity crisis has significantly increased European citizens' interest in the EU forests as irreplaceable carbon sinks and reservoirs of biodiversity. The pressure of public opinion on EU forest policies therefore is on the rise, also due to the fact that the more Europe takes action vis-à-vis third countries' forest protection², the more its domestic agenda must be effective and credible; a case in point is the news about systematic illegal harvesting of primeval forests in Eastern European states such as Poland's well-known Białowieża³, Romania (where the murder of official rangers sparked outrage across Europe⁴), and Slovakia⁵, which resonated powerfully.

Citizens' concerns are not ill-founded: European forests, in fact, are generally not in good ecological condition. Recent scientific reports further paint a worrying picture. According to the 2020 State of Nature Report by the European Environment Agency, less than 15% of assessed woodland and forest habitats are favourable, while up to 84% were assessed as unfavourable-inadequate⁶. The EU Joint Research Centre assessment of ecosystems concludes that *"the condition of EU forests is poor, and there are serious concerns regarding upward trends of several pressures and degrading condition*

*indicators"*⁷. Even the sustainability of current harvesting levels is subject to debate⁸.

As an example at national level, in 2019 the German Ministry of Agriculture reported that only 19% of all German beech trees (the most common species) are in good condition⁹.

Climate change is increasing the incidence of droughts, storms, fires and pests. The European Sawmill Federation¹⁰ reported that wood damaged by pests in six Central European states increased from 27.5 million m³ in 2017 to 118 million m³ in 2019. In Italy alone a storm destroyed 42,500 hectares of forests¹¹ (14 million trees) on 29 October 2018. In 2019, forest fires heavily affected Europe's biodiversity: approximately half of the 160,000 hectares burnt were within Natura 2000 zones¹².

This increased awareness of challenges is mirrored in recent political initiatives at European level. In 2019, the newly appointed EU Commission adopted a Communication on the European Green Deal (EGD)¹³, where European forest protection were deemed a priority in pursuing new climate and biodiversity objectives – two crises to be tackled jointly. The EGD calls for action to improve the quantity and quality of the forested area for the EU to reach climate neutrality and a healthy environment and announced a new EU forest strategy with the key objectives of effective afforestation and forest preservation and restoration in Europe, to help to increase the absorption of CO₂, reduce the incidence and extent of forest fires, and promote the bioeconomy, in full respect for ecological principles favourable to biodiversity.

The focus on the need to improve European forests represents a change of approach. A 2018 progress report¹⁴ on the 2013¹⁵ EU forest strategy concluded

* European Commission, DG Environment. The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the European Commission. Thanks to Liam Cashman and Agustín García-Ureta for their precious advice.

¹ Communication – Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan [COM (2003) 251 final]; Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (OJ L 295, 12.11.2010, p. 23–34).

² Commission Communication on stepping up action to protect and restore the world's forests (COM (2019) 352).

³ Case C-441/17, Judgement of 17 April 2018, ECLI:EU:C:2018:255.

⁴ These crimes were a reminder that Europe is not necessarily immune from the global phenomenon of attacks on public sector and voluntary sector environmental defenders.

⁵ In July 2020 the Commission issued a Reasoned Opinion against Romania and decided to refer Slovakia to the Court of Justice. https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_1212.

⁶ See <https://www.eea.europa.eu/publications/state-of-nature-in-the-eu-2020> and <https://www.eea.europa.eu/themes/biodiversity/state-of-nature-in-the-eu>.

⁷ Mapping and Assessment of Ecosystems and their Services: An EU ecosystem assessment, 2020, p. 118. <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/mapping-and-assessment-ecosystems-and-their-services-eu-ecosystem-assessment>.

⁸ Ceccherini et al., Abrupt increase in harvested forest area over Europe after 2015, *Nature*, Vol. 583 2 July 2020, p. 72.

⁹ German Federal Ministry of Food and Agriculture (BMEL), Deutschlands Wald im Klimawandel - Eckpunkte und Maßnahmen – Diskussionspapier zum Nationalen Waldgipfel, 25.09.2019; BMEL, Daten, Fakten & Hintergrundinformationen zur aktuelles Waldsituation.

¹⁰ See <https://www.eos-oes.eu/en/news.php>.

¹¹ G. Chirici et al., Forest@, *Rivista di Selvicoltura ed Ecologia Forestale*, Vol. 16, pp. 3-9, <https://foresta.sisef.org/pdf/?id=efor3070-016>.

¹² See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1995.

¹³ COM (2019) 640.

¹⁴ COM (2018) 811.

that significant progress has been made towards the 2020 objective of ensuring the sustainable management of all EU forests. The Council in 2014¹⁶ emphasized that “*the forest conditions in the EU have significantly improved due to the important steps taken in implementing sustainable forest management, including the protection of forest ecosystems, even though continued efforts to that end are still needed [...]*”. The European Green Deal brings in a new urgent dimension, which mirrors increased environmental ambition¹⁷.

