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CONTENTS

Editorial

The current issue of *elni Review* contains several contributions focussing on different aspects in the field of European environmental law practice.

In his profound article "The genome editing technique is covered by Directive 2001/18 – Comment on Advocate Bobek's Opinion in case C-528/16" *Ludwig Krämer* argues that genome editing must be understood as being covered by the provisions of Directive 2001/18 on the deliberate release of genetically modified organisms into the environment.

"The ECJ Rules Environmental NGOs Must Have Access to Justice in Water Law Procedures" by *Summer Kern* and *Gregor Schamschula* assesses the current developments of implementation with regard to access to justice in Austrian Water Law. The ruling in question can certainly be seen as a milestone in environmental case law.

The article by *Erjon Muharremaj* "The role of legislation and courts in the protection of the environment in the European Union and its impact on the European integration of Albania" delivers interesting insights with regard to the current state of environmental law in Albania and its shortcomings with regard to jurisdiction. This certainly will have an impact on the acquisition negotiations with the European Union.

Finally, *Martin Führ, Jaqui Dopfer, Kilian Bizer et. al.* discuss simulation games as a method for regulatory impact assessments. They set out their experiences with the method acquired during the impact assessment of the EIA Amending Directive 2014/52/EU.

The current issue of the *elni Review* delivers information about recent developments; a summarized version of the "Peoples' Climate Case"-application delivered by the applicants and a review of the book "Environmental Crime in Europe" by the editors Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi.

We hope you enjoy this issue.

Nicola Below/Martin Führ

July 2018

The genome editing technique is covered by Directive 2001/18
Comment on Advocate Bobek's Opinion in case C-528/16

Ludwig Krämer

1 Introduction

The question, whether or not plants that were obtained by genome editing are covered by Directive 2001/18[1] *is at present the subject of proceedings before the Court of Justice of the European Union (CJEU)*[2]*. In this case, Advocate General (AG) Bobek has just issued his Opinion.*[3] *He concluded that such plants are exempted from the provisions of the Directive, as genome editing is a form of mutagenesis, so that the exemption of Art. 3(1) of the Directive, read in conjunction with its Annex I B, applied. The application of the precautionary principle does not lead, in his opinion, to a different result.*

The Opinion of the AG is not binding for the CJEU. However, it has a considerable weight, as it is the first factual and legal analysis of the case made by someone else than one of the Parties, and as the AG is an eminent lawyer with a rich professional experience and who is in rank equal to a judge at the CJEU.

In the following, it will be argued that the Opinion of the AG comes to conclusions which are contrary to the wording and the purpose of Directive 2001/18, and that genome editing must be understood as being covered by the provisions of that Directive.

2 Genome editing in Directive 2001/18

Directive 2001/18 is process-oriented: it does not consider the genetically modified organism as such, but looks at the process by which the organism has been altered.[4] One of the ways in which an organism may be altered is mutagenesis, which leads to the mutation of an organism. Mutagenesis involves an alteration of the genome of a living species.[5] When it was attempted to influence the mutation of plants by human intervention, techniques of using chemicals and/or radiation were developed (random mutagenesis). They were in use worldwide since the 1920s and did not lead to any concern for human health or the environment.

Since 2001, after the adoption of Directive 2001/18, new forms of intervention in the genome were developed; they were essentially characterized by targeted interventions in the genetic material of an organism. The technique consisted of inserting, deleting, modifying or replacing DNA at a specific point in the genome of a living organism. As the intervention is deliberate and takes place at a specific point of the genome, it is conveniently called genome editing.

The Advocate General classified organisms which underwent random mutagenesis as well as those which were the subject of genome editing as genetically modified organisms.[6] He concentrated on the question, whether the exemption of Art. 3(1) and Annex I B (hereafter the mutagenesis exemption) applied to both the random mutagenesis and the genome editing or – as the applicants in case C-528/16 argued – only to random mutagenesis processes.

Art. 3(1) of Directive 2001/18 reads as follows: "This Directive shall not apply to organisms obtained through the techniques of genetic modification listed in Annex I B". And Annex I B states: "Techniques/methods of genetic modification yielding organisms to be excluded from the Directive, on the condition that they do not involve the use of recombinant nucleic acid and molecules or genetically modified organisms other that those produced by one or more of the techniques/methods listed below are: (1) mutagenesis..."

Prior to the adoption of Directive 2001/18 in 2001, there were only conventional or random methods of mutagenesis that were applied to plants or animals; they used chemicals or radiation in order to reach a mutation. Genome editing as a method was unknown, or in any case not used in breeding techniques in the EU or worldwide. These techniques only started to be used later.

Therefore, the question is, whether the mutagenesis exemption of Art. 3 and Annex I B applies to random mutagenesis as well as genome editing, or whether the exemption of mutagenesis only covers the forms of mutagenesis which were known and in use at the moment of adoption of Directive 2001/18.

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1 Directive 2001/18 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220, OJ2001, l106 p.1.

2 CJEU, case C-528/16 Confédération paysanne a.o. v Premier Ministre, Ministre de l'agriculture, de l'agroalimentaire et de la forêt.

3 Advocate General Bobek, Opinion in case C-528/16, ECLI:EU:C:2018:20.

4 see Directive 2001/18 on the deliberate release into the environment of genetically modified organisms, OJ 2001, L 106 p.1, Article 2 no. 2: '"genetically modified organism (GMO)' means an organism with the exception of human beings, in which the genetic material has been *altered* in a way that does not occur naturally by mating and/or natural recombinant' (emphasis added).

5 Advocate General (fn. 3, above), paragraph 44.

6 *Ibidem*, paragraphs 60 to 64.

3 Genome editing as « mutagenesis » under Directive 2001/18?

The Advocate General was of the opinion that genome editing is a form of mutagenesis. He did not explain this understanding of the term "mutagenesis". Doubts exist in this regard, as in 2001 the technique of genome editing was unknown. In contrast, the exemption for mutagenesis had already existed in Directive 90/220[7], the directive preceding Directive 2001/18. It had worked between 1990 and 2001 without causing any problem in differentiating between genetically modified organisms (plants) and plants where mutations were obtained through treatment with chemicals or radiation. It is difficult to imagine that the EU, when it adopted Directive 2001/18 had anything else in mind than the random mutagenesis methods which existed at that time. In other words, the term "mutagenesis" in Directive 2001/18 was meant to exempt the random mutagenesis methods.

This understanding finds support in Recital 17 of Directive 2001/18, which reads: "This Directive should not apply to organisms obtained through certain techniques of genetic modifications which have conventionally been used in a number of applications and have a long safety record". Also, this Recital existed already since 1990, as Recital 7 of Directive 90/220.

The only technique which had been used in a number of applications and had a long safety record – in 1990 as well as in 2001 – was the mutagenesis with the help of chemicals or radiation. Thus, if Recital 17 is meant to have any useful effect, it must serve as an interpretation of the exemption of Art. 3 and Annex I B.

The Advocate General was of a different opinion. He considered the term "mutagenesis" – which is not defined in Directive 2001/18 – as a general term which also included genome editing. He came to this result by arguing that the use of a specific word "mutagenesis" not only included those techniques, which came under this term at the time of its insertion into a legislative act but also all other techniques which were unknown at that time, but which were developed at a later stage. Only such a dynamic interpretation of the term "mutagenesis" was in his opinion compatible with the intention of Directive 2001/18.[8]

4 Arguments from a historical perspective

There are several arguments, which plead against this understanding. First, the AG has no explanation for the existence of Recital 17. He does not clarify which techniques would be covered by this Recital. He refers to declarations by the Commission and the Council during the hearing of case C-528/16, according to which Recital 17 was a mere statement and did not intend to differentiate between mutagenesis techniques.[9] Such declarations though, made at least seventeen years after the insertion of Recital 17 into the Directive, are not very convincing. They leave open the question, which techniques were considered by that Recital. The only reasonable answer is that Recital 17 was inserted in order to further qualify the exemption of mutagenesis, in the sense that only those techniques should be excluded from the scope of application of Directive 2001/18, which had a long safety record and had been used in numerous applications before 2001.

4.1 Interpretation in the light of Directive 90/2001

The AG argued further that the predecessor of Recital 17, Recital 7 of Directive 90/220, was inserted by the Commission in its proposal for a directive, which later became Directive 90/220; at that time, the exemption for mutagenesis techniques of Art. 3/Annex I B did not exist; it was inserted into Directive 90/220 only at a later stage.[10] This is evidence for the AG that Recital 17 (the earlier Recital 7) and the exemption for mutagenesis are not interdependent.

However, this argument is not pertinent: right from the beginning of legislative activities in the end of the 1980s, it was clear for the Commission, the European Parliament and the Council, that the regulation on genetically modified organisms should not interfere with conventional breeding techniques, which had, as it was worded, "a long safety record". This general understanding of delimiting the GMO techniques to conventional techniques was clear for everybody and in Recital 7 of Directive 90/220. This Recital did not need to be changed, when the exemption of "mutagenesis" was added to the text.

The history of Recital 7 – which later became Recital 17 – and the exemption of mutagenesis thus leads just to the opposite conclusion of that of the AG: the term "mutagenesis" was used in Directive 90/220 as it was understood and practiced at the time of adoption of Directive 90/220. Had a detailed definition of "mutagenesis" been inserted into the text of Directive 90/220, it would have, without doubt, referred to the use of chemicals and radiation, but not to other techniques such as genome editing, for the simple reason that such techniques were unknown.

The delimitation between conventional breeding techniques and alterations of the genetic material of

7 Directive 90/220 on the deliberate release into the environment of genetically modified organisms(GMOs), OJ 1990, L 117 p. 15.

8 AG (fn. 3, above), paragraphs 77 and 107.

9 *Ibidem*, paragraph 95.

10 *Ibidem*, paragraph 94.

an organism functioned without the slightest problem throughout the 1990s. Therefore, it did not need a change in the wording of the Directive in 2001.

This history also explains why the 2001 insertion, in Annex I B of Directive 2001/18, of the use of recombinant nucleic acid molecules does not prove that the legislature of 2001 intended to narrow down the term "mutagenesis" only by referring to such molecules, but meant, for the rest, to cover all forms of mutagenesis techniques, including those that might be developed in the near or distant future.[11] The mutagenesis techniques which existed in 2001 – and which had existed since 1990 and earlier – were exempted: this was already ensured by the joint provisions of Recital 17 and Art. 3/Annex I B. No further clarification was necessary.

4.2 The origins of GMO-law on deliberate release

The understanding of Directive 2001/18 cannot leave aside its origins. In the second half of the 1990s, a crisis broke out as regards the deliberate release of GMOs. In a specific case, concerning BT-maize, the Commission had proposed to approve the deliberate release, but was opposed by the majority of Member States which made it impossible to obtain a qualified majority of Member States supporting the Commission proposal. According to the rules applicable at that time, the Commission then submitted its proposal to the Council. In the Council, thirteen Member States opposed the Commission proposal, one supported it and one abstained. However, as one Member State sided with the Commission, and as the Council needs unanimity in order to deviate from a Commission proposal, no decision was taken by the Council and the file came back to the Commission which then authorized the deliberate release.[12]

This Decision caused an outcry among the EU public and Governments of Member States. The Commission and the whole EC were accused of being too receptive to business interests and neglecting the concerns of the public. It was considered unacceptable that a deliberate release could be approved against the opinion of the large majority of the Member States. Five Member States declared publicly that they would not continue with the procedures of authorizing the release of GMOs, until the safety concerns of the Member States were taken more seriously, procedures were changed and the public trust and confidence were restored.[13] No Member State sided in public with the Commission. The whole approval process for GMOs came to a standstill (the so-called de facto moratorium), which had as the consequence that no approval for the release of GMOs was granted.[14]

Then, the Commission submitted a proposal for amending Directive 90/220.[15] However, the Council was of the opinion that an amendment of Directive 90/220 was not sufficient to restore public confidence in GMO techniques and decided to adopt a completely new text, the Directive 2001/18. It introduced the precautionary principle as one of its key principles, fixed stricter, more protective conditions for the authorization and approval procedure of GMOs, requested an environmental risk assessment for all applications, provided for the systematic participation of the European Food Safety Authority as a scientific body, gave the public the possibility to be consulted during the decision-making process, provided the possibility of the intervention of a Committee on Ethics, and laid down post-marketing controls.

All the provisions which were newly inserted into Directive 2001/18, compared to Directive 90/220, aimed at strengthening the protection of human health and the environment. There was not one provision where the new Directive relaxed the standards and considered that less protection for humans and the environment should be ensured. In order to avoid different approaches to GMO releases among the Member States, which would have threatened the integrity of the EU internal market, a high level of environmental protection was established in the Directive.

In view of this, it cannot be argued, as the AG did, that the mutagenesis exemption of Art. 3/Annex I B meant to leave the gate open and exempt all future scientific evolutions in gene alterations from the field of application of Directive 2001/18. Rather, the legislature of 2001 sought to ensure, as far as possible, that the public in the EU gained a new confidence in the GMO procedure and could be sure that only such GMO products would be released into the environment that had either a long safety record (Recital 17) or were thoroughly tested according to the environmental risk assessment of Directive 2001/18, Annex II.

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11 In this sense AG, *ibidem*, paragraph 77.

12 Commission Decision 97/98, OJ 1997, L 31 p.69. The full story of this case is reported in European Parliament, Report of the Committee on Environment, Public Health and Consumer Protection of 28 January1999, Opinion of the Committee on Research, Technological Development and Energy of 29 September 1998, document PE 227.836 /A 4-0024/99.

