

# European Environmental Law

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**Abstract:** - Prior to their adaptation by the Single European Act, the Community Treaties included no express assignment of competencies concerning environmental politics by the European Community. In setting its environmental policy the Union needs to consider certain elements which are specified as follows. The starting point for Community environmental politics and its evolution is analyzed from the juridical point of view. The paper underlines the necessity of achieving a high level of environmental protection by allowing a judicial harmonization related to the structure and functioning of the internal market.

**Key-words:** aim, community, climate, directive, environment, pollution, strategy, treaty.

## 1. Primary Judicial Bases of the EU Environmental Legislation

### 1.1. Development

Prior to their adaptation by the Single European Act (1987), the Community Treaties included no express assignment of competencies concerning environmental politics by the European Community. Together with the Single European Act (SEA) articles 130r, 130s and 130t were inserted in the Treaty of the European Economic Community. Otherwise the judicial provisions concerning environmental issues were (and are) based on the “article concerning the common market”. The Maastricht Treaty only brought a few minor modifications of the provisions concerning the environment.

In relation to the environmental provisions, the Amsterdam Treaty (renumbering: articles 174 - 176 of the EC Treaty) replaced in particular the cooperation procedure by the co decision procedure, and also provided the possibility of introducing superior national standards for environment protection, even subsequently to the issue of the harmonization measures.

Part of the negotiations with the Central, Eastern and South-Eastern European states concerning their joining the European Union, the

new EU member states pledged to gradually assume the environmental standards valid in the EU.

### 1.2. Principles of Operation

The starting point for Community environmental politics is pursuing the achievement of a high level of environment protection. Art. 174 par. 2 prop. 2 of the EC Treaty defines the principles underlying the environmental policy of the Union. These include the principles of precaution, prevention, rectifying pollution at source and ‘polluter pays’.

### 1.3. Necessary Conditions

In setting its environmental policy the Union needs to consider certain elements: available scientific and technical data, the environmental conditions in each region of the Union, the advantages and expenditure related to performing or not performing of certain activities, respectively, the overall economic and social development of the Union, as well as the balanced development of its regions.

### 1.4. Art. 175 - The Basis for Competencies

The basis for competencies concerning environmental community measures, with no special reference to the common market is art. 175 of the EC Treaty, and not art 174 thereof.

Thus, art. 175 represent a general power of attorney for all potential specialist fields, provided no special competence intervenes for these cases. Art. 175 do not establish the type of measures implement able on its basis in every individual case, all forms of action being taken into consideration.

### **1.5. The Co decision Procedure**

Since the revision of the Amsterdam Treaty, the measures based on art. 175 are subordinated to the Co decision procedure, as provided by art. 251 of the EC Treaty.

In accordance with its provisions, the Commission will first submit a proposal to the European Parliament and Council. The European Parliament states its position in relation to this proposal, and can propose amendments. After obtaining the opinion of the Parliament, the Council will decide by qualified majority. If the Council approves all the amendments contained in the European Parliament's opinion, or if the latter does not propose any amendment, the Council may adopt the proposed directives. Otherwise the Council will adopt a common position and communicate it to the European Parliament. If the European Parliament approves the common position or does not take a decision in relation to this, the directive corresponding to the common position shall be considered as approved. If the European Parliament rejects the common position by an absolute majority, the proposed directive deed will be deemed rejected. If the Parliament proposes by an absolute majority amendment to the common position, then a decision is called for in relation to these amendments.

The Council may approve these amendments within three months, by qualified majority. Unanimity is required when the Commission has taken a rejecting position in relation to the proposed amendments. In both cases the directive in question will be deemed as adopted in this version. If the Council does not approve all amendments of the Parliament, a conciliation procedure will be initiated.

The Conciliation Commission convenes with the aim of establishing an agreement on a common project. If unanimity is achieved and the Conciliation Commission approves a common project, the directive is adopted with this content;

if voted by an absolute majority, the directive shall not be deemed as adopted. All stages required by the conciliation procedure need to be completed within six weeks.