Under the EGD umbrella, a new EU Biodiversity Strategy to 2030¹⁸ was adopted in May 2020, containing a chapter on actions on forests, requiring the strict protection of all remaining EU primary and old-growth forests and increasing the forested area by planting at least 3 billion additional trees in the EU by 2030. It also aims at increasing the share of forest areas covered by management plans and developing guidelines on biodiversity-friendly practices on afforestation and closer-to-nature forestry. Furthermore, to counter the pressure of the increased demand for biomass on forests, the use of whole trees for energy production should be minimised, and bioenergy should focus primarily on wood waste and residues.

Overall, the current intensive use of forests will need to be better balanced against the objectives of carbon sink preservation and biodiversity protection.

This ‘greener’ approach to forests has sparked a heated debate in the EU institutions as well as among stakeholders and NGOs, all seeking to influence in some way the future forest policy of the EU. This debate includes some legal issues.

2 The legal competence of the EU on forests and forestry

In the forest sector it is common to hear allegations that the EU is not legitimated to adopt policy and legislative measures, with ‘forest being a competence of Member States’. This view was also expressed by the Council¹⁹ and European Parliament (EP)²⁰ in autumn 2020. In reality the EU is perfectly legitimated to act on forests and forestry, as it already has²¹. Still, over the past decades, this

allegation has come up repeatedly. A retrospective look shows some intriguing evidence of a fierce debate on this issue.

The first Communication on a ‘forestry policy in the European Community’ was adopted by the Commission in 1978²². In this policy document, the Commission referred to a request by several Member States as well as to several representations by forest owners organisations and the forest industry, all asking for appropriate attention at Community level to forestry issues. The multifunctional role of forests (timber production, environmental protection and provision of recreational facilities) was already acknowledged at that time. Links to agricultural and regional policy, social policies and environmental protection were put forward. The environmental dimension was also highlighted in the 1977 European Community Action Programme on the Environment²³, which anticipated some of the issues discussed in 2020, such as the need to pay particular attention to forest areas which have remained closest to their natural state²⁴ (now referred to as primeval and old-growth forests).

The Commission underlined that a ‘common forestry policy’ should be developed clearly defining common objectives and principles, in order to coordinate Member States’ policies. To facilitate this coordination, the Commission proposed to set up a Permanent Forestry Committee²⁵. In its Resolution on the 1978 Communication²⁶, the EP highlighted that the Community “*should draw up a genuine common forestry policy which would enable it to replace the piecemeal, conflicting national policies by common solutions*”²⁷. It also stressed that, “*although the EEC Treaty does not specifically mention forestry products in connection with the CAP, this should not be used as a pretext for preventing the implementation of a forestry policy*”,²⁸ it considered that “*the Commission has the possibility of taking various statutory measures, as it is shown by the fact that certain Community forestry measures have already been implemented or are in the process of being implemented; in particular, Article 235 (now Article 352 TFUE) and other Articles of the EEC Treaty may be invoked in connection with the various implications (for environmental, phytosanitary, structural policies, etc.) of the forestry measures under*

¹⁵ COM (2013) 659.

¹⁶ 19 May 2014, 9944/14.

¹⁷ “*One million of the eight million species on the planet are at risk of being lost. Forests and oceans are being polluted and destroyed*” (EGD, page 2).

¹⁸ COM (2020) 380.

¹⁹ See <https://data.consilium.europa.eu/doc/document/ST-12695-2020-REV-1/en/pdf>.

²⁰ 2019/2157 INI.

²¹ A. García-Ureta, EU Biodiversity Law: Wild Birds and Habitats Directives, Europa Law Publishing, 2020, Ch. 2, VI, par. 2.4.2; N. De Sadeleer, Droit international et Communautaire de la biodiversité, 2004, Dalloz, Paragraphs 708-724.

²² Bulletin of the European Communities, Supplement 3/79.

²³ OJ C 139/1977 p. 1.

²⁴ Paragraph 113.

²⁵ This was eventually submitted to the Council only in 1988 and adopted on 29 May 1989. Dec. 89/367/EEC, OJ L 165/89, p. 14.

²⁶ OJ C 140 of 5.6.1979, Bulletin of the European Communities, Supplement 3/79.

²⁷ Paragraph 2.

²⁸ Paragraph 3.

consideration”.²⁹ Interestingly, the Parliament also questioned the added value of the Commission draft Council Resolution (appended to the Communication) for not being sufficiently binding on the individual national policies and urged the Commission to draw up “more detailed proposals which would also provide Community financial aid for specific forestry measures [...]”.³⁰

Even if the Commission stated that common measures “will be proposed only as and when they are necessary for the achievement of the common objectives or of broader Community policies”,³¹ it did not question that the EEC was legitimated to take measures on forest and forestry, and even invoked common policy measures on forests. As a matter of fact, the EEC had adopted its first legislation on forest back in 1966, on the marketing of forest reproductive material³².

