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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

Marlene Ågerstrand

Forest and forestry policy between the EU and its Member States

Marco Onida

Recent Developments

CONTENTS

Editorial	1
Authors of this issue	1
Gene drives and the EU	2
<i>Ludwig Krämer</i>	
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	7
<i>Nicolas de Sadeleer</i>	
Better reporting of science to improve regulatory decision-making	12
<i>Marlene Ågerstrand</i>	
Forest and forestry policy between the EU and its Member States	16
<i>Marco Onida</i>	
Recent Developments	
Product policies for a Circular Economy. elni 2020 event cycle “Green Deal – A way forward for EU environmental legislation?”	25
<i>Carolin Isabel Schwarz</i>	
Imprint	29
elni Membership	29

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
December 2020

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Product policies for a Circular Economy

elni 2020 event cycle “Green Deal – A way forward for EU environmental legislation?”

Carolin Isabel Schwarz

Report on the online webinar “Product policies for a Circular Economy” on 14 Oct 2020 as part of the elni 2020 event cycle.

1 Introduction

In 2020, elni organized an event cycle under the all-embracing question “Green Deal – A way forward for EU environmental legislation?” consisting of four events. Due to the corona pandemic all events were organized as online webinars. The third event took place on 14 October 2020 and dealt with product policies for a circular economy.

2 Information flows on SoCs in products

Prof. Dr. Martin Führ, sofia/Darmstadt University of Applied Sciences, opened the webinar and started the first lecture about ‘Information Flows on Substances of Concern (SoCs) in Products from Supply Chains to Waste Operators’. His presentation was the summary of the eponymous study on behalf of the European Commission¹ and had been used before for a joint meeting of the CARACAL and Waste Expert Group. Prof. Dr. Martin Führ first took a look back at the elni forum in Utrecht in 2018 with the title ‘Circular Economy and Product Law – missing links’, emphasizing that this webinar is not the first time elni has thought about circular economy. The above-mentioned study is a feasibility study which started in December 2018 and ended in May 2020. The aim of the study was to assess the feasibility of options to support information flows on SoCs in products to the waste operators. It focuses on the waste stage (not product/substitution), on information needs of the waste sectors and on how to transfer the necessary SoC information. As it is a feasibility study, it tries to look as far as possible into future options. The SoC information should be sufficient for the decision making of the waste operators on what to do with a product. In order to do so, the information should be available upstream, meaning that all actors along the supply chain of a product have to contribute their information to create a full picture for the waste operators. If waste operators have information on SoCs they are empowered for: (A) targeted disposal, (B) informed (preparation for) re-use, (C) enhanced

dismantling/separation of specific items and (D) improved material sorting; resulting in a targeted SoC destruction and separated high quality recyclate.

There are several information carriers available for the information flow on SoC along the supply chain. ‘Tracers’ are directly implemented into the material, having the advantage that the entire material is detectable. ‘Tracers’ allow for the connection of information flow and SoC detection, as they can integrate flags indicating the presence of a SoC in the product (at least at the time the tracer was added to the product – there is a time lag/toxic ignorance problem). ‘Tags’ (e.g. RFID in textiles, QR-codes) can additionally be configured as “unique identifiers” which can also carry information from later stages of the supply chain. They however bury the risk of not being handed over if a product enters the end-of-life stage. Both tracers and tags can be linked to documentation systems. With the ECHA SCIP database one can create a large number of different “unique identifiers” directly linked to a central database (full material declaration approach) with the option to add information gained at a later stage (e.g. on SoC). The information then can be used by actors at the end-of-life stages, e.g. the waste operators.

Most of the technologies presented are already technically feasible but the economic incentives are not strong enough to make full use of them. The main findings of the study are that improved SoC information could generate benefits, as an increased volume of less-contaminated materials enters the recycling or reuse phase and the quality of secondary raw materials can be better judged. However, for the time being there is no ‘one-size-fits-all system’ available, but rather different intervention mechanisms (see (A) to (D) above), information transfer approaches and information carriers can be combined. When doing so, actors have to consider particularities of sectors as well as abilities and trends of waste treatment, including collection. For some product types (e.g. construction products) simple approaches are already available and should be used. Another finding is that the type of SoC information needed depends on the waste sorters’ decision needs which in turn depend on the market of secondary raw materials. Under current conditions, simple yes/no decisions on SoC are sufficient (except for an informed (preparation for)

¹ The whole study can be downloaded [here](#) (30.10.2020).

re-use) and investments in sophisticated sorting are not seen as justified as there is no demand. Prof. Dr. Martin Führ speaks of a ‘hen and egg problem’. Nevertheless, in the future more detailed information on material composition will be more important as differentiated dismantling and re-manufacturing will take place, which will also offer new economic chances and business models. While carriers enabling the transfer of large volumes of information and updating currently have the highest implementation and operating costs, there will be large economies of scale in the future due to the low additional costs of adding other information (e.g. on handling, repairing).