13 The statement of the five Member States- Denmark, Greece, France, Italy and Luxemburg - is published in World Trade Organization (WTO), Dispute Settlement on Approval and Marketing of Biotechnological Products, WT/Ds 291-293, United States, Canada and Argentina v. European Communities, Dispute Panel Report of 29 September 2006, paragraph 7474. See also paragraph7484 which reproduced the public statement of seven EU Member States that no authorization for GMOs should be granted, until it was proven that it did not cause safety concerns.

14 This moratorium lasted from 1998 until 2004 or 2005.

15 Commission, COM(1998) 85, OJ 1998, C139 p.1.

4.3 Precautionary principle in the context of risks of deliberate release of GMOs

This result is also confirmed by the very prominent function, which Directive 2001/18 attributed to the precautionary principle. This principle was referred to several times and very prominently, in Recital 8, in Art. 1, Art. 4 and in the provisions on the environmental risk assessment (Annex II); in particular its mentioning in Art. 1, the introductory article of the Directive, needs to be stressed, as this indicated that the whole drafting and application process should be governed by precautionary considerations. The precautionary principle was given the function to act as a catch-all provision: as soon as there was scientific uncertainty with regard to a GMO, the decision-maker should err on the safe side, in order to protect humans and the environment. Again, this prominent role of the precautionary principle, which is found in no other legislative act of the EU, is explained by the loss of trust of the public in the GMO procedures at European level, the general fear of undesired consequences of a deliberate release of GMOs into the environment and the need to restore this lost confidence.

The AG interpreted the function of the precautionary principle in the context of Directive 2001/18 quite differently. He was of the opinion that the mutagenesis exemption of Art. 3/Annex I B had nothing to do with Recital 17. Consequently, the term "mutagenesis" had to be interpreted, in his opinion, exclusively on the basis of Annex I B. This excluded the application of the precautionary principle in such an interpretation, as this would otherwise lead to an interpretation *contra legem*.[16]

The AG was certainly correct in stating that the precautionary principle cannot lead to an interpretation of a term *contra legem*. However, the AG's understanding of the term "mutagenesis" was based on the assumption that Recital 17 is irrelevant for the definition of "mutagenesis" in the context of Directive 2001/18. The understanding of this notion here is different: "mutagenesis" in Annex I B is the technique of mutagenesis, which has a long safety record and was conventionally used in a number of applications. This is not the case for the "new directed mutagenesis techniques" mentioned in the first question submitted by the French Conseil d'Etat to the CJEU. For this reason, there is no justification for why the precautionary principle should not apply with regard to the question, whether or not such new techniques come under the field of application of Directive 2001/18.

This is another aspect which the AG neglected in his analysis: Directive 2001/18 had the declared objective to appease the public in the EU, which was concerned about the fact that GMOs were allowed to be released into the environment, though a great majority of Member States considered that their safety had not been proven. For this reason, the legislature did not only amend Directive 90/220, as proposed by the Commission, but decided to have a completely new directive drafted. In addition, all the supplementary safeguards, mentioned above, had the objective to ensure that human health and environmental safety were not at risk by a release. In view of this, it is completely unlikely that the legislature intended to establish a general derogation for all present and future mutagenesis techniques, knowing that research in biotechnology was ongoing and being aware that with any progress in research such a general exemption would continuously have a wider field of application.

With the adoption of Directive 2001/18, the legislature intended to ensure a full harmonization of the provisions of Member States on the release of GMOs into the environment. For this reason, the Directive was based on Art. 95 EC (the present Art. 114 TFEU) and not on the environmental, consumer protection or another provision of the EC Treaty. And for the same reason, Recital 17 mentioned the "long safety record" as a decisive criterion: it intended to ensure public opinion in Europe that health and environmental safety were the main concern of the new Directive. This corresponds to the fact that Recital 4 warned against risks from GMOs, Recital 5 referred to the protection of human health and the environment, Recital 6 to the principle of preventive action, Recital 7 reaffirmed the need to ensure the "safe" development of GMO products, Recital 8 introduced the precautionary principle as a leading principle stating that it had influenced the drafting of the Directive and would have to be applied in its implementation, and Recital 9 recurred to ethical principles. All these Recitals, which preceded the Recitals that refer to individual provisions of the Directive, underlined the principal objective of the Directive, which was to ensure the maximum amount of safety, when GMOs were released into the environment.

This intention of the legislature was finally repeated in Art. 1, which stated the objectives of harmonizing national laws and ensuring the protection of health and the environment and Art. 4, which laid down the general obligations and started by requesting Member States to take all appropriate measures to avoid adverse effects on human health and the environment. And the precautionary principle obtained the function to serve not only in the drafting of the Directive, but also in its implementation, which necessarily includes the interpretation given to the different terms of the provisions.

16 AG (fn. 3, above), paragraph 103.

5 Negative effects of the interpretation of genome editing as "mutagenesis"

In contrast to this clearly manifested intention of the legislature, the AG was of the opinion that the use of any new mutagenesis technique would enable the producer of GMOs to escape the provisions of Directive 2001/18 and thus progressively, with the evolution of science, reduce its field of application. According to the AG, this progressive reduction of the field of application of Directive 2001/18 goes hand in hand with the increased freedom of EU Member States to regulate newly directed mutagenesis techniques.[17] This opinion would have the consequence that on the one hand, the double objectives of Art. 1 of the Directive – harmonization of national legislation within the EU and a high level of the protection of human health and the environment – would progressively be undermined by the recurrence to new techniques. On the other hand, the public within the EU would be increasingly confronted with GMOs that were no longer released on the basis of Directive 2001/18, but on the basis of the legislation of the – in 2001 15, now 28 – Member States. As such national legislation will necessarily be different as regards approaches, intensity of the regulation, the application of the precautionary principle, the intervention of national scientific bodies, the time of introduction of such legislation etc., the public would be confronted with GMOs that offer different degrees of safety. Inevitably, this would lead to controls at the national borders and other barriers to the free circulation of approved GMO products.

Such a result is diametrically opposed to the intention of the legislature in 2001, which intended to restore public trust and confidence in GMO techniques and the processes of approving a deliberate release into the environment, and of creating and maintaining an internal market for the release of GMO products.

Furthermore, it is by no means unusual that a specific provision, which is used in EU law, obtains a different, often narrower interpretation than originally considered, due to political, economic or scientific evolution. The best-known example concerns the free circulation of goods within the EU. The present Art. 34 TFEU – which has existed in the original EEC Treaty since 1958 – prohibits quantitative restrictions on imports and *"all"* measures having equivalent effect between Member States. However, in its famous "Cassis de Dijon" judgment, the CJEU decided that national measures, which pursued a legitimate public interest[18] did not constitute measures of equivalent effect and were therefore not prohibited.[19] Later, due to the evolution of environmental law and policy – the environment had not been mentioned in the EEC Treaty of 1958 at all –, it decided that also the proportionate protection of the environment, which restricted the free circulation of goods, did not constitute a measure of equivalent effect.[20]

It follows from this jurisprudence that a restriction of the term "mutagenesis" to those techniques, which were in use in 2001 and had a long safety record, is perfectly compatible with EU law and its interpretation rules.

The opinion of the AG that Member States are completely free in regulating genome editing and that Directive 2001/18 does not apply to that technique, has other consequences: The absence of EU or of national provisions on genetically modified organisms, where the modification was induced by genome editing, allows GMO producers or importers to bypass the careful and long approval procedure under Directive 2001/18 by using genome editing. This would mean that Directive 2001/18 is obsolete: genetically modified organisms, which were modified with the help of genome editing could, in the absence of EU and national provisions, circulate freely within the EU, without environmental risk assessment, assessment by the European Food Safety Authority and the other safeguards which Directive 2001/18 had provided for.

6 Conclusion

Genome editing is not a form of mutagenesis as regulated in Art. 3(1) and Annex I B of Directive 2001/18. The exemption provided for in those provisions only applies to mutagenesis techniques which have conventionally been used in a number of applications and have a long safety record.

17 *Ibidem*, paragraph 150.

18 The CJEU mentioned the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of consumers.

19 CJEU, case 120/78, Rewe v. Zentralverwaltung, ECLI:EU:C:1979:42.

20 CJEU, case 302/86, Commission v. Denmark, ECLI:EU:C:1988:421.

The ECJ Rules Environmental NGOs Must Have Access to Justice in Water Law Procedures

Summer Kern, Gregor Schamschula

1 Introduction

The Aarhus Convention[1] was adopted in 1998 within the United Nations Economic Commission for Europe, following Principle 10 of the Rio Declaration on Environment and Development.[2] This principle states that "[e]nvironmental issues are best handled with the participation of all concerned citizens […]". The Convention is an international treaty with three pillars, namely (1) Access to Information; (2) Public Participation; and (3) Access to Justice. As the Implementation Guide makes clear: "The three pillars depend on each other for full implementation of the Convention's objectives."[3]

The Convention has as of the date of this publication 47 Parties.[4] Austria ratified the treaty in early 2005[5], as did the EU[6]. As made clear by the EU's declaration upon ratification, implementation of the Aarhus Convention partly falls within the competence of the EU and partly within the competence of the Member States. With regards to Art. 9(3) in particular, the EU declared upon approval of the Convention that "the legal instruments in force do not cover fully the implementation of the obligations."[7] Yet the EU has recognized the drawbacks of this lack of implementation at the EU level repeatedly, and most recently issued a Notice on Access to Justice for the Member States so as to achieve better implementation and consistency within the Member States.

1.1 The EU Guidance Document[8]

The EU tried several times to introduce a directive on the third pillar of the Aarhus Convention, yet did not succeed due to resistance by the EU Member States.[9] After the latest failed attempt, the Commission moved on to draft a guidance document ("Notice") which mainly summarizes the case law by the European Court of Justice on the topic, and draws careful inferences therefrom. The Notice was published in April of 2017. While the Notice is not issued in a binding form such as a directive, its contents, which reflect the judgments of the ECJ, are binding. The document has gained a lot of attention, but many feel it falls considerably short of what is needed.[10]

1.2 The Situation in Austria

Environmental NGOs have had neither party standing nor related access to justice rights in Austria apart from EIA[11] procedures and with respect to certain large industrial projects.[12] In nature and water protection, in air quality, forestry law and other environmental law procedures, NGOs have neither been allowed to take part in the permitting proceedings, nor been able to challenge acts and omissions in court. Furthermore, the Highest Administrative Court ruled that Art. 9(3) of the Convention is not clear enough to be directly applicable in Austria.[13] To change this situation, Austrian NGO ÖKOBÜRO handed in complaints to both the European Commission and the Aarhus Convention Compliance Committee (ACCC)[14] in 2013/2014. The EC started an infringement case against Austria in 2014,[15] but took no further official steps after the initial letter. The ACCC found Austria to be in non-compliance, which was then endorsed by the Meeting of the Parties ("MOP") to the Aarhus Convention in 2014.[16] Neither the EC's actions, nor the

1 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25.6.1998, 37770 UNTS 119.

2 Rio Declaration on Environment and Development, 13.6.1992, UN Doc A/CONF151/26 (vol I); 31 ILM 874 (1992).

3 Implementation Guide, at p. 20; https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

4 www.unece.org/env/pp/ratification.html (9.3.2018).

5 Austrian BGBl III 2005/88.

6 Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ 2005 L 142/1ff.

7 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec (26.3.2018).

8 Communication from the Commission, 28.4.2017, C(2017) 2616 final, http://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf (9.3.2018)..

9 See fn. 8 *supra* at p. 6.

10 Comments by the environmental NGO Justice & Environment, http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2017/J_E_Comments_EC_Communication_A2J_Final.pdf (9.3.2018).

11 Environmental impact assessments according to the EIA directive 85/337/EEC, of which there are about 30 every year in Austria.

12 So called "Seveso" and "IPPC" projects, which are either more likely to have a big outfall or store dangerous goods according to directives 96/82/EG and 2010/75/EU respectively.

13 VwGH 27.04.2012, 2009/02/0239.

14 The compliance mechanism of the Aarhus Convention is open to the members of the public; the ACCC reviews cases and issues findings and recommendations, which are submitted to the Meeting of the Parties (MOP).

15 C(2014)4883 final.

16 MOP decision V/9b; following the review of the ACCC during the intersessional period, the most recent MOP in 2017 reaffirmed its earlier decision concerning non-compliance in decision VI/8b.

ACCC findings or even the decision of the MOP have led to further steps in implementing access to justice.

2 ECJ Case C-664/15

2.1 The case(s)

Despite the ruling of the Highest Administrative Court of Austria that the Convention is not directly applicable, in 2015 two cases[17] were combined which argued that the Convention is part of EU law and therefore the EU directives such as the WFD[18] have to be interpreted in a way which allows for access to justice for NGOs. One of the cases, C-663/15, was about the permission of a hydropower plant in Tyrol, while the second case, C-664/15, concerned the permission for a snow cannon in Lower Austria. The Austrian Court asked the ECJ for a preliminary ruling and posed three questions to the ECJ:

1) Does Article 4 of the WFD or this directive as a whole confer on an environmental organisation, in a procedure which is not subject to an environmental impact assessment under EIA Directive, rights for the protection of which it has access to administrative or judicial procedures under Article 9(3) of the Convention?
2) Is it necessary under the provisions of the Aarhus Convention to be able to assert those rights at the stage of the procedure before the administrative authority or is the possibility of being granted judicial protection against the decision of the administrative authority sufficient?
3) Is it permissible for national procedural law to require the environmental organisation — like other parties — to raise its objections not only in an appeal, but in good time at the stage of the procedure before the administrative authorities, failing which it loses its status as a party and is also no longer able to bring an appeal?

Those questions were later amended by the ECJ for the oral hearing.[19] Due to a formality, the case C-663/15 was dismissed by the referring court after the oral hearing of the ECJ in May of 2017 and thus removed from the ECJ as well.[20] The preliminary questions stayed with the ECJ, however, as case C-664/15 was still ongoing.