On 7 January 1986 the Commission adopted a ‘Discussion Paper on Community Action in the Forestry Sector’³³. Its goals were the extension of the forest area and improvements in the utility derived from existing forests. Again, there was a clear presumption that Community measures on forests would not only be legitimate, but also beneficial: “while the Commission is not proposing to establish a Community forest policy, many of the actions suggested would be more effective if taken at the level of the Community rather than at the level of individual Member States”³⁴.

The Commission also criticised the Council for not moving towards the adoption of the proposals which lie on its table:

“The European Commission has made proposals for forestry and timber in the past. Several of these initiatives (on research, agricultural structure etc.) have been implemented. A proposal on the protection of forests from fire and from acid rain damage finds support from a large majority of delegations and discussions in the Council are continuing. Two other initiatives are still before the Council with little progress being made on any of them. In 1979 the Commission proposed a Resolution on a Community Forestry Policy and the setting up of a Standing Forestry Committee. In 1983 it proposed objectives and lines of action for Community policy regarding forestry and forest-

based industries. No decision has been taken by the Council on these proposals”.³⁵

Similar statements can be found in the fourth Environmental Action Programme (1987-1992)³⁶:

*“[...] an increase in the forest area of the Community is desirable for a number of reasons, including the contribution that this could make to environmental protection and improvement [...]”*³⁷. *Moreover the systematic monitoring of forest die-back is an essential measure to accompany measures to control atmospheric pollution; proposals on this (and also to control forest fires) have long been before the Council; the Commission urges the need for their early adoption”*.³⁸

Eventually, on 17 November 1986, the Council adopted Regulations 3528/86 and 3529/86³⁹ on the protection of the Community’s forests against, respectively, atmospheric pollution and fire. Both regulations were based on Article 43 EEC (agriculture) and 235 EEC (implicit competences of the Community). They laid down a five-year scheme, financed by the Commission, for monitoring and reporting on forest damage by atmospheric pollution and forests fires. In 1991 the Commission proposed⁴⁰ extending their validity until the end of 1996. Both the Commission proposals and the Regulations, as adopted by the Council on 23 July 1992⁴¹, were based on a dual legal basis: Art. 43 as well as Art. 130s EEC on Community action on the environment. After the Single European Act, which brought the environmental legal basis in the EEC Treaty, had taken effect, there was no longer a need to rely on Art. 235 EEC in order to justify the proposal from an environmental perspective. In 1996 the Commission proposed⁴² extending the validity of the schemes for another five years. However, in this last proposal, the Commission used only Art. 43 EEC as a legal basis, on the grounds that protecting forests was instrumental to agriculture and rural development. Consequently, the Council adopted Regulations 307/97 and 308/97⁴³ extending the protection schemes until 1 January 2002, based solely on Art. 43 EEC. At this point, the EP brought an action before the European Court of Justice on the annulment of these Regulations, considering that its prerogatives were undermined, since Art. 43 EEC required a simple consultation procedure. In

²⁹ Paragraph 4.

³⁰ Paragraphs 7 and 8.

³¹ Paragraph 4, introduction.

³² Council Directive 66/404/EEC, OJ 11.7.66 no. 2326 p. 161, based on Art. 43 (agriculture) and 100 (internal market) of the EEC Treaty.

³³ COM (85) 792.

³⁴ Paragraph 1.

³⁵ Paragraph 6.

³⁶ OJ C 328 of 7.12.1987, p. 1.

³⁷ Paragraph 2.3.7.

³⁸ Paragraph 2.3.8.

³⁹ OJ L 326/86 p. 2 and p. 5.

⁴⁰ OJ 312/1991, p. 6.

⁴¹ Reg. 2157/92, OJ L 217/1992, p. 1 and Reg. 2158/92, OJ L 217/1992 p. 3.

⁴² OJ C 268/96.

⁴³ OJ L 51, 21.2.1997, p. 9.

contrast, legislation based on Art. 130s EEC would have implied the use of the cooperation procedure, giving the EP greater possibilities to influence the final outcome. The Commission supported the Council. The Court issued its ruling on 25 February 1999⁴⁴ and annulled the two challenged Regulations, stating:

“13. It is clear from the provisions of the amended regulations that the aims of the Community schemes for the protection of forests are partly agricultural since they are intended in particular to contribute to safeguarding the productive potential of agriculture, and partly of a specifically environmental nature since their primary objective is to maintain and monitor forest ecosystems.

[...]

16. In this case, although the measures referred to in the regulations may have certain positive repercussions on the functioning of agriculture, those indirect consequences are incidental to the primary aim of the Community schemes for the protection of forests, which are intended to ensure that the natural heritage represented by forest ecosystems is conserved and turned to account, and does not merely consider their utility to agriculture. Measures to defend the forest environment against the risks of destruction and degradation associated with fires and atmospheric pollution inherently form part of the environmental action for which Community competence is founded on Article 130s of the Treaty.”