Art. 175 par. 2 and par. 1 of the EC Treaty maintains the described procedure for separate areas, requiring however a unanimous decision of the Council. This provision is aimed at avoiding exaggerated limitation of the decision making areas of the member states. This concerns particularly provisions of predominantly fiscal nature, measures in the area of regional planning, land utilization, as well as the management of water resources, but also measures considerably affecting the capacity of a member state to choose between various energy resources and to decide upon the general structure of its energy supply.

Art. 95 of the EC Treaty allow a judicial harmonization related to the structure and functioning of the internal market, harmonization that may refer also to environment protection. In the evaluation process of assistance corresponding to competencies, a decisive role – according to the decision of the European Court of Justice - comes to the main aim of a measure, which is to be emphasized objectively based on its objectives and contents. Consequently invoking art. 95 of the EC Treaty is not justified if a directive produces only marginally a harmonization of the market conditions within the Union. The principal effect of such a measure needs also be considered. As a tendency, the regulations concerning products should be based primarily on art. 95 of the EC Treaty. However, in the case of regulations relating to products no specific tendency can be established.

Art. 176 of the Treaty allows the measures of the member states envisaging a high level of protection compare to the regular ones of the Community, thus highlighting the significant role coming to the member states in relation to environment protection. National measures can be maintained or initiated if measures of added protection, and if in agreement with the EC Treaty. Secondary legal provisions may be ignored, if the interdiction of discrimination and the principle of proportionality are respected.

Art. 95 paragraphs 4 and 5 of the EC Treaty allow – in the case of a harmonization by right at Community level regarding the internal (European) market – the maintaining or the

introducing, respectively, of a national provision, justified by the existence of important requirements, related, *inter alia*, to environment protection. The provisions of each member states introduced at a later point need to be based on to-date achievements of science.

## 2. EU Environmental Strategy and Community Environmental Law

### 2.1. EU environmental strategy

The basis of EU environmental strategy is an action programme called “Environment 2010: Our future is in our hands”. The central points of this political action programme include: climate transformations and global warming; natural habitats and wildlife; environment and health; natural resources; waste administration.

Over the last few years of this action programme, emphasis was placed on combating the increasing emission of greenhouse gases at global level and the loss of biodiversity, on combating the expansion of waste, deforestations, land contamination, the vast effects of pollution on public health and the environment, the continuous growth of waste quantities and the increasing “eco-print” left by the EU.

### 2.2. EU environmental law

Political concepts can be based on vast system of environment protection, including a variety of issues – from noise pollution to waste, from chemicals to motor vehicle exhaust gas, from medicinal spring waters to a European network of environment catastrophe combat. These concepts have been developed over more than 30 years of EU environmental politics.

### 2.3. Structure

EU environmental law can be structured as follows:

- General provisions: action programmes, principles, instruments, application and control, long term development, long term development strategy, implication of environmental policy;
- Combating climate changes: political framework, Kyoto Protocol, reducing greenhouse gases;

- Waste recycling: prevention and recycling of residues, specific waste, hazardous waste, radioactive waste;
- Air pollution: air quality, atmospheric pollution, traffic, industry;
- Water protection and union politics concerning water: water usage, marine pollution, inland waters, discharge of substances;
- Protection of nature and biodiversity: biological diversity, fauna and flora, forests, genetically modified organisms;
- Land (soil protection): land (soil) protection in specific areas, discharge of substances, areas of increased risk;
- Chemicals research: hazardous substances and compounds, pesticides, biocides, fertilizers, risk control;
- Disaster protection: procedures and financing in disaster civil protection, environment pollution caused by accidents;
- Noise pollution: assessment and combat of noise pollution, specific sources of noise pollution;
- Cooperation with third countries: expansion, cooperation with third countries, international treaties.

### 2.4. Aims

The aims of Community environmental law provisions are to ensure approximately the same standards of environment protection in the entire EU. In this respect also a certain margin needs to be allowed, under consideration of local conditions (see section A above, and art. 176 and art. 95 par. 4 and 5 of the EC Treaty, respectively). A balance needs to be established between environment protection measures and the necessity of maintaining the international competitiveness of industry.

### 2.5. Reach

The implementation of a single system for recording, assessment and admission of chemicals, at European level was based on the REACH concept: *Registration, Evaluation, Authorisation and Restriction of Chemical Substances*. The newly founded European Chemicals Agency located in Helsinki accepts registrations starting 1 June 2008.

