

No 1/2005

ENVIRONMENTAL  
LAW NETWORK  
INTERNATIONAL

RÉSEAU  
INTERNATIONAL  
DE DROIT DE  
L'ENVIRONNEMENT

INTERNATIONALES  
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# elni

## REVIEW

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- Enforcement Mechanisms in International Law and International Environmental Law
- The Future of EMAS
- Directive on Ecodesign, the way forward regarding IPP ?
- Building a climate policy in Belgium: flexible mechanisms in a flexible state
- Implications of the Clean Development Mechanism under the Kyoto Protocol on other Conventions:
- The network of European Environment and Sustainable Development Advisory Council (EEAC)

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the case may be. However, to ensure the integrity and thus effective operation of the emissions trading mechanisms, the Kyoto Protocol needed a compliance regime that could backstop their abuse. In short, the Kyoto Protocol's emphasis on rigorous reporting, its creation of eligibility requirements for participation in the Kyoto mechanisms, and the NCP's inclusion of consequences such as suspension of eligibility or deduction of excess emissions are all shaped at least in part by the protocol's reliance on the trading mechanisms.

## 5 Conclusion

My assignment for this contribution was to provide reflections on "enforcement mechanisms in international law in general and international environmental law in particular." I hope to have demonstrated that "enforcement" is a far more multifaceted concept than often assumed – it encompasses a wide spectrum of means for "compelling compliance" with law. Various theoretical perspectives illuminate this spectrum of means, highlighting the different dynamics that can be harnessed by efforts to promote compliance. When a wider concept of enforcement and a set of theoretical lenses are superimposed on the existing experience with MEA compliance regimes, several conclusions emerge.

It is time to leave the shadow cast by the *couple diabolique obligation-sanction* behind. There is no

necessary connection between the enforcement of law and its binding effect or its effectiveness. But, perhaps most importantly, the common assumptions that international law is not enforceable or that international environmental lacks enforcement mechanisms are actually wrong. They are based on an unduly narrow conception of enforcement as imposition of penalties. As a result, they overlook the array of enforcement mechanisms that are available within MEAs, including, not least, the wide spectrum of collective processes of deliberation, justification and judgment. Moreover, although enforcement in the narrow sense plays only a relatively limited role in promoting compliance with MEAs, some agreements actually do provide for what comes close to penalties. However, not in all settings are penalties, or even sanctions in the wider sense of 'disincentives,' feasible or appropriate. At one level, penalties and sanctions are unlikely to be feasible unless they back up norms that are seen to be procedurally and substantively legitimate. At another level, they are unlikely to be effective when non-compliance is not a matter of choice but results, for example, from technical or financial capacity limitations. Therefore, the limited reliance of many MEAs on penalties or sanctions and their focus on justificatory processes and concrete means to promote compliance is not a sign of the weakness of international environmental law, but of its flexibility and, ultimately, strength.

## The Future of EMAS –

### 10 years European Environmental Management and Audit Scheme

Thomas Kiel\*

#### 1 Introduction

The Eco-Management and Audit Scheme (EMAS) is the European Union (EU) voluntary scheme for organisations willing to commit themselves to evaluate, improve and report on their environmental performances. The scheme was launched in April 1995 and was originally restricted to companies of

industrial sectors<sup>1</sup>. EMAS II revision has opened the instrument since 2001 to all economic sectors including public and private services<sup>2</sup>. In addition, EMAS was strengthened by the integration of parts of EN ISO 14001 standard as environmental management system requirement<sup>3</sup>; by adopting an at-

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<sup>1</sup> Council Regulation (EEC) No 1836/93 of 29 June 1993, OJ L 168, p. 1, was applied in Member States 21 month after publication pursuant to its Art. 21.

<sup>2</sup> since then the new legal base is Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 (EMAS II), OJ L 114, p. 1 (in the following referred to as EMAS Regulation).

<sup>3</sup> The environmental management system shall be implemented according to the requirements of section 4 of ISO 14001:1996 which are given in Annex I of EMAS Regulation.

tractive logo to signal EMAS registration to the public<sup>4</sup>; and by considering more strongly indirect environmental aspects such as those related to external traffic, financial services or administrative and planning decisions<sup>5</sup>. Participating in EMAS is voluntary and extends to public or private organisations operating in the EU and the European Economic Area (EEA) - Iceland, Liechtenstein and Norway. In all new member states the EMAS Regulation came into force with the accession to the EU in May 2004.

For participation all organisations, from small and medium size to large industrial sites, assess and continually improve their environmental performance via means of management and internal audit and publish their data in an environmental statement which is checked by an independent environmental verifier. The officially registered organisations may use the EMAS-logo. They get different incentives from Member states<sup>6</sup>.