Based on these main findings, the study offers some recommendations. Market actors should combine material-specific approaches (create amounts (across sectors)) and product-specific approaches (efficient sorting early in the waste chain). The key to guiding sorting targets are standards on secondary materials, meaning that waste actors have to define required information (e.g. on SoCs). In order to do so, they need authority/legislative support. The SCIP database will contribute to improved re-use because information on SoCs has to be reported. Simple solutions should be addressed first, while adequate information flow systems have to be envisaged for more complex supply chains.

A participant of the conference asks about the response to industry criticism of the SCIP database, particularly concerning the administrative burden it creates. Prof. Dr. Martin Führ responds that the future will show that supply chain information tools are the key, due to quality management, reduced costs, and for many other reasons. For actors who are not prepared, they of course create an additional burden initially, but long-term benefits will be increasingly visible. If we are really convinced that a circular economy is important, then we have to be sure to avoid risk cycling. This can only be achieved through material declaration, by knowing what is in the product from the very beginning. To summarize the answer: the complaints are only looking at the burdens, they do not see the business models in this process. In a few years everybody will be happy to have invested in such a system as it is effective and efficient.

Concerning the policy framework, the feasibility study informed the European Green Deal to some extent, which promises that there will be a ‘sustainable products’ policy to support a circular economy. This will lead to new business models and is linked to extended producer responsibility. To achieve this, reliable, comparable and verifiable information is crucial, e.g. transferred through an electronic product passport which is a digital twin of a tag, tracer or other medium linked to a product.

The European Green Deal is looking ahead on the paths described by the feasibility study. Looking at the new Circular Economy Action Plan, ‘sustainable products’ will be defined by legislative initiatives. They will improve product durability, reusability, upgradability and repairability and address the presence of hazardous chemicals in products. All of these aspects were also part of the feasibility study, which one can assume that the European Commission is making use of and transferring into a legislative framework. Regarding the feasibility study and the policy framework, Prof. Dr. Martin Führ concludes that additional incentives are necessary to stimulate a design for a circular economy and make best use of the four intervention options. It is even more important to address the impediments faced by actors along the supply chain, e.g. the standardization of data structure standards is key. The SCIP database stimulates efforts in the area of standardization and reduces administrative burdens. Prof. Dr. Martin Führ is quite optimistic about the future looking at the feasibility study and the policy frameworks, also regarding the upcoming sustainable chemistry strategy. These are all going in the same direction and are building pieces for a broad regulative framework supporting change processes towards a circular economy. He ends his presentation with the sentence: “*We should make better use of the in many ways precious materials that we already have extracted from the planet.*”

3 Case study from the carpet industry

After Prof. Dr. Martin Führ’s lecture, Edmund Vankaan from the European Carpet and Rug Association (ECRA) spoke about “Electronic Product Passport: Contributions to a Circular Economy.” The ECRA is an organization comprised of 44 leading carpet producers from 8 European countries covering approx. 85-90% of the European indoor wall-to-wall carpet production.

For their circular economy strategy, they have identified three important activities: (A) smart selection of materials (use of recyclable materials), (B) transparent information exchange (regarding chemicals and materials), (C) education along the chain. In 2018, roughly 685 Mio m² of carpet remained within the EU market. Materials typically used in carpet production include: a limited amount of polymers; latexes, plastic elastomers and bitumen; natural materials like wool, jute and sisal; as well as CaCO₃, Al(OH)₃, pigments, dyes and additives. Polymers are the most used material; natural materials are only slightly used. Thus, a CE strategy should the first address polymers.

Regarding the information exchange along the chain, the following aspects should be included: whether a product could be used for an extended use phase, whether it could later be separated into monomers or polymers, or whether fibres can be directly used. Furthermore, it is necessary to know whether the product is compostable (bio-based product) so it can be decomposed into CO₂, NO₂ and H₂O or whether it should rather be incinerated (as it has been produced, e.g. 20 years ago and information on materials is missing). Additionally, some products are better decomposed into base chemicals if the materials mix is too complicated to be separated. The following aspects should be the focus of the information flow: SoCs, as they can significantly disturb the material cycle, the material composition (as the recycler needs to have a business case), the amount of each material, the accessibility of materials, other substances (non SoCs) disturbing the recycling operations, and useful information for the use phase of the product.

