CURRENT DEVELOPMENTS

EUROPEAN UNION LAW

Edited by Joe McMahon

I. Environment

I. ENVIRONMENT

A. Introduction

The period since the last survey published in this journal has been marked by much activity, but also some frustration, in the area of EU environmental policy.[1] The present survey comes as the EU nears the end of its Sixth Environmental Action Programme (EAP) setting out the EU's environmental policy directions from 2002 to 2012, where it identified four priority areas for this period: climate change; nature and biodiversity; environment and health; and natural resources and waste.[2] While progress has been made in each of these fields, significant setbacks have also occurred and, in a number of important areas, the state of the EU environment continues to deteriorate.

Nonetheless, it is increasingly clear that the EU views itself as an international leader in environmental protection and, as part of this, a pioneer in environmental policy innovation.[3] To some, this sits uncomfortably with the EU's economic and employment goals, as international regulatory competition means businesses relocate to jurisdictions where environmental compliance costs are low(er).[4] As Europe struggles with economic crisis, and corporate bottom lines are under pressure, these are testing times for the EU's commitment to environmental protection, and the depth of its belief in the concept of sustainable development. In this light, this survey discusses three broad areas of environmental policy development where leadership and innovation are evident: first, climate change and the use of market-based regulatory instruments; second, nature conservation, waste and chemicals regulation; and third, environmental governance and enforcement.

B. Climate Change and the Use of Market-based Regulatory Instruments

Nowhere is the EU's effort to marry continued economic growth with environmental protection goals more evident than in its championing of market-based regulatory

[1] Scott, (2002) 51 ICLQ 4 996.

[2] Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme OJ 2002 L 242/1.

[3] See, for instance, 'The EU is a leading force in the world in taking action on environmental sustainability and, in particular, on climate change.' The Commission's Green Paper on market-based instruments for environment and related policy purposes, COM (2007) 140 final, at para 1.

[4] See, for instance, the discussion in the December 2006 Report on International Competitiveness prepared for DG Environment in the context of the EU ETS Review, available at http://ec.europa.eu/environment/climat/emission/pdf/etsreview (accessed May 14, 2010).

[*ICLQ* vol 59, October 2010 pp 1129–1141] doi:10.1017/S0020589310000552

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

instruments. While this movement has been ongoing since the 1990s,[5] it has gained considerable momentum in recent years, including emphasis in Council conclusions[6] and the 2007 Commission Green Paper discussing the future of such instruments in the EU regulatory mix.[7]

In essence, the aim is to move beyond the limitations of the traditional model of EU command-and-control environmental regulation. Market-based environmental instruments seek to reach the parts of environmental protection that command-and-control cannot, by placing a price on pollution or, put otherwise, by internalizing the environmental cost of pollution (which would otherwise go unpaid) into the market's price mechanism.[8] In this way, market-based environmental instruments give an economic incentive to polluters to minimize their pollution, or at least to reduce it to economically efficient levels. Classic examples of such instruments include taxes, charges and tradable permit schemes. The aim is to reduce pollution in a flexible and cost effective manner, though the approach has raised ethical and distributional concerns that this legitimises pollution for those rich enough to pay for it.[9] Nonetheless, the willingness of EU policy-makers to embrace market-based instruments is understandable. Placing a price on pollution, rather than an absolute upper limit as per much traditional regulation, is more easily reconcilable with the notion that economic growth can continue unabated while still achieving environmental protection goals. For this reason, the use of market-based instruments is central to the EU's Sustainable Development Strategy.[10]

Most of the examples of the EU's use of market-based instruments to date have been related to achieving its goals in tackling climate change. *Quarterly* readers will be well aware of the swift rise to prominence of the climate change debate in recent years, and of the continuing efforts of the international community to forge a deal to combat the threat posed by climate change.[11] After a relatively slow start, the EU has been highly active in this area and has sought to position itself as a global leader in climate change policy.[12] Thus, in October 2009 the European Council called upon all parties to the Kyoto Protocol to embrace the objective of limiting climate change to 2 °C and to

[5] The Commission proposed a carbon tax in 1992, which failed to meet the Council's approval.

[6] See the Conclusions of the Environment Council, March 15, 2010, 7522/10, 8.

[7] Commission Green Paper (n 3).

[8] For an overview of environmental market-based instruments, see R. Stewart, 'The Importance of Law and Economics for European Environmental Law' (2002) 2 Yearbook of European Environmental Law 856.