### 2.6. The “Polluter Pays” Principle

Based on this principle the investments necessary for meeting superior environmental norms will be claimed from the party responsible for producing pollution. Further, this party can be required to withdraw, recycle or eliminate certain products after utilization. Another possibility is that of charging additional taxes from companies or consumers utilizing environmentally damaging products (like packaging). Even liability for the environment is based on this principle.

### **2.7. The Precautionary Principle**

Action will be based on this principle in case of potential environmental endangerment rather than in proved cases. This means that protection measures will be taken from the moment of plausible risk, even in the absence of scientific proof at that time.

### **2.8. EU environmental symbols**

EU environmental symbols are meant to assist citizens in making environment friendly decisions when acquisitioning goods and services. The manufacturing companies and service provider organizations can prove their high standards of environment protection by means of the EU Eco-Management and Audit Scheme (EMAS).

### **2.9. The Environment Directorate General**

The EC includes an Environment Directorate General sited in Brussels, the main role of which is to initiate and prepare environmental legislative norms, as well as to ensure that Community environmental law in force agreed is applied and respected in the EU Member States.

The areas of activity of the Environment Directorate General include the following topics air, biotechnology, chemical substances, disaster and natural catastrophe protection, climate transformations, environment economy, enlargement and neighbouring states, health, industry and technology, international affairs, land usage, nature and biodiversity, noise pollution protection, soil, long term development, waste, water.

### **2.10. The EU Environment Agency**

The role of the European Environment Agency of Copenhagen is to monitor the state of the environment and to warn EU bodies in good time about any issues that may occur.

## **3. Examples of Secondary EC Law**

Birds Directive and Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora

### **3.1. The EU Birds Directive**

The Birds Directive (79/409/EEC) aims at ensuring protection of wild birds, particularly by conserving and restoring the habitats of the bird families. In accordance with art 4., the bird types mentioned in Annex I require implementation of special protection measures for conservation of their vital spaces. In particular pollution or degradation of the vital spaces, as well as any disturbance of the birds need to be avoided by adequate measures, with immediate effect on their survival and reproduction. The most adequate territories (as to their number and surface area) for the conservation of these species need to be declared natural reservations. In such cases considerations related to economic or leisure requirements will not be taken into consideration (see The European Court of Justice, Collection 1996, I-3805 “Lappel Bank”). Decreasing the number of established natural reservations requires special grounds (in particular grounds concerning the general quality of life). Protection material provisions concerning natural reservations are valid even if a territory is not included in the category of natural reservations (see The European Court of Justice, Collection 1993, I-4221 “Santona Marshes”, the so-called “effective bird natural reservation”).

### **3.2. The Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora**

The role of the Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (92/43/EEC) is to ensure the conservation of natural spaces, as well as of wild plants and animals.

For this purpose a Pan-European Ecological Network of natural reservations needs to be established, called “Natura 2000”. These natural reservations need to include the types of vital natural spaces listed in Annex I, as well as the habitats of the bird and animal species listed in Annex II. According to art. 7 of the Habitats Directive, the natural reservations established in

accordance with the Birds Directive will be subject to the legal consequences of the Habitats Directive.

The selection of regions will be carried out by a procedure consisting of several stages, by cooperation of the member state and the Commission. On the established and accordingly categorized territories measures of conservation and prevention of degradation of the vital natural spaces and the species habitats need to be taken, as well as measures of prevention of any disturbance of the species for which these territories were approved.

In addition, art. 6 par. 3 of the Habitats Directive requires a verification of the impact on the environment of plans or projects that may (individually or by interaction with other projects) cause considerable prejudice to a natural reservation in relation to their compatibility with the conservation purposes established for that territory. If the environmental impact evaluation yields a negative result, the plan or project may still be approved, provided the existence of imperative causes of majority public interest, including such of social and economic nature.

### **3.3. Precautionary Action**

The European Commission maintains the conviction that the protection principles of the Habitats Directive need to be applied also to territories included only on a national list of evidence of territories satisfying the objective criteria of the Directive. These precautionary actions of Community law are meant to prevent the destruction or vast degradation of potential flora and fauna habitat territories, rendering them ineligible for being included in the category of natural reservations.