The Court’s very explicit reasoning leaves no doubts that EU measures on the protection of forests are to rest on the environmental legal basis (now Art. 192 TFUE). The term ‘inherently’ seems to indicate that the two mentioned areas (atmospheric pollution and forest fires) are just examples of a broader content, the ‘natural heritage’⁴⁵, that calls for the EU to act instead of its Member States. By this point in time, in fact, environmental legislation already contained important provisions on forestry. In particular, the 1985 Environmental Impact Assessment (EIA) Directive⁴⁶, inter alia, provided for the possible EIA of certain forestry projects. The 1992 Habitats Directive listed a significant number of distinct forest habitat types for purposes of inclusion in the protected nature network, Natura 2000, and the Wild Birds Directive required Member States to preserve, maintain or re-establish in their European territory sufficient diversity and areas of habitats for all the

species of naturally occurring birds, including re-establishing destroyed biotopes.

Although this case centred on diverging views of the Council and the EP at the time (which touched on the extent to which the Parliament should be involved in the shaping of EU forest policy), the dispute nevertheless concerned the choice of legal basis of the Community action on forests and not the EU competence to take action *per se* on forest and forestry.

The EP had made this opinion clear in 1997⁴⁷ in its Resolution on the forest strategy (‘Thomas Report’) which called on the Commission to put forward, on the basis of Articles 43, 130s and 235 EC a legislative proposal on European forestry strategy, while clarifying the borders between Community and Member States’ action:

*“The coordination of national policies must be based on respect for the principle of subsidiarity. Subject to this, the basis for the European Union’s forestry strategy should be a clearer definition of national policies in the EU [...] setting objectives at both national and international levels, re-establishing clearly the responsibilities of the EU and the Member States, with precise procedures for technical cooperation at appropriate levels, establishing a link between forestry strategy and official policies such as environmental and rural policy”.*⁴⁸

The Rapporteur underlined that action on forestry policy can be based on several articles of the EEC Treaty (in addition to Articles 43, 130s and 235, also on competition policy, Article 100 on harmonisation, Article 113 on commercial policy), adding that “*certain Member States are opposed to the idea of a Community policy which would embrace the exploitation of forests (at least insofar as the harvesting of wood is concerned) and the management of the market for wood*”.⁴⁹ Given that certain legal bases (for instance Articles 130s and 235) required unanimity at the Council, he advised the Commission to carefully choose the legal basis for any proposal it wishes to make.

Along these lines, the 1998 Commission Communication on a Forest Strategy for the European Union⁵⁰ stated that “*the treaties of the European Union make no provision for a comprehensive common forestry policy. The management, conservation and sustainable development of forests are nevertheless vital concerns of existing common policies like the CAP*

⁴⁴ Joint cases C-164/97 and C-195/97 ECLI:EU:C:1999:99.

⁴⁵ Habitats Dir. (OJ L 206, 22.7.1992, p. 7–50), 4th recital; and Wild Birds Dir. (2009/147, OJ L 20, 26.1.2010, p. 7–25) 4th recital, where the legislator used the term ‘common heritage’. See A. García-Ureta, EU Biodiversity Law: Wild Birds and Habitats Directives, Europa Law Publishing, 2020, Ch. 3, III, par 5.

⁴⁶ Dir. 85/337, <https://ec.europa.eu/environment/eia/eia-legalcontext.htm>.

⁴⁷ OJ C 55 of 24.2.1997, p. 11.

⁴⁸ Paragraph 2.

⁴⁹ Explanatory memorandum of the Opinion of the Committee on Agriculture and Rural Development – A4-0414/96.

⁵⁰ COM (1998) 649.

and the rural development, environment, trade internal market, research, industry, development cooperation and energy policies.

[...]

*On the other hand, direct and indirect linkages exist between Community and national forestry policies. The Community therefore has a vital role to play in achieving the objectives laid down by the Member States and the Community in the framework of the strategy [...]*⁵¹

The Council, in a Resolution of 15 December 1998⁵² on a forestry strategy for the European Union, adopted at the end of the first Austrian semester of EU Presidency, took a rather different line, identifying “*as substantial element of this Common Forestry Strategy [...] the principle of subsidiarity, given the fact that the Treaty establishing the European Community makes no provision for a specific common forestry policy and that responsibility for forestry policy lies with the Member States, nevertheless taking into account that, pursuant to the principle of subsidiarity and the concept of shared responsibility, the Community can contribute positively to the implementation of sustainable forest management and the multifunctional role of forests*”.⁵³

The Commission considered the management, conservation and sustainable development of forests as ‘vital concerns’ of existing common policies, and the Community to have a vital role to play in achieving the objectives laid down by the Member States and the Community in the framework of the strategy. Furthermore, the Parliament clearly recognized the competences for an EU policy on forests. Thus, we observe that the Council reversed the concept by leaving to the Community a mere role of ‘contributing to the implementation’, even if it did use the terms ‘Common Forestry Strategy’. This is the first of a series of Council Conclusions aimed a re-nationalising EU forest policy, which still lasts today.