[9] See, for instance, R Stavins, 'Market-based Environmental Policies: What can we learn from U.S. experience (and related research)?' (Washington, Resources for the Future Discussion Paper 03-43) 13.

[10] See, for instance, Commission Communication, '2009 Review of the European Union Strategy for Sustainable Development' COM (2009) 400 final, and Commission Green Paper on market-based instruments for environment and related policy purposes, (n 3) para 5.

[11] See the *Fourth Report (AR4) of the Intergovernmental Panel on Climate Change* (Geneva, 2007) and L Rajamani, 'Addressing the 'Post-Kyoto' Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime' (2009) 58 ICLQ 4 803.

[12] See, for instance, 'The EU has always been at the forefront of concrete action against climate change.' Communication from the Commission, 'International Climate Policy post-Copenhagen: Acting now to reinvigorate global action on climate change' COM (2010) 86 final. The EU is a founder member of the International Carbon Action Partnership, comprising States and regions which are pursuing the development of carbon markets through cap-and-trade mechanisms.

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

'agree to global emission reductions of at least 50 per cent, and aggregate developed country emission reductions of at least 80–95 per cent, as part of such global emission reductions, by 2050 compared to 1990 levels.'[13] The EU's commitment to international climate change action is reflected in the Treaty of Lisbon's amendment of the EU's environmental policy goals to include that of promoting measures at international level to deal with regional or worldwide environmental problems 'and in particular combating climate change.'[14] It is notable that this amendment was the only substantial change made by the 2009 Treaty of Lisbon to the Title on the Environment. Further, the links with the newly-inserted title on Energy, Title XXI, one of the aims of which is to promote energy efficiency and the development of 'new and renewable forms of energy', are evident.

Nonetheless, the EU's leadership efforts in the area have not been wholly successful. In particular, its conditional offer to move from a 20 per cent to a 30 per cent reduction in greenhouse gases in the EU by 2020 compared to 1990 levels, 'provided that other developed countries commit themselves to comparable emission reductions and that developing countries contribute adequately according to their responsibilities and respective capabilities' has, to date, not been taken up by the other parties to the 2009 Copenhagen Accord.[15] In terms of its own performance, the EU has quite a way to go even to get to the lower of these targets, with total greenhouse gas emissions in the EU-27 decreasing by 9.3 per cent between 1990 and 2007.[16] In this regard, the impact of the economic recession on industrial activity should, however, help matters.

More successful has been the EU's establishment of an Emissions Trading Scheme (ETS) to help achieve its climate change obligations. As the world's largest emission trading scheme, it represented a veritable regulatory experiment in the use of market-based instruments to achieve environmental goals. This is done by granting permits (allowances) to emit greenhouse gases which are tradable as a commodity on the carbon market. After an initial reluctance to embrace emissions trading (notably in the negotiations running up to signature of the 1997 Kyoto Protocol), the EU performed a swift volte-face, with its landmark 2003 ETS Directive appearing just two years after the Commission's initial legislative proposal—a significant achievement for legislation of this complexity.[17] A revised Directive appeared in 2009 as part of the

[13] See the Conclusions of the European Council of 29–30 October 2009, 15265/1/09, para. 7.

[14] Art 191(1) TFEU.

[15] See the Decision of the Conference of the Parties to the UN Framework Convention on Climate Change, Fifteenth Session, December 17–18, 2009 (the 'Copenhagen Accord'), Appendix I.

[16] See European Environment Agency, *Annual European Community Greenhouse Gas Inventory 1990–2007 and Inventory Report 2009* (EEA Technical Report No 4/2009), 6. This figure excludes the emission and effects of offsetting from the land use, land change and forestry sector.

[17] See the Commission Proposal for a Directive of the European Parliament and the Council establishing a framework for greenhouse gas emissions trading within the European Community and amending Council Directive 96/61/EC (COM (2001) 581 final) and Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC OJ 2003 L 275/32 (the '2003 ETS Directive').