### **3.4. Directive on the assessment of the effects of certain public and private projects on the environment**

#### **3.4.1. Purpose**

The role of the Directive on the assessment of the effects on the environment (85/337/EEC amended by 97/11/EC and by Directive 2003/35/EC providing for public participation, the latter to be applied by 25.6.2005 within national legislation) is to introduce an assessment procedure related to the environment – as soon

and as completely possible. The approval for projects that may have considerable effects on the environment can be granted only after a prior assessment of the possible effects of these projects on the environment. The material conditions for such approval are not stipulated by the Directive on the assessment of the effects on the environment, its role being merely that of providing legal procedure, hence being neutral from the viewpoint of results (as opposed to the Law on the assessment of the effects on the environment).

#### **3.4.2. The Aarhus Convention**

Upon adoption of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters on 25 June 1998 (entered into force on 30 October 2001) the possibilities of participation in the relevant environment related procedure have reached a new qualitative dimension. The EU as well as Austria have signed and ratified the Aarhus Convention. The obligation of adapting Community law to the Convention has involved, in addition to a new version of the Directive on environment information, also new regulations for public participation in decision-making relevant to the environment, as well as introducing access (as provided by the Aarhus Convention) to assessments processes in courts of law.

#### **3.4.3. Directive providing for public participation**

In view of applying the Aarhus Convention, in addition to new regulations on environment information, also and in particular the Directive 2003/35/EC providing for public participation was issued, providing new regulations of public participation in certain plans and programmes, including both plans required for assessment of effects on the environment and cases regulated by the Directive concerning integrated pollution prevention and control (IPPC).

#### **3.4.4. Area of application**

The implementation of all projects mentioned in Annexes I and II involves an assessment of the effects on the environment: for the projects listed

in Annex I an assessment of the effects on the environment is compulsory, while for the projects mentioned in Annex II such assessment will be conducted only if –in the opinion of the member states – necessitated by the characteristics of these projects.

For this reason, for the projects of Annex II either threshold values will be established, or an assessment for each individual case, in order to determine the obligation of assessing the effects on the environment (to be compared to the decision of the European Court of Justice that considerably limits the measurement margin).

### 3.4.5. Assessment contents and procedure

The assessment of the effects on the environment adequately identifies, describes and determines the direct and indirect effects of a project on humans, the fauna and flora, on the soil, water, air, climate and landscape, on cultural goods and inheritance, as well as on the symbiosis of the afore mentioned factors (integrated assessment). In a first stage the project applicant needs to present the data indicated in Annex III in an adequate form.

Next the authorities that can be affected by the project in the area of their environment related tasks will have the possibility of expressing their position in relation to the application for approval of the project. Each application for approval, together with the information presented for this purpose has to be made public, enabling public opinion to express a position in relation to the project before its approval. Public participation has been reformulated by the Directive providing for public participation, being subject to the regulations provided by the Directive on the assessment of the effects of certain public and private projects on the environment as follows:

### 3.4.6. Public participation

The distinction between “public” and “public concerned” is maintained. To the former, the requirement of information provision is applicable both at the “beginning” of the procedure and after approval has been granted. The “public concerned” needs to be granted the possibility of expressing a position, and from that point further the right to request the assessment of the effects on the environment before a court of law or another independent and impartial body

established by law – with the purpose of establishing or challenging the substantive and procedural legality of the decisions (art. 10, Directive on the assessment of the effects of certain public and private projects on the environment, and also art. 15a of the Directive concerning integrated pollution prevention and control (IPPC).

The purpose of amending the Directive on the assessment of the effects of certain projects on the environment by the Directive providing for public participation (2003/35/EEC) is, *inter alia*, to “grant” the public concerned “extended access to justice”. The procedures need to be “fair, equitable, timely and not prohibitively expensive”.

### 3.4.7 Participation of non-governmental organizations

From this point further the “public concerned” includes also “non-governmental organizations” (NGOs) promoting environment protection and “meeting any requirements imposed under national law”. Based on the ensuing requirement of granting NGOs party rights, it can be asserted that a consequence of the Aarhus Convention is a certain “subjectivity of public interest”.