2.2 Opinion of Advocate General (AG) Sharpston

On October 12th, 2017 AG Sharpston delivered her opinion in the case C-664/15. She maintained that the question of the meaning of Art. 9(2) of the Aarhus Convention had already been dealt with in the earlier ruling to C-243/15 and assumed for purposes of the case at issue that significant effects could be excluded and that Art. 6(1)(b) and by extension 9(2) did not apply. Accordingly, she limited her analysis to the effects of Art. 9(3) of the Convention, arguing *inter alia* that this provision itself, in conjunction with directly applicable provisions of EU environmental law, such as the WFD, meant that party standing and access to justice rights should be accorded environmental NGOs. In other words, even where significant impacts could be excluded, such rights pertain.

2.3 The ruling

While not following the lines of AG Sharpston's opinion in all details, the ruling of the ECJ came to many similar conclusions. In particular, the Court affirmed C-243/15 and found that the question of whether an environmental NGO has a right under Art. 9(3) to challenge a permit issued per the WFD only arises when a court's review of the circumstances comes to the conclusion that significant negative impacts are excluded; otherwise the procedure would fall under Art. 6(1)(b) and, by extension, Art. 9(2) would be the relevant access to justice provision. Where such impacts can be excluded, then Art. 9(3) would be the legal basis for access to justice rights. Interpreting this provision in conjunction with Art. 47 CFR, the Court went on to explain that, *"although Member States have some discretion in establishing standing criteria"* according to their national laws, these may not be so strict that it is practically impossible for ENGOs to challenge acts and omissions within the meaning of Art. 9(3) of the Convention. Not only must national courts interpret national procedural rules to allow such challenges, but also, where such an interpretation is not possible, they must disavow such rules of their own motion.

This latter point cannot be understated. It essentially accords direct effect to Art. 9(3) in conjunction with relevant provisions of EU law.

Moreover, with respect to the issue of participation in the administrative procedures themselves (assuming Art. 6(1)(b) is not applicable), the Court indicated that such rights do not arise via Art. 9(3). However, the Court indicated clearly its view that full and active participatory rights can bring great benefits to environmental proceedings and highlighted provisions of EU environmental law which indicate an obligation for Member States to provide such

17 VwGH Ra 2015/07/0051 and Ra 2015/07/0055.

18 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJL 2000/327, p 1ff.

19 The amended questions widened the scope of the court from only Art. 9(3) of the Convention to include Art. 9(2), as was done in the ruling to the case C-243/15, which was decided after the preliminary questions were sent to the court, but before the oral hearing.

20 The original permission for the hydropower plant, which was challenged by the NGO WWF Austria was rescinded due to it wrongfully permitting two different building plans and had to undergo a new procedure. This led to the appeal of WWF being without grievance and thus the case was repealed. Apparently the ECJ was not informed until July of 2017, which led to frustration with AG Sharpston as seen in her opinion, recital 30.

participation. In light of these considerations the Court found that as a minimum, where the national law at issue conditions the right to judicial review on participation in the administrative procedures, then the combined provisions of Art. 9(3) of the Convention, Art. 47 CFR, and Art. 14(1) of the WFD dictate that ENGOs must be given such participation rights.

Finally, the Court found that procedural rules which could result in the loss of party status (and therefore access to justice rights) for a failure to submit an application for party status or to submit objections during the course of the administrative procedure itself would not *a priori* run afoul of Art. 9(3) and (4). Such rules could serve legitimate interests. However, such rules as applied in the case before would be unfair, as the ENGOs could not be considered as submitting cognizable claims in the first place. To bar such claims on the basis that they had not been timely brought was therefore not acceptable. The Court made clear that this aspect of its judgment was to be evaluated on a case-by-case basis, taking into account all relevant circumstances and the national law(s) at issue.

2.4 Impact in Austria

As indicated above, Austria has not implemented the Convention's provisions on access to justice into national law, even after the European Commission opened an infringement procedure, and despite the MOP's endorsement of the ACCC's findings that Austria is in non-compliance due to the lack of implementation of Art. 9(3) of the Convention. The ECJ ruling in the case C-243/15 in November 2016 encouraged some NGOs to apply for standing in ongoing nature protection cases. These applications were, however, denied by competent authorities, courts, and even the Highest Administrative Court.[21]

The new decision in C-664/15, however, has been met with considerably more acceptance domestically, as it concerned an Austrian case and paints a more encompassing picture of the role of the Convention within EU law. Some proceedings where NGOs petitioned for legal standing had even been suspended pending the ECJ ruling. Thus for example in February 2018, two months after C-664/15 was decided, the Regional Administrative Court of Tyrol cited the ruling to grant an NGO legal standing in a water protection case.[22] The Highest Administrative Court recently took up the issue with a ruling in a case of air quality protection,[23] also citing the ECJ and granting the NGO ÖKOBÜRO standing in an environmental matter not yet directly dealt with by the ECJ. It extended, in accordance with the Convention, the right to access to justice to include omissions by public authorities.[24] Especially after this decision by the Highest Administrative Court, it is highly likely that other regional authorities will follow and finally grant legal standing to NGOs in areas such as water and nature protection, maybe even forestry, waste management, building code cases and more. While these rulings, like the one by the ECJ, can be applied directly and give NGOs de-facto access to justice, a legislative implementation would be beneficial, as it could clearly lay out details such as time limits, legal notices for parties to proceedings and such. In its programme presented in December 2017, the newly appointed government of Austria promised "*a solution to the question of the Aarhus Convention*" but has yet to follow up with details.

2.5 Impact in the EU

Gaps and failures in the implementation of Art. 9(3) of the Aarhus Convention have been and remain a considerable problem within the Member States. Austria has been a serious example of just how drastic such shortcomings can be, yet it is hardly alone. Germany had similar issues for example and, like Austria, was found to be in non-compliance with the Convention for its failure to ensure adequate access to justice rights. Germany has since addressed some of these shortcomings with its recent "Umwelt-Rechtsbehelfsgesetz", the law governing access to justice for environmental NGOs. Yet issues remain.

Also, the ruling has to be regarded as adding meaningfully to the ECJ jurisprudence on the question of access to justice in rulings such as *Janecek*[25] and more recently C-243/15. This jurisprudence interprets major procedures with projects having a potentially significant impact on the environment as falling under Art. 6(1)(b) of the Aarhus Convention, with the right to appeal such decisions coming under Art. 9(2). While the ECJ did not exhaustively specify which parts of EU environmental law might be covered in this ambit, it stated that, at a minimum, procedures according to Art. 4(7) WFD and Art. 6(4) Habitats-Directive fall within this scope.

In other cases where potentially significant impacts can be excluded, Art. 9(3) of the Convention comes into play. It is likely that the ECJ will be invited to elaborate more about the definition of "*potentially significant impacts*" sooner or later, as the Convention allows for different solutions depending on the provision triggered (Art. 9(2) vs. (3)).

It will be interesting to see whether Member States will implement different regimes for projects with or

21 VwGH 23.5.2017, Ra 2017/10/0058.

22 LVwG Tyrol 21.2.2018 LVwG-2018/44/0055-6.

23 The case was about the question whether a registered NGO can challenge an air quality plan by a regional government, citing that its measures were not adequate.

24 VwGH 19.2.2018 Ra 2015/07/0074-6.

25 ECJ 25.7.2008 C-237/07.

without significant impacts, or if they prefer other solutions.[26] In addition, the ECJ defined a clear set of rules for how to interpret EU legislation in light of the Aarhus Convention. Some Member States, however, might take different approaches for EU law and national law, as the potential fines by the ECJ outweigh the consequences for breaches of international law, which the ACCC and MOP might impose. Due to the principle of equivalence with EU law, its legal protection must not be weaker than the one set out for national law.[27] Therefore, the standard set by the ECJ sets a minimum requirement, which cannot be undercut. It has to be noted though, that while the sanctions possible within the Aarhus Convention[28] might not "hurt" as much as financial sanctions within an EU infringement procedure, that does not weaken the legal obligation to fulfil the duties of the Member States in implementing the rules of the Convention. As Germany said in its recent amendment of its laws on access to justice: *Pacta sunt servanda*.

3 Conclusion

The ruling by the ECJ in the case C-664/15 can certainly be seen as a milestone in environmental case law. The system in which the ECJ incorporates the Convention into EU law, compiled in April 2017 by the European Commission in its guidance document, was meaningfully explicated and supplemented by this ruling. This ruling has made clear that, even where significant effects can be excluded, access to justice must be given to ENGOs both to ensure their rights under EU environmental law, as well as to ensure that the Member States live up to their obligations under such laws. It has also affirmed the great value in according full participatory rights with respect to such procedures under EU environmental law, and the necessity of giving such rights where access to justice is conditioned on the existence and exercise of such rights. The ruling also clarified considerably the Court's view on certain time-related rules, which can cut off such rights, indicating that the fairness and thus viability of such rules are to be assessed individually and considering the case at issue.

Finally, this ruling goes quite some way in clarifying further the difference between the regimes required by Art. 6(1)(b) and 9(2) of the Convention on one side and Art. 9(3) on the other. And while questions regarding the details remain unclear, especially the question on where to draw the line in between the two articles, the system itself can be seen as rather extensive and encompassing key EU environmental legislation, most noticeably the Habitats-Directive, the Water Framework Directive, the Birds Directive[29] and the Air Quality Directive.

Other questions remaining are the legal implementation in the Member States, a possible divide between law determined by EU legislation versus national legislation and a possible lack of access to justice with regards to the EU institutions themselves. The impact of the decision however is clear, as the ruling comes closer to filling the gap left by not having an access to justice directive.

26 *I.e.* procedures to determine which procedure is the correct one.

27 ECJ 1.12.1998, Rs. C -326/96, recital 18.

28 The extreme end of the scale includes cautions and suspensions of rights and privileges under the Convention.

29 Council Directive 2009/147/EC on the conservation of wild birds.

The role of legislation and courts in the protection of the environment in the European Union and its impact on the European integration of Albania

Erjon Muharremaj

1 Introduction

This paper analyses the main role of legislation and courts in the protection of the environment in the EU and its impact on the course of the European integration of Albania, a candidate country for EU membership. It begins with a brief analysis of the relationship between EU law and domestic law of Member States. It continues with the analysis of the relationship between international law and domestic law in Albania, and sets out the role of the courts in the protection of environment in the EU. Further, the scope of the analysis includes the challenges, the status, and the role of courts in the process of the approximation with the environmental acquis in Albania. Lastly, it is argued that the protection of the environment is multi-faceted and requires an integrated approach. Although Albania has generally harmonised its environmental legislation with the acquis communautaire, it must make serious efforts towards its proper implementation in practice.

2 Relationship between EU law and domestic law of Member States

In the framework of EU legislation, environmental issues fall into the category of the common competencies shared between the Union and its members. Member States exercise their competencies when they are not exercised by the Union itself. Among others, this sphere includes the environment, agriculture and fisheries (with the exception of the protection of marine biological resources), energy, etc. The Treaty on European Union,[1] in its Art. 3 (5) TEU stipulates that "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, *the sustainable development of the Earth*, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the *strict observance and the development of international law, including respect for the principles of the United Nations Charter*" [emphasis added]. Further, in Art. 21 TEU, the EU pursues common policies and actions in order to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty and to help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

It should be noted, that neither the Treaty establishing the European Economic Community (TEEC) nor the Treaty on European Union (TEU) explicitly declare the supremacy of the *acquis communautaire* in relation to national legislation of the Member States. Rather, it is based on rulings of the European Court of Justice (ECJ). Besides, the environment is subject to the competencies of the Community and the Single European Act (SEA), which is based on the wide interpretation of Art. 2 of the TEEC stipulating the objectives of the Community. By striving to balance the economic interests in the freedom of movement of goods and the interests for the protection of the environment, the ECJ has deemed considerations of the latter obligatory, which may also legitimise restrictions on trade. To this end the ECJ has applied the concept of the *"centre of gravity"*, which implies allowing the use of the provisions of the TEEC in harmonising domestic legislations, in order to guarantee the protection of the environment.[2]

In order to confirm this principle consolidated by ECJ case law, Declaration 17 was added to the Treaty of Lisbon, which stipulates the supremacy of the *acquis communautaire*. The declaration is accompanied by the Opinion of the Legal Service of the Council, Nr. 11197/07 of 22 June 2007, which stipulates that, *"It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case-law (Costa/ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."*[3]

Moreover, Art. 216 of the Treaty on the Functioning of the European Union (TFEU) states that, *"The Union*

1 The treaties of the European Union are available at: http://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html (last accessed 18 March 2018).

2 Ludwig Krämer, *"The Single European Act and Environmental Protection, Reflections on Several New Provisions in Community Law"*, Common Market Law Review, Vol. 24, 1987, p. 682-688.

3 Opinion of the Legal Service of the Council, Nr. 11197/07, date 22 June 2007, available at: http://www.cvce.eu/en/obj/opinion_of_the_legal_service_on_the_primacy_of_ec_law_22_june_2007-en-4692675c-dea2-4360-b6b6-42f769ee0d8a.html (last accessed 18 March 2018).

may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope". Under these circumstances, where the protection of the environment is one of the objectives of a treaty to which the EU is a party, its environmental provisions automatically apply to the Member States as well.