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

EU's broader climate and energy legislative package,[18] which also included a Directive on the promotion of energy from renewable sources[19] and a Regulation setting EU-wide standards for carbon emissions from passenger cars (an area previously covered by voluntary commitments by vehicle manufacturers).[20]

The 2003 ETS Directive was based on a decentralized cap-and-trade model, whereby Member States were responsible for drawing up a National Allocation Plan (NAP) for each multiannual trading period[21] setting out—subject to Commission approval—the overall quantity of allowances to be granted within that Member State's jurisdiction, as well as how such allowances would be allocated between polluters (installations) falling within the scope of the scheme.[22] Though this aspect of the scheme helped its political acceptability at Member State level, it resulted in significant difficulties in the ETS's pilot phase, when over-allocation of allowances led to a collapse of the carbon price through flooding of the market.[23] Matters improved in the ETS's second phase thanks largely to the Commission's stricter approach to approval, and in the post-2012 version of the ETS set out in Directive 2009/29 this feature has been fundamentally changed, with an EU-wide cap to be set each year by the Commission. This cap is to decrease year-on-year in a linear manner, thus reducing the overall emissions from polluters covered by the ETS in accordance with the EU's international obligations.[24] The 2009 ETS Directive also reflects a maturing of the scheme in numerous other respects, including a broadening of the scheme's scope to a wider range of polluters,[25] a gradual switch from free allocation to auctioning as the primary method of allowance allocation (responding to criticisms that free allocation on the basis of past emissions led to 'windfall profits' for historically big carbon

[18] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community OJ 2009 L 140/63 (the '2009 ETS Directive').

[19] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC OJ 2009 L 140/16.

[20] Regulation 443/2009 of the European Parliament and of the Council of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO 2 emissions from light-duty vehicles OJ 2009 L 140/1.

[21] The 2003 Directive provided for two multiannual trading periods: Phase I, running from 2005 to the end of 2007, and Phase II, running from 2008 to the end of 2012.

[22] Art 9, 2003 ETS Directive.

[23] See further, Fourth Report of the Environmental Audit Committee of the UK House of Commons, *The Role of Carbon Markets in Preventing Dangerous Climate Change* (HC 290) (London, 2010).

[24] Art 1(9) of the 2009 ETS Directive states that this must be done 'by a linear factor of 1,74 % compared to the average annual total quantity of allowances issued by Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012.'

[25] Initially covering only major industrial carbon polluters such as the cement and steel industries (see Annex I of the 2003 ETS Directive), the ETS's scope was extended to the aviation sectors by Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community OJ 2009 L 8/3, and covers around 40 per cent of the EU's overall carbon emissions. The 2009 ETS Directive broadens its scope to a wider category of installations (see the amended Annex I), subject to a possible exclusion by Member States of small installations from the scheme (see amended art 27).

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

polluters),[26] and an increase in the duration of the validity of allowances (aimed at increasing certainty on the market).[27]

One of the key difficulties for regulators in this area is trying to keep legislation up-to-date with the huge pace of developments in technology, commercial behaviour and climate science, and the 2009 Directive contains a variety of interesting innovations aimed at allowing for such developments to be taken into account going forward. In some cases, this has been provided for in the legislation itself; for instance, the possibility for installations to make use of the novel technology of carbon capture and storage, whereby carbon emissions are sequestered and stored underground, to fulfil their ETS obligations.[28] In other cases, this has been provided for by way of further scope for action on the part of the Commission. An example is the provision made for action to combat the phenomenon of 'carbon leakage' (ie, the relocation of industry to a non-ETS jurisdiction to save costs), where the Commission is empowered to draw up a list of sectors which are exposed to a 'significant risk' of carbon leakage and to allocate 100 per cent of these sectors' allowances free of charge.[29] Though aimed at levelling the playing field on the *international* market, the obvious scope for intersectoral distortions *within* the internal market means that such power must be sensitively exercised. This point is reflected in the fact that the Commission is obliged to consult the European Council prior to drawing up its list,[30] and to report to the European Parliament and the Council on the matter.[31]

More broadly, it is notable that, under the initial phases of the ETS, the EU courts have been active in striking down Commission decisions to reject certain NAPs, partly on the basis that the scheme of the 2003 Directive left considerable leeway to Member States in drawing up such plans, and that this allocation of powers between the Commission and Member States had not fully been respected. Though two important judgments to this effect (*Poland v Commission* and *Estonia v Commission*) are currently under appeal,[32] it is clear that the 2009 Directive's centralisation of powers will in any event result in a narrower interpretation of the scope of Member States' freedom of action in the ETS field in the future.