A major renationalisation attempt of EU forest policy occurred during the negotiations for a draft Constitutional Treaty in 2004, as Austria proposed to insert a section on ‘forests and forestry’ in the list of areas requiring ‘supporting, co-ordinating or complementary action’. Pursuant to this proposal, any harmonisation of the laws and regulations of the Member States in the field of forests and forestry would have been excluded, the Council being only able to adopt recommendations for encouraging cooperation between the Member States and, if necessary, lend its support to their action. This

proposal, that was not retained in the final draft of the Constitutional Treaty, would have implied a step back, establishing a complementary competence in an area where shared competence was already existing.

The Commission maintained its position and, on 15 June 2006, issued a Communication ‘on an EU Forest Action Plan’⁵⁴ laying down 18 actions, mainly in the areas of competitiveness, environment, research and coordination between the EU and Member States’ authorities. It is interesting to observe that this Communication was issued in response to Council Conclusions adopted one year earlier⁵⁵, whereby the Council asked the Commission to adopt an Action Plan encompassing “*both Community forest-related actions and forest-related actions in the Member States*”⁵⁶, thus accepting, in this case, the competence of the EU forests, at least by means of ‘actions’.

In 2013 the Commission issued a ‘Communication on a new EU forest strategy: for forests and the forest-based sector’⁵⁷, stating that “*while the Treaty on the Functioning of the EU makes no reference to specific provisions for an EU forest policy, the EU has a long history of contributing through its policies to implementing sustainable forest management and to Member States’ decisions on forests*”.⁵⁸ The Council adopted Conclusions on 19 May 2014⁵⁹, maintaining its position that “*responsibility for forests lies with Member States [...]*”.⁶⁰

As regards the EP, the Resolution of 28 April 2015⁶¹, in reaction to the Commission Communication of 2013, represents a significant change compared to its past positions. The ‘Köstinger Report’ states:

“[W]hereas the European Union has no competence to elaborate a common forestry policy but some of the Union’s policies may have implications for national forestry policies, while it is the Member States who decide the political approaches to forestry and forests;

whereas, although this is clearly an area of Member State responsibility, there are potential advantages for forest-based businesses in better and more active coordination and in a higher profile for this important economic sector, which guarantees jobs at European level, particularly in rural areas, while

⁵¹ Paragraph II.2.

⁵² OJ C 56 of 26.02.1999, p. 1.

⁵³ Paragraph 2b.

⁵⁴ COM (2006) 302.

⁵⁵ 2662nd Council meeting Agriculture and Fisheries, 30-31 May 2005.

⁵⁶ Paragraph 13.

⁵⁷ COM (2013) 659.

⁵⁸ Chapter 1.

⁵⁹ 9944/14 PRESSE 297.

⁶⁰ Paragraph 8.

⁶¹ 2014/2223 (INI).

*protecting ecosystems and offering ecological advantages for all, without prejudicing the responsibility of the Member States*⁶²”.

The fact that responsibility lies with the Member States is repeated three times. But there is more: in paragraph 4, after recognizing that there can be a transnational dimension of natural disasters (forests increase soil stability and protect from avalanches), the Parliament “*stresses in this connection that any attempt to make forestry a matter of EU policy should be resisted and that the sector’s local and regional basis and the competence of the Member States in this area must be respected while seeking coherence between the respective competences of the EU and the Member States*”.

The line changed again in a Resolution of 16 September 2020⁶³, where the Parliament stressed “*the need to recognise the EU’s competences, responsibilities and funds available in the area of forest protection, including European forests as part of the world’s forests, in the framework of EU environmental policy.....calls, therefore on the Commission and the Member States to ensure, in line with the European Green Deal and the 2030 Biodiversity Strategy, the highest standards of environmental protection and greater consistency between the task of protecting and restoring forests both within the EU and in its external action*”.⁶⁴

And, shortly after, in a Resolution of 7 October 2020⁶⁵, the same Parliament underlined that responsibility for forests lies with the Member States, while at the same time acknowledging the EU action and policies based on shared competences:

“*[W]hereas the Treaty on the Functioning of the European Union makes no reference to a common EU forest policy, and responsibility for forests lies with the Member States; whereas, however, the EU has a history of contributing, through its policies and guidelines, including Article 4⁶⁶ of the TFEU as regards energy, environment and agriculture, to sustainable forest management (SFM) and the Member States’ decisions on forests*”.⁶⁷

The differences are partly explained by the fact that these two Resolutions originated from two different Committees (Environment the former, Agriculture and Rural Development the latter).

From this retrospective analysis, it emerges that, overall, Member States seem not to be keen about an active EU policy on forests. However, an extensive

set of EU rules on forests exists, showing that the EU has definitely exercised its shared competences, and Member States can still exercise their competence to the extent that the EU has not made use of shared powers. According to a recent study by the European Forest Institute, there are no less than 570 EU policy documents that have an impact on the EU forest-based bioeconomy, several directly or indirectly affecting forests and/or forestry⁶⁸. We can conclude that forest policy is far from being, legally speaking, an exclusive competence of Member States: a European forest policy does exist⁶⁹.