On the other hand, ECJ case law has an important role in safeguarding the implementation of those provisions since the landmark judgment in the *Costa v. ENEL*-case, because *"... it* [ECJ] *interprets the Treaty and other parts of the legislation in such a manner, by emphasizing the spirit, and not the letter of the Treaty. The Court sees the Community as a living organization, which grows, thinks, and interprets the meaning of the provisions of the Treaty and the secondary legislation of the Community and reacts in a flexible manner*."[4]

Apart from ensuring the practical implementation of the *acquis communautaire* in general, the ECJ possesses the mechanism of the judicial review of the uniform or *quasi* uniform implementation of European environmental law. It thus plays a crucial role in the development of national environmental legislative conformity to European law.[5]

According to the former ECJ legal advisor Francis Jacobs, *"...the protection of the environment, as a public interest, was awarded a constitutional status by the ECJ even before a legal basis existed in the text of the Treaty. It was established as a fundamental objective of the Community, which in certain circumstances and conditions prevails even over the principles of free trade."*[6] *Jacobs* refers to the ECJ judgment in the case *Danish Bottles*,[7] in which the Court confirmed once again what it had ruled in its previous judgment Nr. 240/83, 7 February 1985, *Procureur de la République v Association de défense des brûleurs d'huiles usagées*, that the protection of the environment is one of the main objectives of the Community. This can thus justify some restrictions on the principle of the free movement of goods, stipulated in Art. 30 TEEC. In the *Danish Bottles* case, the ECJ went further, ruling that, "…protection of the environment is a *mandatory requirement* which may limit the application of Art. 30 TEEC." [emphasis added]. However, in the view of the Court, measures adopted to protect the environment must not "go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection".[8] Following this, the ECJ ruled that the restrictions imposed by Denmark were disproportionate to the objective pursued.

Compared to the time of the aforementioned judgments in the 1980's, it can be said that European environmental law is not a separate or minor legal stream today, since it affects the drafting of policies of nearly every sector. Today, the ECJ continues its important facilitating role. In the case *Commission v. Ireland*, Nr. C-494/01, the ECJ analysed the responsibility of Ireland regarding the implementation of Art. 4, 5, 8, 9, 10, 12, 13 and 14 of the Council Directive 75/442/EEC on Waste. The Court ruled that in principle, nothing stops the Commission from finding that apart from the fact that Ireland has not implemented these specific provisions, the latter has not complied with the code of conduct of its authorities, which have adopted a practice that goes contrary to its provisions. As a corollary, it concluded that this infringement stemmed from conflicting practices adopted by the national authorities and that this was well demonstrated in the case under consideration.[9]

3 Relationship between international and domestic law in Albania

The relationship between general international law and the Albanian domestic law has been defined in several articles of the Albanian constitution. In the beginning, its Art. 5 states that the *"Republic of Albania respects the international law that is binding upon it."* At first sight, this provision can be understood as a formulation of a general character, made by a country that declares that it will act in the international arena according to the generally accepted norms of the community of states. In their entirety, these norms would include the treaties, customary law, general principles, doctrine and case law, where the latter two serve as secondary, complementary sources to the first three, which are considered as the main normative sources, within the meaning

4 Allan F. Tatham, *"EC Law in Practice. A Case-Study Approach"*, HVG-Orac, 2006, p. 21 and Alexandre Kiss, Dinah Shelton, *"Manual of European Environmental Law"*, Cambridge: Grotius Publications, 1993, p. 22.

5 Gyula Bándi, *"ECJ Environmental Jurisprudence – The Role of Explanatory Provisions"*, p. 11, in Gyula Bándi, (eds.), *"The Impact of ECJ Jurisprudence on Environmental Law"*, Akaprint Kft, 2009.

6 Francis Jacobs, *"The role of the European Court of Justice in the Protection of the Environment"*, Journal of Environmental Law, 2006, Vol. 18, Nr. 2, p. 194.

7 ECJ judgment, Nr. 302/86, 20.9.1988, *Commission of the European Communities v. Kingdom of Denmark*, available at: http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30d59fff14b66b78496fa271f18da1a09f5b.e34KaxiLc3qMb40Rch0SaxuNbNz0?text=&docid=95033&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=361426 (last accessed 18 March 2018).

8 *Ibid*., para. 11.

9 ECJ judgment, Nr. C-494/01, 26.4.2005, para. 27, available at: http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30d509ab2b017680409a94aaadca0c537c51.e34KaxiLc3qMb40Rch0SaxuNc3j0?text=&docid=58802&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=159073 (last accessed 18 March 2018).

of Art. 38 of the Statute of the International Court of Justice (ICJ).

But a narrow meaning of this provision would restrict it to the confines of a formal declaration with no specific value. This is because the behaviour of states according to the norms of international law is a *sine qua non* condition for them to participate in the international arena, such that this provision would not represent any novelty. As such, a wider meaning should be attributed to Art. 5, referring to other provisions of the Albanian Constitution, despite it being said that *"This article* [Art. 5] *must be interpreted in such a narrow manner, closely linked only to Article 122 of the constitution, which means that Republic of Albania recognizes and abides by the ratified international treaties, which are published in the Official Gazette, because in this manner they become part of the domestic legal system of our country."*[10]

Based on the constitutional provisions, the treaties to which Albania is a party, including environmental ones, have become part of the domestic legal system through the ratification of laws by the Parliament. As such, it can be mentioned that Law No. 8216 of 13 May 1997, adhered Albania to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; Law No. 8294 of 2 March 1998, ratified the Berne Convention on the Conservation of European Wildlife and Natural Habitats; Law No. 8556 of 22 December 1999, adhered Albania to the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD); Law No. 8672 of 26 October 2000, ratified the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; Law No. 9021 of 6 March 2003, adhered Albania to the Convention on International Trade in Endangered Species of Wild Fauna and Flora; Law No. 10277 of 13 May 2010, adhered Albania to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, etc.

As it can be seen, Albania has become a party to several main environmental conventions, and their provisions have been adopted in its domestic legislation.

4 The role of the courts in the protection of the environment in the EU

The majority of the environmental cases adjudicated by the ECJ are initiated by the Commission against the Member States, based on Art. 258 (former-220) and Art. 260 (former-228) TFEU. If the Commission holds the opinion that a Member State has not fulfilled an obligation deriving from the Treaties, it issues a reasoned opinion on the issue, after granting the possibility to the Member State to provide its own comments. If the Member State does not comply with the opinion within the deadline set by the Commission, the latter may take the case to the ECJ, after the State has presented its comments. When the Commission takes the case to the ECJ pursuant to Art. 258, because the Member State has not fulfilled its obligation to transpose a directive enacted according to the legislative procedure, it can set a reasonable fine to be paid by the Member State. If the ECJ finds that there is an infringement, it can rule on the amount to fine the Member State, not to exceed the amount set by the Commission. The obligation to pay begins on the date set by the Court in its judgment.

In order to reduce the length of the proceedings before the ECJ and to avoid delays in delivering justice, the Court first takes the Opinion of the Advocate General. The ECJ, apart from the 28 judges, one for each Member State, also includes 9 Advocates General, elected by agreement between the Member States, for a 6-year mandate with the possibility of re-election. The role of the Advocate General is very important because he is the first to deliver an opinion on the legal qualification of a case, which he submits to the ECJ. Statistics show that the ECJ follows the opinion of the Advocate General in about three quarters of its judgments.[11]

With regard to the interpretation of domestic legislation compared to that of the provisions of the respective EU directives, the ECJ ruled in *Marleasing SA*, Nr. 106/89, that Member States are obliged to take all the necessary measures, be they of a general character or specific measures, in order to guarantee the fulfilment of the directive's objective. This is compulsory for all authorities of the Member States, including their domestic courts, for the cases under their jurisdiction. From this it can be inferred that in the application of the domestic law, the domestic court must interpret the law in light of the meaning, wording and objective of the directive. As the ECJ has ruled in other cases, the exclusion in principle of the possibility of the individual to rely on these directives is contrary to their compulsory character, stipulated in Art. 249 of TEEC. This holds especially true in the case of directives that aim at the control and reduction of pollution, drafted with the purpose of protecting public health.[12]

[10] Xhezair Zaganjori, *"Vendi i së Drejtës Ndërkombëtare në Kushtetutën e Republikës së Shqipërisë" (Position of international law in the constitution of the Republic of Albania)*, Jeta Juridike, Nr. 2, February 2004, School of Magistrates, Tirana, p. 32.

[11] The composition and functioning of the ECJ, and the procedure followed in the judgments, including the environmental cases, are available at: http://curia.europa.eu/jcms/jcms/Jo2_9089/?hlText=environment

[12] ECJ judgment, Nr. 106/89, 13.11.1990, Marleasing SA and La Comercial Internacional de Alimentación SA, available at: http://eur-lex.europa.eu/resource.html?uri=cellar:384f064c-f467-4dda-a3cb-a44d930a6e25.0002.06/DOC_1&format=PDF (last accessed 18 March 2018).

Domestic courts of Member States are in fact those who interpret *acquis communautaire* during their everyday work, including the environmental *acquis*, together with the ECJ, which guarantees the uniform implementation of the EU legislation and avoids the possibility of different or opposite interpretations by the domestic courts. The latter can refer their cases to the ECJ for an interpretation of the *acquis*, where it decides whether or not the legislation of that member is in line with the *acquis communautaire* . Through a request for a preliminary ruling, domestic courts may even request the evaluation of the validity of an EU legal act. In these cases, the ECJ ruling is not simply an answer given to the domestic courts through an opinion, but it is given in the form of a fully reasoned judgment, which is binding on the domestic courts for the solution of the dispute under consideration. The judgment is directed not solely at the requesting court, but to all the other domestic courts of the EU Member States that are ruling on disputes with a similar object. It is precisely through such requests for preliminary rulings that every EU citizen can request the interpretation and clarification of the norms that have an impact on him/her. Notwithstanding the fact that such a request to the ECJ can be directed only by a domestic court, all parties to a dispute, together with the Member States and the EU institutions can take part in the proceedings before the ECJ. Through such rulings, many principles of the *acquis communautaire*, the environmental ones included, have been interpreted by the ECJ.[13]

Differing from the domestic courts, which operate in a narrower framework, within a more or less homogenous environment and a unique legal culture, the ECJ must undertake the role of interpreter in a context where different legal cultures co-exist.[14]

The role of the courts in the protection of the environment is so important that it can even widen the scope of territorial application of the legal norms themselves. In the case *Commission v. United Kingdom*, the ECJ emphasised that *"...it is common ground between the parties that the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive* [Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora – emphasis mine] *is to that extent applicable beyond the Member States' territorial waters. It follows that the directive must be implemented in that exclusive economic zone."*[15]

5. Approximation with the environmental acquis in Albania: challenges, status and role of courts

For many years now, EU membership has been the main objective of the foreign policy of the Republic of Albania, with efforts being put into the European integration process. Considering such a relationship between the *acquis communautaire* and the domestic legislation of the EU Member States, the same relationship should thus exist with Albanian domestic law. Albania has the status of a candidate country for EU membership, and at this stage of the integration process a fundamental document is the Stabilisation and Association Agreement (SAA), signed on 12 June 2006 and entered into force on 1 April 2009.

The constitutional basis for the membership of Albania in the EU can be found in Art. 122 (3) and Art. 123 of the Constitution of the Republic of Albania, which stipulates the primacy of the norms deriving from an international organisation over domestic law in case of conflict between these norms, and the transfer of state competencies to the international organisations for certain issues, pursuant to agreements with these organisations.[16] Despite some earlier opinions for a non-certain status of the EU law *vis-á-vis* Albanian legislation,[17] these constitutional provisions altogether give the EU the status of a higher organisation.[18] An interesting development was the proposed amendment to the Constitution, in the framework of the justice system reform, currently under way in Albania. According to the proposal of the Group of Experts of High Level, the amended Art. 122 (2.1) of the amended Constitution would stipulate that *"2/1. The European Union law shall prevail over the domestic law of the Republic of Albania"*.[19] This was a clear provision of the absolute primacy of EU law over the domestic law of a country

13 Further information on ECJ rulings related to the protection of the environment can be found at: http://curia.europa.eu/jcms/jcms/Jo2_9089/?hlText=environment (last accessed 18 March 2018).

14 Ludwig Krämer, *"EC Environmental Law"*, London, Thomson-Sweet&Maxwell, 2007, p. 51.

15 ECJ judgment Nr. 6/04, 20.10.2005, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, par. 117, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=60655&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2836 (last accessed 18 March 2018).

16 Constitution of the Republic of Albania, available at: https://www.constituteproject.org/constitution/Albania_2016?lang=en (last accessed 18 March 2018).

17 Alfred Kellermann, *"Impakti i anëtarësimit në BE në rendin e brendshëm ligjor të Republikës së Shqipërisë" (Impact of EU membership on the domestic legal order of the Republic of Albania)*, "E drejta parlamentare dhe politikat ligjore", Nr. 1, 2007.

18 Luan Omari, Aurela Anastasi, *"E drejta kushtetuese"*, ABC, 2010, p. 61.

19 The consolidated version of the Constitution of the Republic of Albania integrating the draft constitutional amendments is available at: http://www.euralius.eu/images/Justice-Reform/Consolidated-version-of-the-Constitution-Integrating-the-draft-Constitutional-Amendments.pdf (last accessed 18 March 2018).

which has not even opened the accession negotiations yet with the EU, let alone become a member. This has happened at a time when even the current EU members do not have such formulations in their constitutions, taking into account the debate over the supremacy of EU law within the organisation itself. However, this provision was not included in the final version of the amended Constitution.

In the current stage of the integration process, in the framework of the SAA, Albania's undertakings regarding the environment are stipulated in its Art. 108, which states that *"The Parties shall develop and strengthen their cooperation in the vital task of combating environmental degradation, with the aim of promoting environmental sustainability. Cooperation shall mainly focus on priority areas related to the Community acquis in the field of environment."*[20] The approximation of Albanian environmental legislation with the *acquis communautaire* is part of the National Plan for the Implementation of the Stabilisation and Association Agreement (NPISAA) enacted with this specific purpose.