While the EU ETS represents the example *par excellence* of the EU's use of market-based environmental instruments, efforts are also underway to incorporate a market-based approach into other areas of EU environmental policy. Unanimity of voting in the Council on fiscal matters makes significant legislative reform on environmental taxation going beyond the current Energy Taxation Directive, with its many derogations, unlikely.[33] However, as many Member States have moved forward with their own environmental taxation and subsidy schemes, the issue of the compatibility of

[26] See amended art 10, 2009 ETS Directive. See also, however, the transitional rules in arts 10a and 10c, allowing free allocation in a transitional period under certain conditions.

[27] See amended art 13, 2009 ETS Directive.

[28] See amended art 12 and Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide OJ 2009 L 140/114.

[29] Art 10b, 2009 ETS Directive.

[30] Arts 10a and 13, 2009 ETS Directive.

[31] Art 10b, 2009 ETS Directive.

[32] See T-183/07 *Poland v Commission* and Case T-263/07 *Estonia v Commission*, judgments of September 23, 2009, not yet reported (under appeal as Case C-504/09 P and Case C-505/09 P).

[33] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity OJ 2003 L 283/51, as amended. The Commission is currently reviewing the Energy Taxation Directive with a view to proposing a minimum EU-wide carbon tax going beyond the scope of the current Directive.

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

such schemes with EU state aid rules has frequently arisen. In this regard, while generally approving of the overall aim of such schemes, the Commission and European Court of Justice (ECJ) have indicated a move towards a stricter approach in assessing the proportionality of such schemes including, for instance, the extent to which derogations from green taxation schemes can be justified on environmental grounds.[34]

C. A More 'Traditional' Approach: the Examples of Nature Conservation, Waste and Chemicals

In contrast, a more traditional, command-and-control style of regulation continues to be evident in many areas of EU environmental policy, and particularly in areas where it is felt that a market-based approach would fail to provide adequate guarantees of environmental protection. Three of the most important such areas in which substantial developments have taken place in recent years include the EU's environmental laws dealing with nature conservation, waste and chemicals. As mentioned above, these areas correspond to three of the EU's four priority areas identified in its Sixth Environmental Action Programme (ie, the nature and biodiversity, natural resources and waste, and environment and health streams). In each of these areas, the EU's approach reflects an ambition to be a global leader in environmental policy.

In the area of nature conservation, the EU's core legislative armoury has essentially been in place since the early 1990s, in the form of the 1992 Habitats Directive, which built upon the 1979 Birds Directive.[35] The key developments here, therefore, have consisted in interpretations of these Directives by the EU courts, as well as actions to ensure their enforcement taken by the Commission in the ECJ as well as by private parties in national courts. In relation to the former, the ECJ has, in a number of strongly-worded judgments, made clear that it will interpret the Habitats and Birds Directives in the light of their conservation objectives, meaning a strict approach to exceptions allowing Member States to authorize developments in protected areas.[36] In relation to the latter, the Commission has been increasingly active in pursuing Member States under what is now article 258 TFEU for breach of nature conservation rules—encouraged, in part, by the ECJ's stringent approach—and, in 2008, over one-fifth of open environmental infringement cases related to this area.[37] Such action is buttressed by the regime established by the 2004 Environmental Liability Directive, which establishes a liability regime requiring preventative or remedial (as the case may be) action to be taken for, inter alia, damage caused to protected

[34] See, for instance, the Community Guidelines for State Aid for Environmental Protection OJ 2008 C 82/1 and Case C-487/06 P *British Aggregates Association v Commission* [2008] ECR I-10505.

[35] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ 1992 L 206/7, as amended, and Directive 2009/147 of the European Parliament and the Council of 30 November 2009 on the conservation of wild birds (codified version) OJ 2010 L 20/7.

[36] See, for instance, Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visseri* [2004] ECR I-7405 and Case C-304/05 *Commission v Italy* [2007] ECR I-7495, which concerned a project to modify ski runs for the 2005 World Alpine Ski Championships.

[37] See the EU's Environmental Policy Review 2008 (Brussels, 2008), 57.

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

species and habitats.[38] However, the practical impact of this Directive remains unclear, due partly to the limited number of judgments handed down by the EU courts to date on the issue.[39]

Despite this, and as recognized by the Environment Council of March 2010, the levels of biodiversity within the EU continue to diminish, and the EU's target to halt the biodiversity loss of the most important protected habitats and species by 2010 was not met.[40] The Council's response was to set an even more ambitious target, this time to halt 'the loss of biodiversity and the degradation of ecosystem services in the EU by 2020', and to restore them in so far as feasible, 'while stepping up the EU contribution to averting global biodiversity loss.'[41] A striking feature of these efforts is the increasing reliance on the *economic* rationale of protecting biodiversity (ie, avoiding costs from loss of ecosystem services), rather than simply relying on ethical reasons based on the intrinsic value of preserving biodiversity.[42] This shift in emphasis is perhaps unsurprising in the light of the current pressure across the EU on the public funding essential to turn these targets into reality.