3 Forests and environmental protection: the concept of ‘sustainable forest management’

One may wonder why so much attention is given to whether or not the EU has competence on forests in soft law documents (such as Council Conclusions or EP own initiative reports), when this competence is already exercised in legislation. This seems to mirror the opposition of the forestry sector to possible further legislation, in particular on the key issue of ‘how’ forest should be ‘managed’. Subject to certain important substantive and procedural constraints that derive from EU legislation such as the Habitat and Birds Directives, the Water Framework Directive⁷⁰, the Environmental Impact Assessment Directive, the Public Access to environmental information Directive⁷¹, the legislation on pesticides⁷² and on invasive alien species⁷³, the decision on how and when to harvest and what species to replant, has so far been largely in the hands of Member States. However, in light of the key role of forests for climate and biodiversity, the room for manoeuvre of Member States might shrink. For example, the new EU Biodiversity Strategy announced “*a proposal for legally binding EU nature restoration targets to restore degraded ecosystems, in particular those with the most potential to capture and store carbon and to prevent and reduce the impact on natural disasters*”.⁷⁴ The great differences existing in the Member States, especially in private forests⁷⁵ (e.g. requirements related to forest management planning, decisions on withdrawals or public access to forests) might also require some common standards.

⁶² Paragraphs A and B.

⁶³ 2019/2156 (INI).

⁶⁴ Paragraph 2.

⁶⁵ 2019/2157 (INI).

⁶⁶ Article 4 TFEU lists the areas of shared competence between the Union and the Member States.

⁶⁷ Paragraph B.

⁶⁸ G. Winkel ed., Towards a sustainable European forest-based bioeconomy – assessment and the way forward, EFI 2017, p. 19-27.

⁶⁹ D. Wydra, The legal Context of European Forest Policy-Making, in H. Pülzl et al. (eds) European forest governance: Issues at stake and the way forward. What Science Can Tell Us 2. European Forest Institute, 2013.

⁷⁰ See <http://data.europa.eu/eli/dir/2000/60/2014-11-20>.

⁷¹ Dir. 2003/4, OJ L 41, 14.2.2003, p. 26–32.

⁷² See https://ec.europa.eu/food/plant/pesticides_en.

⁷³ Reg. 1143/2014 OJ L 317, 4.11.2014, p. 35–55.

⁷⁴ Paragraph 2.2.1.

⁷⁵ Nichiforel et al. How private are Europe’s Forests? A comparative property rights analysis, Land Use Policy 76 (2018) 535-552.

The question arises, what ‘forest management’ means. Decisions on harvesting are part of forest management, as are actions to preserve forests. Even a decision not to harvest in order to protect a forest is a management decision. In this sense, any action which has a potential impact on the future forest state is relevant from an EU policy perspective. Choices on harvesting and planting are decisive for the future forest’s condition. For example, it can be argued that choices made decades ago to plant monocultures have contributed to the current high vulnerability of some of the EU forests to natural disturbances (because monocultures are by definition more fragile ecosystems in terms of biodiversity, and will therefore be more at risk and less resilient in the face of new pests for example).

The next question is, what it means to sustainably manage a forest. If one looks at the historical role of forests, when timber was nearly the only natural resource in the naval, construction and energy sectors – which also led to widespread deforestation in Europe – one cannot be surprised that the dominant concept of forest sustainability relies on the long-term availability of timber. Keeping harvesting below growth rates ensures the ‘sustainable’ use of forests. This paradigm is still largely dominating in traditional forestry, where the only ‘non-timber’ consideration refers to protective forests, in particularly in mountainous regions.

However, in the last decades, more articulated environmental considerations have emerged, linked to the role of forests to climate, biodiversity, air, water, food, medicaments, etc.

A first attempt to codify the environmental dimension of forestry was made at the Earth Summit of 1992, with the adoption of ‘Forestry Principles’. However, besides their strong emphasis on national sovereignty typical of the language of international law, these principles fail to integrate a real environmental concern into forestry and subordinate conservation to socio-economic development⁷⁶. The ecological importance of forest is just to be ‘recognized’⁷⁷. Explicit reference is even made to the ‘positive role’ of plantations as a way to offset the pressure on primary and old-growth forests⁷⁸

⁷⁶ Paragraph 2 (a): States have the sovereign and inalienable right to utilize, manage and develop their forests in accordance with their development needs and level of socio-economic development and on the basis of national policies consistent with sustainable development and legislation, including the conversion of such areas for other uses within the overall socio-economic development plan and based on rational land-use policies.

⁷⁷ Paragraph 4.