All of the Albanian governments since the 1990s have set the approximation of the domestic law with the *acquis communautaire* and its effective implementation as one of their main priorities. Understandably, Albania must ensure that current and future legislation should strive towards the gradual approximation with the *acquis communautaire*, but it is equally important to understand that *"approximation"* does not mean simply *"copy & pasting"* European legislation. Rather, it means the drafting of comprehensive legislation, and most importantly, its implementation in practice. As far as the approximation is concerned, according to Art. 70 of the SAA the approximation will occur in two phases. In the first transition phase of 10 years, the approximation shall include the main areas of the common market, competition, trade, public procurement, intellectual property, and the standardisation and certification of products. In the second phase the approximation will continue in the remaining areas. In the same article, it is stipulated that apart from the approximation, Albania will ensure that its current and future legislation will be duly implemented.

Challenges of the EU itself regarding the implementation of this legislation arise firstly from the fact that it is very wide and diverse, including matters related to climate change, protection of air, water, soil, biodiversity, up until the management of chemicals and waste. Also, the environmental *acquis* includes diverse techniques, beginning with those that guarantee the standards of products in order to reach environmental objectives, continuing with restrictions and prohibitions, the use of economic instruments, the defining of delicate zones that require a higher level of protection, the evaluation of plans and programmes that have an impact on the environment, up to those that guarantee the participation of the public in environmental decision making. Further, the environmental *acquis* must be also implemented in diverse conditions and natural environments, as diverse as the world that surrounds us, beginning with the diverse national and regional environments, different administrative divisions, and different regions that intertwine issues of transnational relations. Apart from these aspects, the implementation of the environmental *acquis* is further complicated if we take into account the fact that it includes issues to which the public is very sensitive and always ready to put into action the mechanisms at its disposal that challenge the decision making of the authorities through administrative and judicial review. To these can be added the challenges that are related to the lack of respect by the national authorities for the deadlines set by the environmental *acquis*, the lack of knowledge and capacities in the domestic public administrations, deficiencies in the capacities of domestic law-enforcing authorities, and the lack of investment in the infrastructure that guarantees the abatement of pollution and the protection of the environment. Lastly but no less importantly, there are the challenges that stem from the continuous enlargement of the EU, including countries that come from former totalitarian systems, with mentalities and capacities totally different from those of the existing Member States.[21]

EU environmental legislation is adopted by the Member States (by the same token it is also adopted gradually by the candidate countries) almost exclusively through directives. Under these circumstances, these rules are not directed to the legal subjects, but rather to the Member States, in the form of "requests" to harmonise their legislation, which as a consequence obliges the subjects to act in accordance with the domestic harmonised norms. As stipulated in the Sixth Programme of Environmental Action of the Community of 2007, EU legislation stands behind 80% of the domestic environmental legislation.[22]

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20 Art. 108, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, available at: http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22009A0428(02)&rid=1 (last accessed 18 March 2018).

21 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementing European Community Environmental Law {SEC(2008) 2851} {SEC(2008) 2852} {SEC(2008) 2876}, p. 3, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0773&from=EN (last accessed 18 March 2018).

22 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-term review of the Sixth Community Environment Action Programme {SEC(2007) 546} {SEC(2007) 547}, p. 3, available at:

Regarding the role of the EU directives in domestic Albanian law, the Supreme Court of the Republic of Albania ruled in its judgment of the Civil Bench, Nr. 22 of 19 January 2011: *"Regardless of the fact that our country is not yet a full member of the European Union, its directives (regulations) are a guidance for our legal practice."* Also, in another *dictum* of the Supreme Court, it is mentioned that Albania will ensure that its existing and future legislation will be properly implemented and imposed (Art. 70 of the Stabilisation and Association Agreement, ratified by Law Nr. 9590 of 27 July 2006), as it has been confirmed in the firmly-held stance of the Albanian judiciary.[23]

The fact that the Albanian judiciary is already referring to EU legislation is a very positive and welcoming development, even for its procedural aspects. In its unifying judgment Nr. 2 of 27 March 2012, the Joint Benches of the Supreme Court ruled regarding the deadlines that: *"The same position is held by the Regulation (EEC Euratom) Nr. 1182/71 of the Council, date 03.06.1971, that states the applicable norms for the time periods, dates and deadlines, which are applied for the acts of the Council or the Commission, which are approved or will be approved, based on the Treaty that established the European Economic Community or the Treaty that established the European Community of Atomic Energy."*

Also, in another case, the Court of First Instance of Tirana referred directly to the jurisprudence of the ECJ, although not related to the protection of environment, but to that of the consumer.[24]

Despite the very limited jurisprudence relevant to the implementation of the environmental legislation, the domestic courts of Albania must play an important role in the integration process through the interpretation of the environmental *acquis*.

6 Conclusions

This analysis has focused on the role of legislation and courts in the protection of the environment in the European Union and its impact on the European integration of Albania at this stage of its integration.

As far as legislation is concerned, in the framework of the implementation of the Stabilization and Association Agreement with the EU, Albania has made progress in the approximation of its environmental legislation with the *acquis communautaire*. Certainly drafting a comprehensive legal framework, even if it is approximated with the *acquis communautaire* as it is in the case of Albania does not, *per se*, guarantee the protection of the environment, if the mechanisms are not in place for its implementation and a strong judiciary to guarantee the rule of law. In this regard, the role of the courts becomes all the more important, since they give practical meaning to the legislation on environmental protection and pave the way for its interpretation in practice. Even though Albania is not yet a member of the European Union, and as such the ECJ judgments have no binding force within its jurisdiction, in practice the Albanian courts must rely on ECJ case law when called to settle the disputes and interpret environmental legislation. Since the major part of the *acquis* on environment protection has been adopted, the corollary would be the adoption of relevant case law as well. But, as it has been shown in this analysis, the very limited domestic case law is not indicative of the important role that the Albanian judiciary should play in the integration process. Just as the ECJ has applied the concept of the "centre of gravity", which implies allowing the use of the provisions of the treaties in harmonising domestic legislations, in order to guarantee the protection of the environment, so must the Albanian courts act through their judgments in the domestic arena.

Despite the progress Albania has made in the harmonisation of its environmental legislation with that of the EU, considerable problems still remain. They can only be solved through close, coordinated cooperation with the relevant EU agencies, in order to guarantee the protection of the environment as a common good which belongs not only to us, but also to future generations.

Recently, the European Commission recommended that the Council open accession negotiations with Albania as a result of the progress made. Nevertheless by reinforcing the approach for the negotiating chapters including the judiciary,[25] a proper implementation of the environmental *acquis* as well is of paramount importance for the whole integration process.

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0225&from=EN

23 Unifying judgment of the Joint Benches of the Supreme Court of the Republic of Albania, Nr. 1, 17.1.2011, p. 13.

24 Judgment nr. 172, date 10.01.2009, Court of First Instance of Tirana, referring to the judgment of the ECJ of 3 July 1991, Case C-62/86, AKZO Chemie BV v. Commission of the European Communities.

25 https://eeas.europa.eu/headquarters/headquarters-homepage/43084/former-yugoslav-republic-macedonia-and-albania-commission-recommends-opening-accession_en (last accessed 20 May 2018).

Simulation games in the Regulatory Impact Assessment – Simulation of the implementation of the EIA Amending Directive 2014/52/EU

*Martin Führ, Jaqui Dopfer, Kilian Bizer et al.**

1 Introduction

Laws have the task of influencing the behaviour of the respective addressees in such a way that the legislator achieves their intended goals. A (new) law would not be required if existing framework conditions were already designed such that regulatory goals could be achieved. In this case actors would already have sufficient incentives to behave in a targeted manner. But this is not usually the case; on the contrary: legislation has the task of addressing "non-conforming" behaviour and of getting actors to participate in the implementation of regulatory goals. This is a demanding task and applies even in cases where compliance can be assumed. However, it is even more difficult if evasive behaviour is to be expected or it is feared that the addressees could develop and implement individual or collusive counter-strategies.[1]

For all the above-mentioned constellations, it is helpful if legislators can rely on a more precise understanding of the facts to be regulated. Moreover, constitutional principles even suggest this (see Section 2). Accordingly, the "rules of the game" for the preparation of legislation by the executive both at the national level (§ 44 GGO) and in the European Union[2] *stipulate that an impact assessment must first be carried out and documented in advance for draft legislation.*

Beyond simple constellations, in which an immediate behavioural requirement – according to the motto: "Refrain from behaviour X" or "You shall not X" - is sufficient, the regulatory challenge is to shape the legal framework in such a way that several actors with different interests will comply. This often depends on a temporal sequence of conduct contributions; in addition, the individual contributions are normally dependent – either sequentially or alternately. In other words, those who draft bills as desk officer (in the following referred to as legal experts) encounter a multi-layered constellation of actors. Especially in such cases, which are likely to be the rule rather than the exception, the legal experts are reliant on methodologically-based approaches to real analysis during the design of the body of laws. In this case simulation games are particularly suitable as they allow for dynamic interaction and its influence on legal requirements to be tested and estimated (see Section 3). The application of this methodology to the implementation of the EIA Amending Directive 2014/52/EU illustrates both the possibilities and the limitations of the methodology (Section 4).

The present contribution and the underlying simulation games on the EIA Amending Directive were funded by the German Federal Environment Agency in the research project "Further development of the EIA instrument – solution proposals and simulation game for the implementation of the EIA Amending Directive 2014/52/EU" (duration 2015 – 2017) within the environmental research plan.[3]

This essay is split into two parts. The first part primarily regards the experience from the simulation game on the EIA Amending Directive, which was aligned with the new version of the German Environmental Impact Assessment Act (EIAA). The second part of the essay, which will be published in the next issue of the elni Review, deals with experiences from other simulation games and, based on this, describes more comprehensively the possibilities and limits of simulation games for the purpose of regulatory impact assessment.

2 Legal demands for real analysis

Before making decisions, legislators must carry out a "social science-based real analysis of the living conditions that have to be regulated".[4] Although this national legal requirement is not explicitly stated in the text, it is so fundamental that it can claim validity even without a textual reference. It results directly from the rationality claim of the law: The Federal Constitutional Court develops it from the two elementary material rationality criteria: the principles of proportionality and equality before the law. There is also a close interconnection in this respect between the two criteria: "The principle of equality and the prohibition of excessiveness have in common that they can seek a legal measure and estab-

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1 For a current example of a strategy in the area of pollutant reduction from passenger car engines see *Führ, M.*, Der Dieselskandal und das Recht - Ein Lehrstück zum technischen Sicherheitsrecht, NVwZ 2017, pp. 265-273.

2 Standardized in the Impact Assessment (see *Bizer, K./Lechner, S./Führ, M.* (eds.), The European Impact Assessment and the Environment, Heidelberg 2010); redrafted in 2015 as part of the Better Regulation Initiative (see *Purnhagen, K. P. / Feindt, P.H.*, Better regulatory impact assessment: making behavioural insights work for the Commission's New Better Regulation Strategy. In: European Journal of Risk Regulation 3/2015, pp. 361 – 368).

3 FKZ 3715111010; the final report is available on the website of the German Federal Environmental Agency; download at https://www.umweltbundesamt.de/publikationen/fortentwicklung-des-uvp-instrumentariums-planspiel. (last

4 *Denninger E.*, Freiheitsordnung – Wertordnung – Pflichtordnung, JZ 30, 1975, 545-550, 546. The following description is based on *Führ, M.*, Eigen-Verantwortung im Rechtsstaat, Duncker & Humblot, Berlin 2003, p. 226 f.

lish a balance, therefore presupposing the measurability of state action and understanding any state action as a rational act of taking measures." This "act" requires a corresponding basis, namely that the "shaping and regulating state authority takes up the legal and actual structures of order found in the subject matter of the regulation, and values them as a justification for equality or distinction".[5]

Both material principles require a real analysis that must be procedurally processed by the state authorities.

On the basis of fact-finding, the legal expert has to prepare forecasts of future development (compulsory forecasting), which forms the basis for an assessment of the constellation (obligation to assess). This may result in the obligation to act in a legislative manner (obligation to act) in a way, taking into account conflicting legal interests, to ensure that the objectives of action are effectively achieved.[6] If the legal expert acts, they are required to disclose their regulatory objectives and the assumptions and valuations on which they rely (duty to give reasons). The justification provides the foundation for an examination on the basis of the principle of proportionality, as the German Federal Constitutional Court stated in its decision on the Capacity Regulation:[7] "Such content control presupposes that the assumptions and valuations of the legislature which determined its consideration" are "disclosed" in court proceedings.[8]

The obligation to observe can also be described as a constitutionally justified obligation for "law evaluation". The legislator must regularly empirically check the existing status of laws to ensure that it still complies with the constitutional requirements. The enshrined feedback of legal reality creates the basis for a proceduralized "learning process" of the legislature: It must again ask whether the assumptions regarding the actual development on which the original initial assessment was based are still correct and whether any discrepancies give reason for an adjustment of the regulatory concept.

In summary, it must be stated that the demand for the rational justification of legislative decisions, rooted in the foundations of legitimacy of law, has been reflected in a requirement profile further specified by the case law of the German Federal Constitutional Court. A permanent, empirically-based real analysis is required from the legislators; it remains unclear on which methodological basis this has to be done.