In the area of natural resources and waste, the major development in recent years has been the 2008 recasting of the Waste Framework Directive, which has been the cornerstone of the EU's waste policy since its enactment in 1975.[43] The aims of the 2008 Directive were, in essence, to simplify and clarify the previous legislation, to strengthen the emphasis on waste prevention and recovery, and to introduce an approach where a product's whole life-cycle, rather than just the waste phase, is looked at in EU waste policy.[44] While the product of political compromise following long debate, the 2008 Directive nonetheless includes several important new features, including: setting for the first time general[45] recycling targets for household, construction and demolition waste[46] with the aim of moving towards a '*European recycling society*';[47] integrating the EU's formerly separate regimes for waste oils and hazardous waste into a consolidated framework;[48] and setting out an overarching five-level waste hierarchy

[38] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ 2004 L 143/56. The transposition period for the Environmental Liability Directive expired in 2007.

[39] See Case C-378/08 *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economic*, judgment of March 9, 2010, not yet reported and Joined Cases C-379/08 and C-380/08 *Raffineri Mediterranee and others*, judgment of March 9, 2010, not yet reported.

[40] See Commission Communication, 'Halting the Loss of Biodiversity by 2010—and beyond—Sustaining ecosystem services for human well-being' COM (2006) 216 final and the Environmental Council Conclusions of March 16, 2010 (7536/10).

[41] Environmental Council Conclusions of March 16, 2010 (7536/10), para 2.

[42] ibid. The Council notes that 'the annual loss of ecosystem services under a business-as-usual scenario is estimated to be equivalent to around €50 billion, while by 2050 the accumulated welfare losses could be equivalent to 7% of annual consumption.' See further, *The Economics of Ecosystems and Biodiversity*, a major study launched by Germany and the Commission (Report for Policy-Makers released on November 13, 2009 and available at http://www.teebweb.org (accessed May 14, 2010)).

[43] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives OJ 2008 L 312/3. The transposition period for the 2008 Directive expires on December 12, 2010.

[44] ibid, recital 8.

[45] That is to say, not specific to a particular waste stream, such as packaging waste.

[46] Art 11, Directive 2008/98.

[47] ibid art 11(2).

[48] ibid arts 17–20.

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

to apply as a 'priority order' in waste prevention and management law and policy.[49] Despite the stated aim of simplifying EU waste law, the 2008 Directive essentially retains the previous legislation's definition of waste—a matter of vital importance because the Directive's regulatory regime applies only to the handling of 'waste' as legally defined.[50] This means that the voluminous and complex case law to which this definition has given rise will, by and large, remain valid. However, some clarity has been given on the issue of when a material considered to be waste ceases to be waste (for instance, through recycling)[51] and when a material is to be considered as a by-product from a production process rather than waste.[52] In addition to the substantive recasting of the Directive, the Commission has made clear its intention to step up the enforcement of EU waste legislation on the ground,[53] and is investigating the possibility of setting up a dedicated waste enforcement agency to support such enforcement, whose tasks could potentially include carrying out on-site inspections of Member States' compliance with EU waste rules.[54] Such a move is, however, likely to be strongly resisted by Member States.[55]

Finally, no discussion of recent developments in EU environmental policy could be complete without mention of the EU's controversial landmark chemicals regime, laid down in a 2006 Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).[56] REACH represents a comprehensive overhaul of the previously rather patchy regulatory regime applicable to the production and marketing of chemicals within the EU. The key elements of the regime comprise:

(1) a generally applicable registration obligation whereby, in order to produce or market a chemical within the EU, manufacturers or importers must apply for registration, submitting a file including information on the chemical's health, safety and environmental properties;[57]
(2) a precautionary-based evaluation of registration dossiers, particularly where there are suspicions of a substance's health and/or environmental impact or in the case of proposals for animal testing (where duplication of information is to be avoided);[58]
(3) an authorization requirement for certain highly dangerous chemicals, such as carcinogens, whereby the Commission is charged with deciding on applications for

[49] The five levels are: prevention; preparing for re-use; recycling; other recovery (eg energy recovery); and disposal.