⁷⁸ Paragraph 6(d): The role of planted forests and permanent agricultural crops as sustainable and environmentally sound sources of renewable energy and industrial raw material should be recognized, enhanced and promoted. Their contribution to the maintenance of ecological processes, to offsetting pressure on primary/old-growth forest and to providing regional employment and development with the adequate involvement of local inhabitants should be recognized and enhanced.

(‘offset’, implies that such pressure was deemed acceptable).

In 2000 the United Nations Forum on Forests (UNFF) was set up to promote the management, conservation and sustainable development of ‘all types of forests’, but nothing tangible really changed in terms of principles for the sustainable management of forests⁷⁹. Even the 2015 Sustainable Development Goal 15, which includes specific targets on forests, does not provide for the means to measure progress. The only indicators provided to this end concern the “*forest area as proportion of a Country’s land area*” (which is not a useful concept)⁸⁰ and the “*progress towards sustainable forest management*” - which is, at least regarding the environmental dimension, a concept largely undefined and therefore challenging to assess. In other words, the international community agreed that forests have to be managed sustainably, but failed to provide a working definition. Environmental standards may only work if the compliance with them can be verified. This is a key question for forests and the environment.

The criteria for sustainable forest management (SFM) agreed on in 1993 by the Pan-European Ministerial Conferences on the Protection of Forests in Europe, known also as the ‘Forest Europe’ process⁸¹, comprising 47 Countries (including all EU Member States) suffers from the same challenges. The (non-binding) definition of sustainable forest management agreed on in 1993 reads:

*“[T]he stewardship and use of forests and forest lands in a way, and at a rate, that maintains their biodiversity, productivity, regeneration capacity, vitality and their potential to fulfil, now and in the future, relevant ecological, economic and social functions, at local, national, and global levels, and that does not cause damage to other ecosystems”.*⁸²

This is also referred to in EU legislation (Art. 21 of Regulation (EU) 1305/2013⁸³ on support for rural development), that makes financial support conditional on the existence of a forest management in accordance with this definition.

In order to make this definition operational, criteria and indicators have been adopted and updated. Six Forest Europe criteria currently exist, of which number 4 is on biodiversity (“*Maintenance, conservation and appropriate enhancement of*

⁷⁹ Alastair Fraser, *Achieving the sustainable management of forests*, 2019, Springer, Chapter 1.

⁸⁰ As Fraser points out, one country could harvest its primary and old-growth forests, replace them with plantations, and score positively according to this criterion (cit. page 4).

⁸¹ See www.foresteurope.org.

⁸² See <https://foresteurope.org/themes/?sfm=/themes/forest-europe-expert-groups/>.

⁸³ OJ L 347/2013 p. 487, art. 21.

biological diversity in forest ecosystems”). Compliance is assessed through ten indicators (tree species diversity, regeneration, naturalness, introduced trees species, deadwood, genetic resources, fragmentation, threatened species, protected forest, forest bird species). But none of these indicators contains a threshold or range of values to show whether the forest is sustainably managed or not. In the absence of such a threshold, the practical use of the Forest Europe criterion on biodiversity is challenging. Fraser notes that “*this was a major political problem during negotiations, because many countries considered that only they could decide what is sustainable*”.⁸⁴

Based on these criteria, Forest Europe produces regular reports on the state of Europe’s forests. However, in the absence of threshold values it is difficult to answer the question of whether or not European forests are sustainably managed. For example, the 2015 report⁸⁵ states that the quantity of deadwood ranges from 8 m³/ha in Northern Europe to 20 m³/ha in Central-Western Europe, with a slight increase over the last 20 years in most of European regions. However, these amounts vary considerably depending on forest types and other factors and are influenced by forest management regimes. No information can be inferred on whether this means that forests are managed sustainably. 30% of European forests are dominated by a single tree species (conifers), while 70% have two or more tree species. The only conclusion that can be drawn is that the rate of monocultures is very high (which, for biodiversity, is rather a negative factor, since monocultures will typically provide ecological services to fewer wild plants and animals than will biodiverse forests). As regards natural regeneration, nearly 68% of European forests regenerate naturally, while on the other hand short rotation coppicing for bioenergy is expanding. Again, what does this mean in terms of sustainability? Furthermore, data seems not to be made available in a consistent manner. Around 12% of European forests are protected for biodiversity reasons, but the level of protection varies considerably in the different countries. Overall, the report concludes that “*biodiversity remains an important topic*”, but nothing is said about whether this indicates how sustainably or unsustainably European forests are managed. Since, as mentioned, scientific reports show a significantly low percentage of forest habitats and forest-dependent species in favourable condition, one

should conclude that EU forest are not managed sufficiently sustainably⁸⁶.