If the project also has considerable effects on another member state the latter, its authorities and public concerned need to be included in the procedure. The assessment results of the effects on the environment (particularly the results of the hearings and position expressions) need to be considered within the approval process. Thus the purpose of assessing the effects on the environment will be only of decision preparation in view of the approval procedures, upon which decision of approval needs to be made public.

## 3.5. Directive concerning integrated pollution prevention and control (IPPC)

### 3.5.1. Purpose and area of application

The Directive concerning integrated pollution prevention and control (IPPC) envisages an integrated concept of pollution combating. The concepts applied to date, relating only to separate elements of the environment have proved as insufficient, as pollution can shift to another element. In accordance with the described situation the Directive in question refers to

atmospheric, water and soil emissions, including waste management. The new systems conducting the activities mentioned in Annex I, as well as any essential modifications require approval. Existing systems subordinated to Annex I need to be subject to verification by the approval requirements after 8 years. In addition the IPPC Directive refers to the current functioning of the systems.

### **3.5.2. Approval**

The approved application for approval needs to contain certain information.

### **3.5.3. Public participation**

The application for approval needs to be made public, in order to allow the public to express a position. The Aarhus Convention provides new procedural regulations for the IPPC systems, hence the amendment of the IPPC Directive by the Directive providing for public participation 2003/35/EC, in accordance with the innovations presented above, for projects requiring environmental impact assessment (EIA). These amendments had to come into force within the national law system by 25.6.2005.

### **3.5.4. The approval decision**

In relation to the conditions for approval the approval needs to ensure, *inter alia*, that all adequate measure combating environmental pollution are taken, that no considerable environmental pollution is caused and that energy is used efficiently. The approval needs to include the threshold values set for certain toxic emissions mentioned in Annex III, as well as the requirements for emission monitoring. In the case of several authorities being competent for the same system, the procedure and the approval clauses need to be coordinated in a comprehensive manner, in order to ensure an efficient integrated concept. The decision of approval needs also to be made available to the public.

### **3.5.5. The best available techniques**

The measure of assessment is “the best possible techniques”, the definition of which includes aspects of economic efficiency (as opposed to the concept of “state of techniques” at national level).

The concept itself of best available techniques envisages an integrated manner of assessment. In relation these techniques the Commission will ensure the exchange of information between the member states and the industry concerned, which exchange will have to yield the best available techniques for each individual area of production within the framework of BREFs (Best Available Techniques Reference Documents). Consequently the competent authorities will regard BREF documents as a standard for the approval procedure and the issue of norms in general, thus harmonizing the technical requirements from all over Europe, and moreover, to produce an effect of continued updating.

### **3.5.6. Operation of the systems**

The competent authorities need to check the approval clauses with regularity, and, if the case, adapt these to the new situations. Thus, IPPC systems are subject to a requirement of updating, not known in the past in the Austrian judicial system applicable to industrial systems.

## **4. Climate protection. The Directive establishing a scheme for greenhouse gas emission allowance trading within the Community (Directive 2003/87/EC)**

### **4.1. Emissions/pollution**

The provisions concerning conservation of air purity can be connected either to the cause/source (the emissions aspect) or to the effects (mixtures). Within the approval procedures of systems that can emit air polluting toxic gas, the competent authority will regularly issue threshold values (emission threshold values) in the case of each individual toxic gas.

The threshold values of pollution protection are limit values for certain air polluting toxic gases, and in case of their being exceeded the authorities can - regardless of the approval procedure - impose certain measures to the polluters.

A new approach to climate protection has been applied since the trading of greenhouse gas emission allowance.

## 4.2 Climate protection

Lately climate protection has been a central topic of EU international environmental politics. Over the last years the EU has emphatically demonstrated its international role in addition to its environmental politic within the Community. The EU has signed numerous international agreements concerning the environment and has a decisive participation in the development of global environmental politics.