However, in order to capture the actual effects of existing behaviours and to subsequently provide forecasts for possible alternative regulatory options, the theoretical approach and its methodological implementation must assess their respective impact on the policy behaviour of individuals in a forward-looking way.[9]

3 „Simulation game“ and transposition of EU legislation

There is no agreement on what is meant by a "simulation game". Accordingly, the term is used in very different ways. Some use it for a structured discussion alongside case studies. The term as used here can be described as follows: The simulation game depicts a real context of action in a game situation and thus makes dynamic processes accessible for analysis: The game participants adopt the roles of real actors and rely on a – simplified – description of a concrete action situation.[10] In this context they "simulate" („simulation game"[11]) the communication, negotiation and decision-making processes that take place in "real life". The "stations" that these processes have to go through correspond to those in reality; however, they are condensed in the simulation game to one or two days. The actors either take on their own professional role or play the role of other actors whose thinking and acting patterns are familiar to them from their professional experience.

The simulation game has the essential characteristics of a game (rules, game management, etc.). The framework conditions of the game are given by "game documents", which represent a part of the reality, but whose complex relationships are reduced to the characteristic factors that are relevant and necessary for the purpose of the simulation game.[12] The simulation game object is not created statically but is subject to a dynamic development process: For example, missing information or documents can be supplemented by the actors or the game management. Furthermore, the game management can feed additional "impulses" in order to depict the actions of other "stakeholders" (NGOs, press, political debates).

5 *Kirchhof, P.*, Der Allgemeine Gleichheitssatz, HStR, Band V, § 124, 1992, para. 205.

6 In summary BVerfG of 29.11.1995 - 1 BvR 2203/95 - NJW 1996, 651 ("Ozon").

7 BVerfGE 85, 36/57 – "Kapazitätsverordnung".

8 In this respect the legislature has a "burden of proof". If the standard "was not provided with a justification from the outset, which makes the relevant aspects clear, the history of origin must be reconstructible afterwards" (BVerfGE 85, 36/57 - Capacity Regulation). Justification gaps or errors in the context of deduction can lead to the conclusion that there are material shortcomings which, as a result, can give rise to the unconstitutionality of the norm.

9 For the quality standards to be applied for the impact assessment, see *Bizer/Lechner/Führ 2010*, supra note 2.

10 *Rönsch, H.D. /Reimann, B.W.*, Planspiel, in: Fuchs-Heinritz/Lautmann/Rammstedt et al. (eds.), Lexikon zur Soziologie, 3. Aufl. 1995, Opladen, p. 499.

11 *Herz, D./Blätte, A.*, Einleitung, in: Herz, Blätte (eds.), Simulation und Planspiel in den Sozialwissenschaften. Eine Bestandsaufnahme der internationalen Diskussion, Münster 2000, p. 3.

12 *Golombiewski, B.*, Steuerliche Planspiele: Anforderungen, Leitungsvermögen und Eignungsprüfung steuerlicher Planspiele als Instrument steuerlicher Ausbildung; Forschung und Planung sowie Entwicklung eines anforderungsgerechten Referenzmodells für die Planspielkonstruktion, Bielefeld 1995, p. 5 f.

The essential characteristics of a simulation game in the understanding described here include:

- There is one game management, which assigns specific roles to the participants and provides them with the relevant basic information exclusively (i.e. not or only partly visible to the other participants).
- The simulation game is divided into several "rounds" - in the case of the EIA these were the procedural steps of the EIA, the so-called "EIA stations". Each round, temporally much shorter than in real life, reproduces a certain time sequence in reality.
- In each round, the actors can perform certain predefined actions; such as
  - send messages and documents to other actors,
  - propose meetings with other actors,
  - write press releases and carry out other forms of public relations.
- For the subsequent evaluation, but also for a control of the simulation game which is as realistic as possible, all the above actions are only possible "through the game management". The game management decides, for example, in the case of incompatible conversation requests, which meetings come about (in this round) and which not.
- All actions – including the course and results of bi- or trilateral meetings – as well as the associated intentions need to be documented directly by the simulation game participants (on the basis of prepared "forms" in paper form, to be completed by the participants and to be handed over to the game management at the end of each round).
- In case the simulation game "comes to a halt" or the closeness to reality is in question, the game management can feed additional impulses; for example, in the form of contributions from actors who – for reasons of simplification or simply a lack of suitable participants – are not involved in the game.

A simulation game structured in this way allows us to test certain relevant processes in a "protected" environment. It thus offers the participants decision-making aids, for example with regard to the choice of a preferred (e.g. entrepreneurial) strategy. As a research method, the simulation game allows us to gain information about a particular object of investigation (exploratory experiment),[13] or to test specific hypotheses (decision experiment), which allow for a fluent transition to the field experiment.[14]

The possibility of examining participants' reactions to specific framework conditions also qualifies the method as an instrument of legal impact assessment: It helps to assess whether a regulation is appropriate and necessary to achieve the intended normative effect and to what extent undesirable effects are to be expected. The role of the simulation game is usually to test existing draft regulations before they are translated into applicable law. The method is therefore usually classified as a tool of the accompanying regulatory impact assessment.[15]

The simulation game outlined below is assigned to the "artefactual field experiments", in which probands are recruited from their usual field of action in order to increase the external validity.[16] Such "experiments" are designed on the basis of documents taken from stylized but real cases to maintain the usual environmental factors. In this way, it is ensured that the simulation game remains as close to reality as possible and at the same time changed framework data can be introduced.

4 Simulation game to implement the EIA Amending Directive

In order to illustrate the simulation game methodology, the course of a simulation game is briefly sketched below. It should be emphasized that the research project[17] underlying this paper was about accompanying the process of implementing an EU Directive. The aim was to contribute to a federal law implementation of the EIA Amending Directive in compliance with European law, while at the same time being practicable and enforceable and furthermore ambitious from an environmental point of view. The EU Directive only changed the existing EIA rules selectively. The regulatory "opportunity space" to be represented by the simulation game was thus limited in several respects. It was therefore a specific form of "accompanying" legislative impact assessment.

4.1 Subject and concept

The simulation game design intended to subject the new national regulations, which result from the implementation obligation with regard to the EIA Amending Directive 2014/52/EU,[18] to a practical suitability test (test object). Therefore, the simulation game tested the

13 *Golombiewski* 1995, supra note 12, p. 32.

14 *Harrison, G.W./List, J.A.*, „Field Experiments", Journal of Economic Literature, Vol. 42/2004, No. 4, pp. 1009-1055.

15 *Böhret, C. /Konzendorf, G.,* Handbuch Gesetzesfolgenabschätzung (GFA). Gesetze, Verordnungen, Verwaltungsvorschriften, Baden-Baden 2001, p. 96. In contrast, the simulation game is rarely used in the sense of a prospective consequence analysis, which examines several alternatives without effect on results in order to exploit optimizing potentials.

16 For the validity of the simulation results see *Bizer, K./Scheier, J./Spiwoks, M.,* Planspiel Kapitalmarktprognose. Ein empirischer Vergleich der Prognosekom-petenz von Amateuren und Experten, sofia-Studien zur Institutionenanalyse 13-2, Darmstadt 2013; *Harrison/List* 2004, supra note 14.

17 FKZ 3715111010 "Further development of the EIA instrument – solution proposals and simulation game to implement the EIA Amending Directive 2014/52/EU" (duration 2015-2017, on behalf of the German Federal Environmental Agency); see already paragraph 3.

18 See *Bunge, Th.*, Neue Anforderungen an die Umweltverträglichkeitsprüfung: die UVP-Änderungsrichtlinie 2014, NVwZ 2014 and *Balla, S./Peters, H.J.*, Die novellierte UVP-Richtlinie und ihre Umsetzung, NuR 2015, pp. 297-305.

regulations that go beyond the status quo of the German standard in the EIA law of the federal government. The basis of the simulation game was the legal situation, which arises from all proposed changes, as contained in the documents submitted by the contracting authority (work or draft bill), adopted in this form by the legislature.

The game players acted on the basis of the - fictitious - already amended EIA standards (status quo + amendments to the Directive). The task of the simulation is to represent the incentive and inhibition situation of the key actors as realistically as possible, and in particular to gain insights into the dynamic processes that result from the expectations of the individual actors and their interaction (see section 4.1.3).

4.1.1 Considerations

To obtain meaningful results for the later law enforcement

- the structurally different "stations"[19] on the one hand and
- project types from different systematic groups, such as the project for the "Evaluation of the EIA Act " on the other hand[20]

need to be considered. The simulation game focused on projects from two comparatively frequently occurring project types:

- Installations according to the Industrial Emission Directive (2010/75/EU) as well as
- infrastructure projects (for example in traffic).

Thus, two structurally different process constellations are the subject of the simulation games..

For other types of projects, in particular for the EIA in the process of establishing or modifying a development plan[21] and the broad wreath to "other projects", it was not possible for reasons of capacity to carry out a separate simulation game.

The research project was content-related designed that on the one hand as many of the aspects which are the subject of the implementation of the EIA Amending Directive, can be mapped in the game plan, and on the other hand to reduce the content of the simulation game which is not the focus of an EIA. The specification in Art. 3 (2) EIA Directive (new version) requires that environmental impacts resulting from the susceptibility of the project to major accidents and disasters should also be taken into account. Therefore, the German Federal Immission Control Act project had to be located spatially in the potential flood area of a river. The general conditions of the road construction project were also adapted accordingly.

4.1.2 Simulation game structure

These preliminary considerations resulted in a three-stage simulation game structure:

1. Simulation game 1: concerning the screening process[22] ("Federal Immission Control Act plant": new construction and operation of a pig farm (space for 2,475 animals) with biogas plant);
2. Simulation game 2: EIA procedure ("Federal Immission Control Act plant": new construction and operation of a pig farm (space for 5,280 animals) with biogas plant);
3. Simulation game 3: EIA procedure ("infrastructure project": construction of a new state road as a bypass).

Simulation game 1 depicts the special features that determine the screening process. The topics addressed in simulation games 2 and 3 respectively show similarities (subjects in the statements of the project sponsor are now in the "EIA report"). However, the procedures run in different administrative and procedural contexts and the benchmarks for the decisions are not identical (Planning approval: fundamental consideration, better possibility to include alternatives; legal immission protection authorization: generally bound decision to consider alternatives in principle only if proposed by the developer).

4.1.3 Simulation game design

The three-stage structure allowed learning processes to be taken into account by the participants (in the transition from simulation game 1 to simulation game 2) as well as by the project team (especially with regard to simulation game 3).

The basic concept in this simulation game, according to the previous remarks was to apply the work or regulation draft provided by the legal experts to concrete cases and to map – as close to reality as possible – the actions of the actors in the real administrative units, but also involve experts and other stakeholders. The simulation was thus carried out by the actors usually involved. These include project sponsors, appraisers, approval and environmental authorities as well as associations. The group of participants included 10-15 people each, therefore about:

- 2 representatives of the project sponsors
- 2-3 appraisers
- 3-5 representatives of the approval and environmental authorities
- 2-3 representatives of the associations (objectors/ stakeholders)

19 For the approach of dividing the EIA process into individual "stations", see *Führ, M./Dopfer, J./Bizer, K. et al.*, Evaluation des UVP-Gesetzes des Bundes, Darmstadt/Göttingen/Kassel 2008, p. 31.

20 See *Führ/Dopfer/Bizer et al.* 2008, supra note 19, p. 41.

21 The area of the EIA of the urban development planning project is not considered in more detail because a parallel project took place on this subject of investigation.

22 The term refers to the examination of whether or not an EIA should be carried out in individual cases.

Most of the participants played their "own" role but some also slipped into new roles. In this case, the respective actor (e.g., project sponsor or authority) was represented by several persons, so that a basic role understanding was given. The change of roles also allowed the participants (such as the participating legal experts) to gain new perspectives and bring this into the gameplay.[23]

In the case of the appraisers and associations, it was partly possible for the same people to participate in two or all three simulation games.

In order to detect unintended effects as well, the simulation game was not limited to those aspects where the legislative draft included changes; rather, a complete procedure with all EIA stations was played through on the basis of the concrete cases.[24]

The intervention points created by the new law, which would be worth considering for each actor, were summarized in advance by the project team in a table. At the same time this table formed the basis for the list of hypotheses to be examined in the simulation game.

	Stations of the EIA
0	Screening
1	Scoping
2	„EIA report“
3	Government participation
4	Public participation
5	Summarised presentation
6	Rating
7	Consideration in decision (and possibly remedies)
8	Information (transparency)
9	Monitoring

Table 1: Stations of the EIA

Due to the size of the simulation game documents (for example, the EIA report, 47 pages), it was important to make them available to the players before the game in order to enable them to familiarize themselves with the materials.

After the individual stations, each participant had to complete a short questionnaire in order to query as directly as possible the impressions of the actors on the effects of the new regulations.

4.2 Implementation of the simulation games

4.2.1 Selection of suitable actors

Parallel to the design of the simulation games, the selection of suitable simulation game participants took place. Persons with as many years of experience as possible in the implementation, management or monitoring of environmental impact assessments and audits were considered suitable.

For the area of the project sponsor as well as the approval and, if applicable, environmental authorities, suitable representatives of the authorities were selected with the help of the circle of "experts for environmental assessment of the federal and state governments" (Circle of EIA / SEA ministries responsible, mostly environment ministries). The project types considered in the simulation games (Federal Pollution Control Act (BImSchG) facilities and infrastructure projects) had to be taken into account.

In addition, two to three reviewers were added, who have special expertise in environmental testing or other technical matters (e.g. plant safety). Participants with many years of experience in the field of EIA were also won from the ranks of environmental associations.

4.2.2 Creation of the simulation game documents

For the simulation games, the regulation proposals to be tested were prepared in such a way that the participants could use the simulation game documents to make the effects of the specifications de lege ferenda (in the form of the work or referent’s draft) the basis of their "game". From the numerous individual points for which the EIA Directive requires implementation[25], those were to be selected for which it seemed sensible to "test" the corresponding implementation standard explicitly in a simulation game.