[50] By art 3(1), Directive 2008/98, ''waste' means any substance or object which the holder discards or intends or is required to discard.'

[51] ibid art 6.

[52] ibid art 5.

[53] See further, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, discussed below.

[54] See the report commissioned by the Commission, *Study on the feasibility of the establishment of a Waste Implementation Agency*, December 7, 2009, available on http://ec.europa.eu/environment/waste (accessed May 14, 2010).

[55] See, for instance, the UK's response, available at www.parliament.uk/deposits/deposited papers/2010/DEP2010-1054.doc (accessed May 14, 2010). The UK is against the idea of an EU waste enforcement agency.

[56] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC OJ 2006 L 396/1.

[57] ibid, Title II.

[58] ibid, Title VI.

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

authorization based on the recommendations of the newly-established European Chemicals Agency (ECHA);[59] and

(4) risk reduction measures, also to be adopted by the Commission following an ECHA opinion.[60]

Particularly notable is the fact that the registration duty extends not only to substances newly introduced onto the market (the focus of prior reporting obligations), but also to substances already on the market, which may have been in circulation for decades without any data available on them. Further, the key roles attributed to the Commission and ECHA reflect, in a similar manner to the revised ETS Directive discussed above, a centralization of decision-making, and a step away from the mutual recognition approach initially characteristic of health regulation in the internal market.[61] More generally, the sheer size of the EU chemicals market, accounting for almost 30 per cent of global chemical shipments in 2008,[62] means that familiarity with the REACH regime is essential for any global player on the chemicals market.

D. Environmental Governance and Enforcement

A further area in which significant developments have occurred in recent years relates to the governance and enforcement of EU environmental law. In relation to environmental governance, the key international document here is, as reported in the last Survey, the 1998 Aarhus Convention, which is based on the three-fold principles of access to information, public participation, and access to justice in environmental matters.[63] The EU ratified the Convention in 2005.[64] The first two principles—access to information and public participation in environmental decision-making—have proven relatively uncontroversial,[65] and have been implemented (albeit subject to important limitations) by two 2003 Directives[66] and, in respect of their application to

[59] ibid, Title VII. [60] ibid, Title VIII.

[61] See further, V. Heyvaert, 'No data, no market: The future of EU chemicals control under the REACH Regulation' (2007) Env Law Rev 201.

[62] See, KPMG International, *The future of the European Chemicals Industry* (2010), available at www.kpmg.com (accessed May 14, 2010).

[63] UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on June 25, 1998.

[64] 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 124/1.

[65] Though see Case C-216/05 *Commission v Ireland* [2006] ECR I-10787 (on the requirement of a fee for participation in the context of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175/40) as amended) and Case C-266/09 *Stichting Natuur en Milieu* OJ 2009 C 267/26 (pending).

[66] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC OJ 2003 L 41/26 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC OJ 2003 L 156/17.

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

EU institutions, a 2006 Regulation.[67] The third principle, however, has caused more difficulty, for a number of reasons.

In relation to access to justice in national courts, the 2003 Directives contain provisions relating to access to justice, albeit with a limited scope of application.[68] The prospects of any generally applicable legislation are dim, given Member States' fundamental unwillingness to allow Brussels to interfere in their autonomy to manage their own legal systems.[69] However, within their scope of application, the provisions of the 2003 Directives have to date been broadly interpreted by the ECJ. For instance, the requirement that access to justice must not be '*prohibitively expensive*' is not, in the ECJ's judgment, compatible with a discretionary power for judges to decline to award costs against an unsuccessful party.[70] In relation to access to justice at EU level, though the 2006 Regulation established a right to request an *internal* review by an EU institution or body which has adopted an environmental administrative act,[71] access to independent judicial review of EU environmental acts in the EU courts remains severely restricted. This is so due to the famously strict *locus standi* test for challenging EU acts by which, under the ECJ's interpretation of the 'individual concern' requirement set out in what is now article 263 TFEU, the applicant is required to show that he is affected by the impugned act in a manner that is peculiar to him and that differentiates him from all others concerned.[72]

The serious difficulties with satisfying such a test in an action aimed at preserving an environmental public good are evident, and have been pointed out to the ECJ, which has refused to change its approach on the basis that national courts offer an alternative avenue for redress in such cases.[73] On this point, however, the Lisbon Treaty offers some solace, in removing the 'individual concern' requirement in the case of a challenge to a 'regulatory act which is of direct concern [to the applicant] and does not entail implementing measures.' Nonetheless, the scope of this exception remains uncertain, not least because the term 'regulatory act', a hangover from the now-defunct Constitutional Treaty, is not defined in the Lisbon Treaty and will fall to be interpreted by the EU courts.