The latter shows that the information exchange should not only be used for the end-of-life scenario. With the production of a carpet, ECRA feeds information into a database called PRODIS (= product information system). The database includes information on material composition and recycling options (based on recent technologies), but also information necessary for the use phase, e.g. on installation or on cleaning & maintenance. The newly designed electronic product passport enables actors along the supply chain to get this information on every stage of the life cycle of a product. In particular, the electronic product passport covers the following information which is available online and is product specific via a QR-code or license number:

- material composition
- information on chemicals used
- recycled content
- recycling potential based on CEN or industry standards
- CE label and declaration of performance (DOP)
- technical data based on CEN product standards
- indoor air quality based on GUT criteria
- environmental product declarations based on 3rd party validated LCA-data
- properties of use

However, the disadvantage is that a QR-code is not permanently affixed to the product. In the future, a secure information transfer could be realised via a miniaturised RFID-chip containing a specific product ID.

Regarding the recycled content, ECRA has started an active work item on standardization. The title of the standard is “definition and declaration of recycled, bio-based and renewable material content

(organic and inorganic) in textile floor coverings”. In spring 2021, the standard shall be finalized and used. Furthermore, together with other associations and under the umbrella organisation PolyCert Europe, ECRA is creating a harmonized scheme for the overall declaration of recycled content in materials. The scheme is divided into three sections, with the third section containing information on hazardous substances in the recycled content.

Edmund Vankaan also speaks of a “hen and egg problem” regarding the question of whether to start with a sustainable product, with technical solutions for material processing or with collecting and sorting. In his opinion, these must occur at the same time and be brought together in the end. ECRA is now looking at solutions for the collecting and sorting to get a preselected amount of materials and start the recycling process. At the same time, they are looking for technical solutions for the material processing. The sustainable product design aims at reducing the amount of products that go to energy recovery, thus reducing CO₂ emissions, and increase the amount of fibre materials that go into a pool of recycled materials (polymer pool).

At the end of his presentation Edmund Vankaan gives an example of potential CO₂ savings through recycling carpets. Assuming that 70% of PA6 yarn used in carpets could be reused in new carpets, after collection, sorting and recycling, 223,000 tonnes of CO₂ could be saved (which is almost half of the CO₂ emitted by using virgin PA6).

In sum, not only the communication on SoCs in the product is important, but also that on the material composition, recycling options and possible use scenarios to increase the lifetime of a product and guarantee safe and optimized recycling in the end.

4 Discussion

After the two presentations, the audience started a discussion. The first question was how to increase the low recycling rates in the European carpet sector and what the law should do in this regard. Edmund Vankaan answers that in previous years carpets were not designed to be recycled and there was no market for recycled materials. Thus, recycling rates were low. In his opinion, it is crucial to achieve a circular economy with polymer pools, respectively pools of recycled materials, making recycled materials available and creating a market. The example of recycled PA6 shows that since there is a market for the recycled material, more carpets are made out of PA6 today. Prof. Dr. Martin Führ adds that in the status quo there are two problems: the raw material is too cheap and there is no sufficient supply of secondary material in sufficient quality. That is why financial incentives and an enhanced version of ecodesign requirements are needed. Required

recycling rates should be increased step by step, e.g. starting with 4%, then 20%, and so on. Actors who have a business plan contributing to a circular economy in mind need the help of legislators, otherwise they will not be successful. Law has to focus on a system that incentivizes products that are easy to recycle. At the moment, the approach of the European Commission is still based too heavily on voluntary contribution.

Another question referred to the new Circular Economy Action Plan, which says, “To fulfil this ambition, the EU needs to accelerate the transition towards a regenerative growth model that gives back to the planet more than it takes”². The participant asks how it will be possible to give back to the planet more than we take. Prof. Dr. Martin Führ answers that literally the only chance to do this is photosynthesis. On an implicit basis this means to create solutions that make use of photosynthesis, e.g. wooden floor carpets. He adds that this seems to be a more philosophical idea and we have to try to minimize the damage, take as little as we can and give back as much as we can. Even if we achieve a circular economy, we will still need energy for the recycling processes which will still produce CO₂. The quote is more about planetary boundaries and the need to improve the state of the environment.

A third and last question was whether an extended producer responsibility can really play a role in advancing a circular economy. Prof. Dr. Martin Führ answers that it has to be a tailor-made one with good incentives. It should be designed in a manner that offers real business cases and leaves no opportunities for free riders. For example, there should be consequences if recycling rates are not met. Furthermore, the extended producer responsibility has to be thought through for the different industrial sectors. The European Commission could conduct role playing exercises for the different sectors to explore the interaction of such a scheme before amending legislation.

² New Circular Economy Action Plan, available here (27.10.2020).

elni membership

If you want to join the Environmental Law Network International, please fill in this membership form (see also www.elni.org/elni/membership) and send it to the elni Coordinating Bureau, c/o TH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: roller@th-bingen.de.

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Imprint

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

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

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

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

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- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

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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, focusing 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 researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

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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