Based on the knowledge gained, the simulation team then created the simulation game documents. The respective projects (BImSchG plant and infrastructure projects) were based on real cases. However, the simulation game documents had to be tailored to the specific issues arising from the implementation of the EIA directive, which made a simplification and stylization of the resulting "neuralgic points" necessary: The documents must show a sufficient level of detail without overloading the course of the simulation game. As a result, they must ensure that a screening process (simulation game 1) and the work stages of the actual environmental impact assessment (simulation games 2 and 3) can be simulated.

The step-by-step design of the simulation game (see section 4.1.3) made it possible to use the findings from the simulation games already carried out as part of the research project to prepare the documents for the next simulation game accordingly. The simulation team also prepared supplementary materials that were not available to the simulation game participants from the beginning, but rather in the form of a "supplementary opinion" at a later date (for example, following the discussion date). Already during the implementation of the first simulation game it proved to be helpful to carry out a structured reflection, which enables feedback on the draft law, but

[23] In some constellations, they presented their behaviour particularly impressively, which was invigorating for the gameplay.

[24] See *Führ/Dopfer/Bizer et al.* 2008, supra note 19, p. 31; here now extended by the station "Information to the public".

[25] For a summary see Bunge 2014 and *Balla/Peters* 2015, supra note 18.

also compiles proposals for changes to the simulation game process with regard to the following simulation games. However, this round of feedback was also important in the second and third simulation games because it revealed further aspects that had to be considered in the evaluation.

come familiar with the topic (in preparation lasting several hours), but also had already exchanged and coordinated with players in their group before the game started and, if necessary, had already developed strategies relevant to the game together. All participants also had the opportunity to talk to the simulation game team

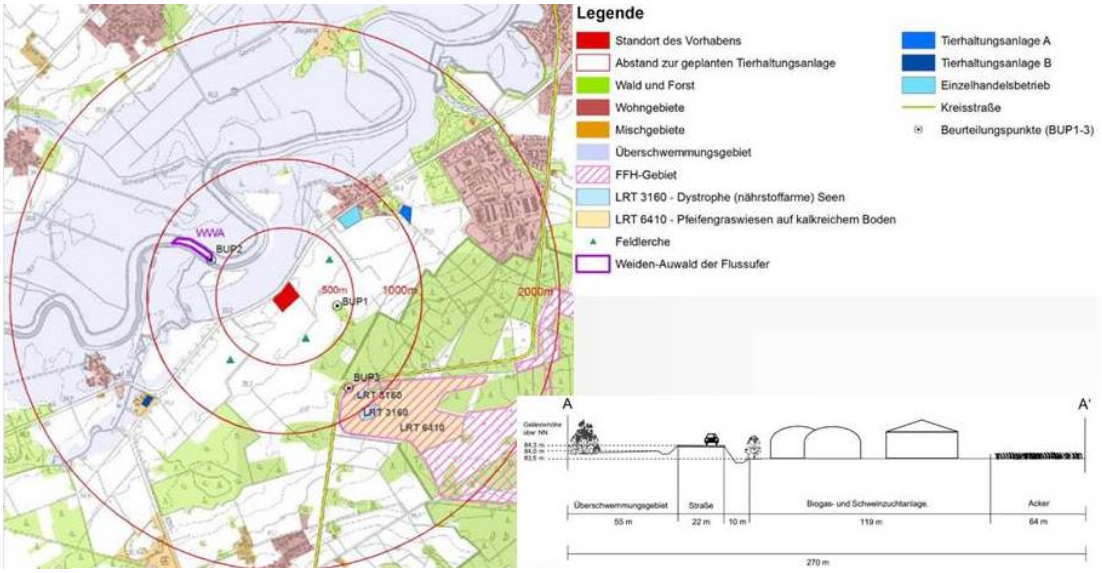

Figure 1: Documents for simulation game 1 (excerpt) - pig fattening farm with biogas plant

4.2.3 Implementation of the simulation game

As already mentioned, the simulation game took place in three variants that differ from each other. The screening (simulation game 1) was created as a one-day event with a subsequent expert discussion on individual questions (accumulation, existing facilities). The simulation games 2 (EIA procedure for a BImSchG project) and 3 (EIA procedure for an infrastructure project) each required a two-day event. The two BImSchG simulation games were carried out in cooperation with the Schader Foundation, Darmstadt; a conference centre in Hanover was used for the infrastructure project.

In order to ensure that the players were familiar with the documents and contents of the project at the start of the game and thus enable a smooth introduction to the simulation game, the documents were sent tout before the simulation game date. In addition, the participants received in advance a questionnaire on key aspects of the draft amendment, comprising several pages, which had to be completed and returned before the simulation game. Finally, the participants were informed in advance of their role in the simulation game as well as the allocation of the other participants to the simulation game actors groups (for example, project sponsors, licensing and technical authorities (water, nature conservation), environmental association, appraiser). In this way, the participants in the simulation game could play their respective "role" – combined into groups – so that they could benefit from their specific knowledge and routines. As a result, the players had not only be-

in advance and to clarify any questions that might arise.

On the actual simulation day, all the actors first gathered together in one room. Afterwards, all groups of actors had the opportunity to withdraw in their own room, for example to consult within the group or to develop strategies for the further course of the game.

This was followed by the first simulation game block with stations 1-3; afterwards an equally long block was available for stations 4-7. In the two-day simulation game, more time had to be estimated accordingly.

4.3 Evaluation of the results of the simulation game

The evaluation of the results of the simulation game was based on the documentation of the individual interactions in the context of the simulation game (messages, conversation protocols, etc.), as well as on the other observations of the game management. In addition, the results were based on the evaluation of questionnaires.

Furthermore, the comments of the participants in the feedback rounds at the end of each of the three simulation games were added.

The individual "stations" of the EIA structured – analogous to the procedure for the evaluation of the EIAA[26] - the evaluation of the simulation game; It had to be taken into account that not only the relevant legal regu-

26 See *Führ/Dopfer/Bizer et al.* 2008, supra note 19, p. 53 ff.

lations for the respective station influenced the behaviour, but also "pre-effects" from later stations (for example greater transparency vis-à-vis the public).

On the basis of the results of the evaluation, proposals were finally to be developed to describe whether and, if so, how it is recommended to redesign the examined regulatory objects in order to align them more closely with practice and to avoid misinterpretation and possible deficits in their application.

Finally, the following sections summarize the main results. This also includes design proposals that go beyond the previous drafts for amending the EIAA, by relating to the interaction with other specialist law.

4.3.1 Understandability and manageability of the EIAA Amending Directive

The evaluation of the game results, the technical discussions and additional written comments from the participants showed that some of the participants interpret the regulations in the EIAA amendment in very different ways and assess their relevance, manageability in practice or the scope of the regulations in some cases in a highly divergent way.[27] For many of the participants, this resulted in a high degree of uncertainty or in an assessment of the implementation, which in some cases differed greatly. However, this does not only apply to the new or amended regulations, but also in some cases to existing regulations.

Within the scope of the EIAA Amending Directive, not only the new requirements of the EIA Directive were implemented, but also modifications were made to regulations that had already caused difficulties in practice for years, such as, for example, the accumulation within the framework of the preliminary EIA review. In the course of extensive discussions in the simulation games and as a result of significant modifications to the draft amendments, the participants noted improvements in the comprehensibility and manageability of the specifications. The handling of cumulation issues in the context of the determination of the EIA obligation could remain difficult and error-prone, according to the impression from the simulation games, but also on the basis of the new regulations.

With regard to the comprehensibility and manageability of the EIAA Amending Directive, it should also be noted that participants also showed considerable uncertainties with regard to the implementation of legal texts which they assessed as "well understandable". The main difficulty was to interpret the new requirements correctly. These difficulties can only be remedied to a limited extent by reformulating the draft law. However, due to their relevance for implementation, they should be taken up and taken into account in the context of the justification for the law, the general administrative provision for the implementation of the EIAA (UVPVwV) to be updated or in the context of further working aids.

Problems regarding the interpretation and implementation of legal requirements can also be understood as an indication of a need for additional qualification. In fact, the simulation games called on participants on several occasions to ensure that the experts involved in the preparation of EIA reports had sufficient expertise – as required in the EIA Amending Directive – to a greater extent than in the past.

4.3.2 Interaction between the EIAA and specialist law

The feedback of the participants and the evaluation of the questionnaires completed during the simulation game showed a significantly better result in simulation 3 (simulation game for the construction of a new state road) compared to simulation 2 (BImSchG plant with pig fattening farm) with regard to the comprehensibility and manageability of the specifications of the draft amendment. The reason for this is probably not only the fact that the EIA amending draft to simulation game 3 had already been updated and in some cases had already taken up suggestions from the participants of the first two simulation games. The differences with regard to problems in the manageability and implementation of the requirements were obviously mainly due to the requirements of the respective specialist law. This concerned both the substantive and legal interaction and the coordination of procedural requirements from EIA and specialist law. For example, the participants in the simulation game to the EIA plan approval procedure saw fewer – or even significantly fewer – problems with regard to manageability than the participants in the simulation game on legal immission protection proceeding with almost all the points asked for, such as "consideration of protection goods", "cumulation", "description of reasonable alternatives", "measures to avoid", "measures for monitoring".

This finding is presumably primarily due to the distinction between EIA law and specialist law. For example, participants in immission protection in particular are of the opinion that all specifications in the EIAA that are not covered by technical legislation, such as the description of reasonably tested alternatives, the preparation of an independent EIA report, monitoring measures, etc., are not to be taken into account in the context of the legal immission protection approval proceeding or may not be relevant to the decision.

This problem can only be partially addressed by additions and modifications within the framework of the EIAA Amending Directive. Above all, a strong coordination between EIAA and specialist law is necessary here. New contents in the EIAA Amending Directive, such as the "new" protective goods (e.g. land) and

[27] See the evaluation papers for the individual simulation games, which are documented in condensed form in the appendix to the final report (see footnote 17).

material testing requirements (e.g. environmental effects resulting from the vulnerability of projects to serious accidents and disasters), can only become effective if the relevant substantive legal assessment standards are provided.

4.3.3 Further approaches to optimization

In principle, the participants see various possibilities to improve the regulations even further. In simulation games 2 and 3 in particular, the participants criticized the references to other regulations, some of which were nested several times. This regulatory technique made the handling of the legal text considerably more difficult.[28]

In general, this leads to the recommendation that such references should therefore be checked again to see whether it would be more user-friendly not to use them and to formulate the respective specification in detail instead. This would have to be weighed in individual cases against the disadvantage that the EIA Act might contain an excessive number of repetitions of text (and thus redundant text).

Another suggestion resulting from the simulation games is that "duplications" should be avoided and that the individual specifications should be more clearly distinguished from one another. This applies, for example, with regard to the coordination between the Annexes to the EIA Act draft amendment, in particular Annex 2 "Information provided by the project developer in preparation for the preliminary assessment of the individual case" and Annex 3 "Criteria for the preliminary assessment of the individual case within the framework of an environmental impact assessment".[29]

5 First recommendations for the use of simulation games

The methodology for the simulation game for the EIA Amending Directive allowed the dynamics resulting from the interaction of the actors to be depicted relatively realistically, albeit under "laboratory conditions". In this respect, this methodology differs from a normal workshop that could also be structured along the "stations" of the EIA process. The preparation of such an approach would be much less time-consuming; However, in the findings to be expected, it would remain substantially behind those of a simulation game, because although the assessment of the actors regarding the effects of the new legal situation can be queried in each case, depending on the respective previous experience, only "static" statements will be obtained, which do not include any interaction. The conceptual design of the simulation game for the EIA amending directive goes far beyond this, because it focuses on the interaction of the relevant actors under the newly applicable framework conditions and thus takes on a dynamic perspective.

Based on the evaluation of the simulation games (see section 4.3), proposals can be developed to describe whether and, if so, how it is recommended to redesign the examined regulatory objects in order to align them more closely with practice, to avoid misinterpretation and possible deficits in their application based on them. The draft regulations used in the simulation game were to be measured in particular by following the criteria:

- Comprehensibility and clarity of the wording,
- suitability for the purpose pursued (effectiveness) and
- practicability in enforcement (efficiency)

Special attention was paid to possible gaps and misleading wording. It was also examined whether individual requirements in the draft regulations are too general or too specific and are therefore expected to achieve their purpose in practice only to a limited extent.

It can be said that it has been possible to identify concrete and detailed possibilities for improving the designs. The participation of the legal experts in the simulation game ensured immediate access to the knowledge gained, so that the following simulation game could already draw on an updated version of the draft law. In the evaluation, the simulation game team formulated the most appropriate regulatory content and, in some cases, regulatory alternatives. Telephone conferences, in which the German Federal Environment Agency as client and the simulation game team as contractor as well as the legal experts from the responsible federal ministry took part, enabled an intensive technical exchange, both in the run-up to the simulation (for example on the content of the simulation and the problem orientation created in the game documentation) and in the evaluation.

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28 This criticism partly took up the continuation towards the finally adopted version of the Implementation Act.

29 These duplications can also be found in the EIA Amending Directive; the legislator therefore did not take up this suggestion, although it seemed quite plausible to the legislators involved.

The "Peoples' Climate Case" summarized

Hugo Leith, Roda Verheyen and Gerd Winter

1 Summary of the Application

The case, dubbed the people's climate case[1], is brought by children and their parents, working in agriculture and tourism in the EU and abroad who are and will increasingly be adversely affected in their livelihoods and their physical well-being by climate change effects such as droughts, flooding, heat waves, sea level rise and the disappearance of cold seasons. They are supported and joined by an association of indigenous Sami youth. The applicants are engaged in a range of economic activities, including the cultivation of crops, forestry management, animal herding, and eco-tourism.