[67] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies OJ 2006 L 264/13.

[68] The 2003 Directives apply within the fields of the Environmental Impact Assessment Directive (Directive 85/337, note 65 above, as amended) and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257/26), as amended.

[69] See similarly, the principle of national procedural autonomy set down, for instance, in Case 33/76 *Rewe v. Landwirtschaftskammer* [1976] ECR 1989, para 5. See the Commission's Proposal for a Directive on Access to Justice in Environmental Matters COM (2003) 624 final, which never progressed past a first Opinion of the European Parliament.

[70] See art 10a of Directive 85/337, (n 65) above, as amended and Case C-s427/07 *Commission v Ireland*, judgment of July 16, 2009, not yet reported, para 94. See also, Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, judgment of October 15, 2009, not yet reported.

[71] Regulation 1367/2006, (n 67) art 10.

[72] Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95, confirmed by Case C-50/00P *Unión de Pequeños Agricultores (UPA)* v. *Council* [2002] ECR I-6677.

[73] Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* [1998] ECR I-6651.

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

It is in the area of enforcement of environmental law, however, where some of perhaps the most significant battles have been fought, and advances made. Many, though not all, of these advances are the result of far-reaching judgments by the ECJ in the area. Four important examples suffice. A first is the Court's 2005 judgment in *Commission v Council*,[74] in which it held that legislation requiring Member States to criminalise certain serious environmental offences should be passed under what was then the first pillar (ie, the Community pillar) rather than, as the Council argued, under the more intergovernmental third pillar (ie, Police and Judicial Cooperation in Criminal Matters). The Court reasoned, inter alia, on the basis of the need to ensure effective achievement of the EU's environmental goals, even if this meant an incursion into Member States' highly sensitive criminal law competence. This led to the 2008 Directive on the Protection of the Environment through Criminal Law which requires criminalization of a range of serious offences, but which—in conformity with the ECJ's case law[75]—does not go so far as to harmonize the sentences which must be imposed for their commission.

A second is the Court's judgment in *Commission v Ireland* in which, for the first time, the Court found a Member State to have committed a general, systemic and persistent breach of EU environmental law (in that case, the Waste Framework Directive) rather than, as it normally does, simply finding individual discrete breaches.[76] This finding has a number of important implications: the Commission can group together many individual infringements into one case, saving time and effort; the Commission can adduce additional evidence arising after its reasoned opinion in support of an allegation of systemic breach;[77] and the burden of proof shifts to the Member State to challenge the detail of the evidence produced and its consequences where the Commission has adduced 'sufficient'[78] evidence of a systemic breach. In essence, this finding makes the Commission's job easier in seeking to obtain infringement judgments in areas where there is a long-standing and pervasive practice of disregarding EU environmental rules.

A third important development is the increasing use of the possibility provided for in the Treaty (in what is now article 260 TFEU) to impose fines and/or penalty payments on Member States who have failed to comply with an ECJ infringement judgment. To date, a significant number of article 260 proceedings brought have related to the environment.[79] Here again, the Lisbon Treaty has been innovative, enabling the Commission, under article 260(3) TFEU, to ask for a lump sum or penalty payment to be imposed on a Member State the first time it goes to court (ie, under article 258 TFEU), without having to go to court a second time. While this possibility applies only where a Member State has failed to notify the Commission of measures transposing a Directive, it should speed up the often sluggish transposition process and provides

[74] Case C-176/03 *Commission v Council* [2005] ECR I-7879. See also, Case C-440/05 *Commission v Council* [2007] ECR I-9097.

[75] See Case C-440/05 *Commission v Council* [2007] ECR I-9097.

[76] Case C-494/01 *Commission v Ireland,* supra note 53. See generally, P Wennerås, 'A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments' (2006) 43 CML Rev 1 31.

[77] ibid para 37. [78] ibid para 44.

[79] A recent example is Case C-121/07 *Commission v France* [2008] ECR I-9159 concerning failure to comply with an infringement judgment relating to EU legislation on genetically modified organisms (France was ordered to pay a lump sum of €10 million).