In conclusion, SFM, in the absence of a sufficiently precise definition for assessing the sustainable management of an individual forest stand, is of limited use. As Winkel et al. underline⁸⁷, “*this inclusive, but also elusive definition has encouraged national forest policy subsystems to evaluate and emphasize the dimensions of forest sustainability differently. Therefore, what is considered a sustainably managed forest varies significantly and can be linked to different societal demands, expectations, economies and related power constellations in national and sub national forest policies*”.⁸⁸ Nichiforel et al. indicate that “*certain management practices in European private forestry may be considered as responsible forest management in one jurisdiction, while in other jurisdictions they may appear to infringe laws*”.⁸⁹

This is not to say that it is not possible to improve the concept of sustainable forest management and make it fit for the multi-functional role of forests. Recently, the private international association of foresters ‘Pro Silva’ developed, building on the Forest Europe criteria, significantly more detailed indicators⁹⁰. This demonstrates that, even among foresters, the limits of the current approach to SFM and the need for more precise standards is known. These standards could be developed by the EU by making full use of the shared competences on forests and forestry.

4 Concluding remarks

Legally speaking, the issue of EU competence on forests is rather straightforward. In a context of shared competences, the EU has often made use of its powers. The current debate appears to be motivated more by political than legal reasons: the EP in 1979 considered the absence of an explicit EU competence on forests in the Treaty as an obstacle to be overcome, and even suggested to the Commission how to do so; while more recently – although with

⁸⁴ A. Fraser, cit, p. 170.

⁸⁵ See <https://foresteurope.org/publications/#1471590853638-cbc85f9c-8e6e>.

⁸⁶ More precise criteria related to the environmental dimension of forest management can be found in private certification schemes. Still, they are primarily based on standards related to forest production and their ability to demonstrate sustainable forest management is somewhat limited. See Stupak, B. Lattimore, B.D. Titus, C. Tattersall Smith, Criteria and indicators for sustainable forest fuel production and harvesting: A review of current standards for sustainable forest management, Biomass and Bioenergy 35 (2011) p. 3287-3308.

⁸⁷ G. Winkel, J. Gleißner, T. Pistorius, M. Sotirov, S. Storch, The sustainably managed forest heats up: discursive struggles over forest management and climate change in Germany, Critical Policy Studies, Vol 5, n. 4, December 2011, 361-390.

⁸⁸ Cit., p. 365.

⁸⁹ Cit., p. 550.

⁹⁰ See <https://www.prosilva.org/close-to-nature-forestry/pro-silva-principles/>.

quite diverging views over time – this is rather used as a reason not to develop EU measures.

Only the European Court of Justice can definitely interpret EU law. The jurisprudence of the Court shows that responsibilities for forests do not legally lie with the Member States⁹¹. This is also demonstrated by the vast set of EU rules adopted over the years that concern forest directly or indirectly (and not only those founded on the environmental legal basis, but also on others such as agriculture and energy⁹²).

The question arises, whether the Treaty must necessarily refer to a forest policy to sustain that the EU enjoys such competence. Under Art. 191 TFEU (first indent), the Union's policy on the environment aims at preserving, protecting and improving the quality of the environment. Although the term 'environment' is not defined, it is beyond doubt that it includes trees and forests. Moreover, forests are natural resources, which under Art. 191 (third indent) have to be used prudently and rationally.

The political dimension behind this debate reflects relevant significant interests. About 40% of EU forests are owned by the States, while 60% is in private hands. The national administrations in charge of managing state-owned forests are generally also those in charge of forest policy, and shaping the Member States' position at EU and international level. Private forest owners associations share largely the same goals and it is no surprise that national forest policies are very strongly influenced by forestry interests.

Although, for forest which fall under protection regimes, in particular the Natura 2000 network, the competence is increasingly with the environmental administrations, given that around 80% of the forestland in the EU is available for wood supply, the administrations in charge of agriculture/forestry (which is generally referred to as 'silviculture', a term which is self-explanatory in policy terms) tend to remain the dominant ones, in particular in countries where the forest sector is economically strong.

Opposition to EU competences – to the extent of not considering the relevant Court's jurisprudence – originate from this context. The political context also explains the urge of some to continuously stress that EU forests are 'sustainably managed', despite reports on the state of nature providing a different

picture. In line with Article 191 TFEU the EU might further influence the way forests are to be managed, for example by imposing new climate or biodiversity-related management criteria such as generally limiting monocultures or largescale clear-cuts, requirements that already exist in a number of countries. As we have seen, the EU is not fully equipped to demonstrate clearly whether or not a forest is sustainably managed and thus would require, to this end, the adoption of further standards– standards that the EU legislator is, in legal terms, perfectly equipped to develop.

⁹¹ It should be noted that, on the occasion of adoption of the Council Conclusions on the perspectives for EU forest strategy post 2020 on 16.11.2020, Belgium declared "We do not consider that forests are an exclusive competence of the Member States because forestry policy is not explicitly mentioned in the treaty as an EU exclusive competence or a shared competence", <https://www.endseurope.com/article/1700312/member-states-say-no-common-forestry-policy>

⁹² Directive 2018/2001 on the promotion of the use of energy from renewable sources, OJ L 328, 21.12.2018, p. 82–209.

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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.

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