For each of the families, climate change has in some cases already curtailed their activities and livelihoods; for instance, droughts have led to the destruction of a Portuguese farmer's forest in a wildfire, to a French farmer's lavender harvest to seriously decline, and a Kenyan pastoralist to loose feeding ground and water; sea level rises and worsening storms have inundated a Fijian farmer's land and will put a North Sea island hotel owner at risk, and changing patterns of freezing and warming in winter times have harmed Sami reindeer herding. As time goes on climate change will if left unchecked increasingly impair living conditions if mitigation measures remain inadequate. Changes in the climate have also exposed some of the applicants to physical harm; these risks to physical well-being will increase as climate change worsens.

The Defendants are the European Parliament and the Council of the EU. These are the institutions of the Union responsible for the adoption of the legal acts challenged by this application.

The Applicants are represented by the three authors of this article.

The Applicants bring two related applications concerning the responsibility of the Union for emissions of greenhouse gases ('GHGs'), leading to dangerous climate change.

They contend that the Union has failed and continues to fail to meet its urgent responsibilities to limit the emission of GHGs, in breach of its binding obligations of higher rank law. This breach currently manifests in three recently adopted legal acts of the European Parliament and the Council, which cover different sectors of the economy. These comprise:

(a) the amended Directive on emissions trading (the "ETS Directive");[2]

(b) the Regulation on climate action by Member States (the "Effort Sharing Regulation" or "CAR Regulation")[3], and

(c) the Regulation on land use, land use change and forestry (the "LULUCF Regulation")[4];

– collectively, the "GHG Emissions Acts".

The GHG Emissions Acts in aggregate comprise an overall reduction of 40%, as compared to the emissions of 1990, by 2030. This target is inadequate – by at least 10 to 20 % - to deliver the level of reduction demanded by higher rank law. The applicants accordingly seek the annulment of the GHG Emissions Acts insofar as they fail to set more ambitious targets.

Further, the Union's past and continuing failure to adopt sufficient measures to reduce emissions as required by higher rank law has caused, is continuing to cause, and will cause the applicants damage, engaging the non-contractual liability of the Union. The applicants accordingly seek an injunction requiring the Union to set deeper emissions reduction targets at the level required by law.

2 Admissibility

The applicants are each directly and individually concerned by the acts under challenge as required by Art.263 (4) TFEU.

Direct concern: In setting emissions reduction targets, the GHG Emissions Acts are also instruments by which quantities of allowable emissions are allocated to Member States; in total, still 60% of the emissions of 1990 are permitted to be allocated in 2030. This is an excessive volume of emissions

1 See the website https://peoplesclimatecase.caneurope.org/. For the full version of the application click 'documents'. A concentrated version which was required by the General Court will soon be published on the same website.

2 Directive (EU) 2018/410 of the European Parliament and the of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814[Annex 1] pp.1 ff., as published in the Official Journal 2018 L 76/3.

3 Regulation (EU) 2018/842 of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ 2018 L 156 p. 26. The Regulation will in the following be cited as ESR.

4 Regulation (EU) 2018/841 of the European Parliament and of the Council on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) 525/2013 and Decision 529/2013/EU, OJ 2018 L 156, p. 1.

which directly infringes the applicants' fundamental rights.

Individual concern: Concerning the requirement of individual concern the applicants have two submissions.

First, according to the standard set out in the *Plaumann* case[5] for showing "individual concern", the applicants meet that standard. Each applicant complains of a breach of fundamental individual rights. While all persons may in principle each enjoy the same right (such as the right to life, or the right to an occupation) the effects of climate change (to which the EU Emissions Acts under challenge contribute) and hence the infringement of rights is distinctive and different for each individual.

Second, in the alternative, it is submitted that the *Plaumann* formula is inapposite and should not be followed in this case. Rather, the standing requirements of Article 263 (4) TFEU are established if it is shown that the act under challenge does affect the applicant in an individual capacity, even if other persons may also be affected, especially where the harm caused is serious. The applicants clearly meet this alternative standard.

a. Since adoption of the *Plaumann* formula the text of Article 263 (4) TFEU has changed: the object "decisions" was exchanged for "acts", thus including legislative acts which do not have addressees to whom an applicant seeking to establish standing could be compared (a comparison the *Plaumann* formula assumes can be made).

b. The formula has perverse results: the more serious the harm and thus the higher number of affected persons, the less legal protection is available.

c. The stringency of the *Plaumann* approach is not sustainable in light of the CJEU's insistence that all questions of EU law – and in particular those arising under the Charter – are reserved to its jurisdiction.[6] If the CJEU is to be the sole arbiter of the reconciliation of EU measures and fundamental rights, it must follow that an individual whose fundamental rights are at stake necessarily has a right of access to the EU judicature.

d. The *Plaumann* test – when applied in the context of rights under the Charter – is inconsistent with the guarantee for effective remedies of rights conferred by Article 47 of the Charter. A gap in legal protection is clear in the present case. This action is not directed against implementing measures of either Member States or EU institutions but rather against the fundamental legal basis for climate action; more precisely the allocation by the GHG Emissions Acts of an excessive and unlawful quantity of emissions. That allocation is dictated by the Emissions Acts themselves, and requires no implementing measures which could be the subject of a challenge.

Concerning the reindeer herders' association (one of the applicants), CJEU case law is pertinent insofar as it grants an association *locus standi* if the individuals forming it or at least part of them have standing themselves.

All of the members of the association belong to families of reindeer holders and therefore have individual standing.

3 First Plea: annulment of the three GHG Emissions Acts

The Applicants submit that the GHG emissions that would be allocated and permitted under the +60% target (or -40 %, respectively) enshrined in the three GHG Emissions Acts are incompatible with higher rank law, as follows:

a. First, <u>any</u> further emissions of GHG gases will contribute to the ongoing warming of the Earth system and to dangerous climate change. Permitting any further emissions will result in harm and will encroach on the interests protected by the EU's duties; namely, the international no-harm rule, as well as various fundamental rights of the applicants, including the right to health, occupation, property, well-being of children, and equal treatment both of generations and people living in developed and less developed countries.

b. Second, moreover, the GHG Emissions Acts would permit the continued emission of dangerous GHGs at levels that materially exceed the maximum permissible levels of emissions that are implied by the Paris Agreement. Scientific analysis can estimate the maximum quantity of emissions that can be released globally into the atmosphere so as to result in a likelihood of temperature increases being kept within the defined levels to which the EU has committed itself. The EU cannot consume more than its *per capita* share of those global emissions, yet the GHG Emissions Acts will result in it doing so. The Paris Agreement tem-

[5] The *Plaumann* formula defines "individual concern" of persons other than those to whom a decision is addressed as: "if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed." (ECJ decision of 15.7.1963, Case 25/62 Plaumann v Commission [1963] ECR p. 95, at 107.

[6] ECJ Opinion 2/13 of 18.12.2014, Case C-2/13 (Adhésion de l'Union à la CEDH) ECLI:EU:2014:2425 para. 189.

perature limits as such therefore can provide no justification for the EU's policies; rather, those policies are in direct conflict with its requirements.

c. Third, the infringement of norms entailed in the GHG Emissions Acts is unlawful, unless the Union establishes a well-founded justification. Any such justification would need to show that the Union had acted proportionately and had infringed theduties and rights only to the extent that was necessary. To make good such a justification, the EU would need to identify and adopt measures for emissions reduction to the extent of its technical and economic capability.

d. Fourth, insofar as the EU legislature contends that its conduct in permitting the level of emissions it proposes in the GHG Emissions Acts is justified in the light of other, competing interests, the legislative record is to the contrary. The evidence shows that the EU's analysis of its 2030 targets impermissibly pursued an outdated objective of achieving an 80% reduction in emissions by 2050. That policy is contrary to law and in particular to the Paris Agreement. As the EU began its analysis from the wrong starting point, it failed to consider the feasibility of more ambitious reduction options.

e. Fifth, as could have been explored by an in-depth analysis of all emission sectors, the technical and economical capacity of the EU clearly extends to making emissions reductions of 50-60%. It is submitted that the GHG Emissions Acts must therefore be declared void insofar as they will allow in 2030 the emission of more than 40%-50% of the 1990 levels of emissions.

f. However, in order to avoid a legal vacuum, it is applied that the contested provisions shall remain in force for such limited period as the Court determines appropriate, until they are replaced with emissions target levels compliant with the norms of higher rank law.

4 Second plea: injunction for non-contractual liability

Further to the Applicants' case that the targets in the GHG Emissions Acts are incompatible with the Union's legal obligations and must therefore be annulled, the Applicants also contend that the non-contractual liability of the Union is established, entitling them to seek relief under Article 340, TFEU.

In overview, the Applicants' case is as follows:

a. First, the EU has failed to take sufficient steps required by high rank law to reduce emissions from within the Union. It has been in breach of its obligations to take these steps since 1992 (when the UNFCCC was adopted), alternatively since 2009 when the Charta of Fundamental Rights became binding EU law. It continues to be in breach of this obligation today.

b. Second, these failures have made and are continuing to make a material contribution to dangerous climate change that has already occurred, is occurring, and will occur, and for which the EU therefore bears a significant degree of responsibility.

c. Third, this dangerous climate change has caused, is causing, or will cause the Applicants material loss.

The relief sought is an order requiring the EU to adopt emissions reduction targets through the existing framework of the ETS, ESR and LULUCF regimes that are sufficient to bring the EU into compliance with its legal obligations. Based on the analysis of the emissions budget and of feasibility set out above, the Court can be confident that the minimum that the EU is obliged to is to adopt targets to the full extent of its capability.

The Applicants submit that this requires emissions reductions of 50%-60% by 2030, or such other level as the Court finds appropriate.

Book Review

"Environmental Crime in Europe" by Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi (eds.)

Nicola Below

The book "Environmental Crime in Europe" by the editors Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi is the second edited volume of the the EU-project "European Union Action to Fight Environmental Crime" (EFFACE). EFFACE was a 40-month research project funded under the European Seventh Research Framework Programme. Eleven European research institutions and think tanks were involved. The project assessed the impacts of environmental crime as well as effective and feasible policy options for combating it from an interdisciplinary perspective, with a focus on the EU.

The book is a follow-up to the results of the research strand of EFFACE dealing with actors, instruments and institutions involved in the fight against environmental crime and goes beyond a mere technical implementation study. The aim of this collection is to explore how environmental crime is controlled and environmental criminal law is shaped and implemented within the European Union and its Member States, from a technical and practical point of view. In doing so, it focusses on seven countries, particularly France, Germany, Italy, Poland, Spain Sweden and the United Kingdom. The selection took into account the differences in the legal traditions (civil law and common law) and a reasonable geographical spread. The book consists of three strongly interrelated parts.

Part I examines the European legal framework, looking in particular at Directive 2008/99/EC on the protection of the environment through criminal law and the specific competences of the EU in this domain. This part introduces the analysis in question and concludes with a critical discussion on the history and elements of the Environmental Crime Directive.

Part II – the country studies – forms the core of the book. The idea is to study implementation within the much broader context of functioning environmental criminal law in the wider context of the entire system of criminal law in each of the country. To this end, the country chapters address on the material side the definition of environmental crime, substantive criminal law principles, the structure of environmental crime, the transposition of Directive 2008/99/EC, procedural provisions, the role of inspections, the prosecutor, courts, administrative sanctions and the applicable type and magnitude of sanctions. On the practical side, the authors reflect on the way in which environmental crime is dealt with, paying attention to the types of penalties imposed, the number of prosecutions and administrative sanctions imposed, etc. In result, the country studies deliver judgements on the effectiveness of the enforcement practices, taking into account the effect of domestic environmental crime law on compliance.

Part III provides a comparative analysis based foremost on a methodology developed at the Max Planck Institute for Foreign and International Criminal Law in Freiburg im Breisgau (Germany). The method focusses on the ability of criminal law to protect environmental interests, particularly in its relationship to administrative law. A distinction is made between the protection of environmental interests via so-called abstract endangerment, concrete endangerment and independent crimes. Based on the comparison the book concludes with an outlook on the state of affairs, indicates the main challenges for the future and formulates recommendations.

Environmental pollution is a continual issue in the European Union. Although diverse European and national policies strongly affirm the importance of environmental protection, the outcomes are still arguable. Whereas there may be diverse assumptions as to the question of why environmental harm still occurs, little is still known and little is scientifically backed about the reasons. The book "Environmental Crime in Europe" by the editors Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi is one of the many puzzle pieces that the legal discipline in Europe needs to construct a more viable regulatory framework in the future. The book sets out the relations between, on the one hand, the strongly interrelated legal framework relevant to environmental protection and, on the other, the impacts of this legal framework, as well as other possible influences on the actors involved: from legislator to criminal. The focus on the practical side is not only a precious contribution to European scientific discourse, but also delivers insights to practitioners dealing with environmental crime in Europe.

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Institut für angewandte Ökologie
Institute for Applied Ecology

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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I·E·S·A·R
Institute for Environmental Studies and Applied Research
FH Bingen

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

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

The Institute fulfils its assignments particularly by:
- Undertaking projects in develop-ing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research

- **European environmental policy**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

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

The areas of research cover
- Product policy/REACh
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conversation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the
- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Na-ture Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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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.

elni Board of Directors

- Martin Führ - Society for Institutional Analysis (sofia), Darmstadt, Germany;
- Jerzy Jendroska - Centrum Prawa Ekologicznego (CPE), Wroclaw, Poland;
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- Marga Robesin - Stichting Natuur en Milieu, Utrecht, The Netherlands;
- Gerhard Roller - Institute for Environmental Studies and Applied Research (I.E.S.A.R.), Bingen, Germany.

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