The European Union has assumed the reduction of emissions globally, having a significant contribution to the adoption of the Kyoto Protocol in 1997, an exigent deed created with the purpose of climate protection. After the coming into force of the Kyoto protocol, subsequently to being ratified by Russia, at present the main problem is the concretization and consistent enforcement of its norms, including in particular the requirement of reducing greenhouse gas emission in the EU by a yearly rate of 8% (related to the 1990 levels) until 2012.

The protocol provides regulations for the reduction of four greenhouse gases: carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), sulphur hexafluoride (SF<sub>6</sub>), and two groups of gases (hydrofluorocarbons and perfluorocarbons). For achieving these reductions by each individual member state also the decreasing of the CO<sub>2</sub> level needs to be taken into consideration ((sequestration of atmospheric CO<sub>2</sub> in forests or in the soil and generation of biomass), as well as CO<sub>2</sub> reductions by means of the so-called flexible mechanisms (emissions trading, Joint implementation, the Clean Development Mechanism).

The Commission intends to expand emissions trading to flights within the European space starting 2011, and to flights to and from third countries starting 2012. The requirements of the Kyoto Protocol being binding only until 2012, discussions have been initiated on the climate protection policy after this year. The post-Kyoto process is stimulated mainly within the framework of the annual UN conferences, with the participation of the signing states of the UN Framework Convention on Climate Change and of the members of the Kyoto Protocol. The subsequent conferences on climate are those of Posen (December 2008) and Copenhagen (December 2009).

In addition the EU plans on reducing emissions also in other economic branches, like buildings and the totality of traffic participants.

## 4.3 Emission trading

By the Directive establishing a scheme for greenhouse gas emission allowance trading within the Community (Directive 2003/87/EC) the EU states were legally bound to structure a system for greenhouse gas emission allowance trading starting 1.1.2005. By means of this instrument greenhouse gas reduction will be achieved not by imposing specific limit values on the systems, but by issuing allowances for emissions and providing for the possibility of their trading. The trading of the emissions allowance represents a first-time unification of the instruments of market economy with those of environmental protection, thus being an innovative tool of environmental politics.

The functioning of Emission Trading (ET) is based on the following principle: the agents emitting greenhouse gas (GHG) are issued allowances for certain GHG quantities. If these agents are successful in reducing emissions, the exceeding allowances can be offered on the marketplace and acquired by those agents whose emissions exceed the allowances issued to them. The market price of the allowances results from the law of supply and demand. The possibility of trading the allowances stimulates the reduction of GHG emissions (efficient from the viewpoint of costs). The first trading period encompasses the years 2005 to 2007, the second the interval 2008 – 2012. This period coincides (by no means accidentally) with the first period of requirements of the Kyoto Protocol. Consequently 5-year intervals are to be expected.

The trading system will function by the “Cap and Trade” principle, meaning that by establishing the total number of allowances at the beginning of a trading period a superior limit is imposed for the missions generated by the systems subject to this regulation. No other allowances can be issued during this period. Each system is issued a number of allowances for that period. The exact number of assigned allowances will be established by a document called “National Allocation Plan”. The allocation is subject to a number of rules and criteria, that need to be applied by the governments of the member states.

Prior to the issue of the allowances, the National Allocation Plan has to be approved also by the European Commission.

#### **4.4 The Law of Greenhouse Gas Emission Allowances**

In Austria the Directive in question was applied by the Law of Greenhouse Gas Emission Allowances, in compliance with which the Ministry of Agriculture and Forestry, Environment and Waters, in agreement with the Ministry of Economy and Labour and the Finance Ministry are required to devise a National Allocation Plan for the 2005-2007 period, and starting 2008 for 5-year intervals, indicating the total quantity of emission allowances issued for that period, the ratio of issued GHG emission allowances and the emissions of all other sectors, as well as the allocation of the issued allowances to the holders of systems subject to the provisions of the Law of Greenhouse Gas Emission Allowances.

#### **4.5 National climate strategy**

In addition to the mentioned aspects certain measures will be taken also in other areas, in accordance with the Austrian Climate Strategy (traffic: mixtures of biofuels, heating: energy saving, “eco-investments” abroad). All these measures aim at reducing CO<sub>2</sub> emissions by an ambitious 13%, an obligation Austria has assumed by burden sharing within the EU.

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