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

further teeth in the enforcement of EU environmental law. Further, the Lisbon Treaty has removed a step from the article 260 TFEU procedure—namely, the Commission is no longer required to issue a reasoned opinion prior to bringing a Member State to court under this article—which will also increase the pace of this procedure.[80]

A final important development in enforcement of EU environmental law is the Commission's demonstration that it is willing, where necessary, to use its powers to apply for interim measures against a Member State. Though such powers are provided for in what are now articles 278 and 279 TFEU, they have rarely been invoked against Member States in the context of article 258 TFEU actions.[81] Since 2007, however, the Commission has done just that on a number of occasions. The most high-profile to date was an article 258 TFEU action against Poland for infringement of the Habitats Directive. The case concerned a project to construct a motorway by-pass through a protected area of forestry (the Augustów forest), located in the Rospuda river valley in the north-east of Poland. The Commission applied for interim measures to prevent Poland from commencing or continuing works of reforestation aimed at compensating for damage to the Augustów site, which works were themselves to take place in a site which should, the Commission argued, have been protected.

In acceding to the Commission's request on an *ex parte* basis, the President of the ECJ ordered that no works should take place on the site pending the outcome of the main proceedings, and set down a date for an *inter partes* hearing of the interim measures application.[82] By the time of this hearing, however, the Polish Minister for the Environment was willing to give an undertaking to the Court that no work would proceed prior to the conclusion of the main proceedings, meaning that the interim measures procedure could be struck out.[83] The case is of interest not only as an indication of the Commission's readiness to take draconian measures to preserve important environmental interests, but also because, for a brief period, it raised the spectre that a Member State might ignore an interim judgment of the ECJ, and the question of what the implications of such action might be. In any event, such a stand-off did not occur: Poland backed down, and ultimately altered its plans to the satisfaction of the Commission, resulting in the main proceedings being struck out.[84]

[80] Art 260(2) TFEU: 'If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. . . .'

[81] See also, Case C-503/06 R *Commission v Italy,* Order of the President of February 27, 2007 [2007] ECR I-19, Case C-76/08 R *Commission v Malta*, Order of the President of April 24, 2008 [2008] ECR I-64, Case C-573/08 *Commission v Italy*, Order of the President of December 10, 2009 [2009] ECR I-0000.

[82] Case C-193/07 R *Commission v Poland*, Order of the President of April 18, 2007, not published in the ECR (see application at OJ 2007 C 199/14).

[83] Case C-193/07 R *Commission v Poland*, Order of the President of July 18, 2007, not published in the ECR (see application at OJ 2007 C 199/14). A further application for interim measures was lodged by the Commission in the same case, and subsequently struck out following further assurances from Poland that it would not commence works until the main proceedings had been concluded: see Case C-193/07 RII *Commission v Poland*, Order of the President of January 25, 2008, not published in the ECR (see application at OJ 2007 C 199/14).

[84] Case C-193/07 *Commission v Poland*, Order of the President of August 25, 2009 OJ 2009 C 11/19.

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press

E. Conclusion

Developments in EU environmental law in recent years have been characterized by a realization of the limits of traditional environmental regulation, leading to diversification of regulatory techniques and innovations in approaches to governance. This movement has comprised not only the embrace of market-based instruments, but also a commitment to participation and consultation in environmental decision-making, as well as the constitutionalization of the EU's climate change and energy aims. The full effects of such changes will take time to become evident, and in certain areas a positive effect can already been seen (for instance, in the progress towards meeting the EU's climate change obligations). Nonetheless, and despite the proliferation of legislative and policy instruments in the field, in the most recent of the EU's annual Environmental Policy Reviews, only three policy areas out of 26 rated were given a 'good performance' rating. Fourteen areas fell into the worst-performing category, indicating poor performance, a worrying trend or that EU targets were unlikely to be met.[85] In essence, this reflects the EU's continuing difficulty in marrying economic and environmental goals and its reluctance, in case of irreconcilable conflict, to prioritize environmental protection. Though such difficulties are in no sense confined to the EU, until these indicators improve, they will sit uneasily with the EU's efforts to stake a claim to global environmental leadership.

SUZANNE KINGSTON*

[85] In the Commission's 2008 Environmental Policy Review, for instance, only three of 26 policy areas given a performance rating were rated as achieving a 'good performance' (COM (2009) 304, 29).

* University College Dublin.

https://doi.org/10.1017/S0020589310000552 Published online by Cambridge University Press