By the end of 2004, more than 4000 sites in more than 3000 organisations are registered under EMAS<sup>7</sup>. Most of them are companies from the industrial sector, but since 2001 more and more companies from the service sector and local authorities have joined the scheme<sup>8</sup>. More than half of the European registrations are from German companies and organisations<sup>9</sup>. Today there is growth in Spain and Italy, and, to a smaller extent, in Belgium and Portugal. There are some expectations on participants from new member states.

Commission shall review EMAS in the light of experiences gained during its operation and international developments no later than five years after the entry into force<sup>10</sup>. On 15 November 2004 a revised version of ISO environmental management standard 14001 was published. The author takes this

for opportunity to think about the future developments of EMAS.

## 2 Adaptation to ISO Standard

EMAS I started before EN ISO 14001:1996<sup>11</sup>. However, the reception of EMAS was different in the Member states. Some front runners took and promoted EMAS as first environmental management system<sup>12</sup>. Others had own national standards on an early stage<sup>13</sup> and switched from there mainly to official support of ISO certifications. Where ISO standard was first in the market place, the member states try to update with EMAS requirements later<sup>14</sup>. Nowadays there exist more ISO certificates than EMAS registrations in Europe<sup>15</sup>.

To link both schemes EMAS II made the chapter 4 of EN ISO 14001 "requirements for environmental management" the prerequisites of EMAS<sup>16</sup>. From practical view EMAS can be regarded as an EN ISO 14001 certification with some additional issues:

- Demonstrated legal compliance,
- substantial improvements of the environmental performance,
- external communication – e.g. open dialogue with the public through environmental statement, and
- active involvement of employees and their representatives.

In the legal compliance issues the difference between EMAS and ISO is getting more evident after some years of use. ISO revision has brought no major clarification or new requirement on legal compliance. In a Draft of International Accreditation Forum is foreseen a comment, that it is not task of the environmental verifier to evaluate legal compliance under EN ISO 14001 as it is under EMAS<sup>17</sup>.

Today there is no doubt that the link between ISO and EMAS is useful and should be held in the future. As EN ISO 14001 Standard was slightly modified in 2004 there is a necessity of a quick adaptation of EMAS Annex I. This can be done by comi-

<sup>4</sup> see Art. 8 and Annex IV of EMAS Regulation for use of EMAS logo.

<sup>5</sup> Annex VI 6.2 and 6.3 of EMAS Regulation distinguishes between direct and indirect environmental aspects.

<sup>6</sup> See Report from the Commission to the Council and the European Parliament on Incentives for EMAS registered Organisations, COM (2004) 745 final; in Germany for instance: Ordinance on regulatory relief in immission control and waste law for registered sites and organisations under Regulation (EC) No 761/2001 (EMAS-Privilegierungs-Verordnung – EMAS-PrivilegV).

<sup>7</sup> EU EMAS help desk is responsible for a compilation of the national registers of EMAS organisations held by the EMAS Competent Bodies which are to be found in the Internet under: [http://europa.eu.int/comm/environment/emas/about/participate/sites\\_en.htm](http://europa.eu.int/comm/environment/emas/about/participate/sites_en.htm).

<sup>8</sup> Registration bodies in Germany report that in some cases more than 80% of new EMAS-participants are from non industrial and non-commercial organisations – mainly from local authorities and services.

<sup>9</sup> EMAS started very successful in Germany. German register is published in the Internet: <http://www.emas-register.de>.

<sup>10</sup> Art. 15 para. 1 of EMAS Regulation.

<sup>11</sup> EN ISO 14001:1996 Environmental management systems – requirements with guidance for use.

<sup>12</sup> Austria and Germany.

<sup>13</sup> British standard BS 7750:1994 - Specification for Environmental Management Systems.

<sup>14</sup> In all new EU member states have been ISO certificates.

<sup>15</sup> There are just estimations on the number of ISO certificates because there is no registration like under EMAS.

<sup>16</sup> s. Annex I A of EMAS Regulation.

<sup>17</sup> IAF TC-30-04: White Paper on the relation between ISO 14001 EMS conformity assessment and legal compliance, 2004.

tology procedure<sup>18</sup>. As the ISO revision has made no major changes of management requirements<sup>19</sup> it is an adaptation without bigger meaning. Commission will start the procedure the beginning of 2005. Adaptation should be finished within the transition period of ISO 14001:2004<sup>20</sup>. According to DG Environment decision could be made in mid of 2005<sup>21</sup>.

### 3 Evaluation

In order to evaluate the actual situation of EMAS a study will parallel survey the EMAS scheme and the European Eco-label. The contract has been awarded in October 2004 by the Commission to a consortium led by an Italian University. Outcome from the study is expected on November 2005. It shall provide major inputs for the upcoming revision.

Within the evaluation process Commission has to answer the question: Which is the added value of EMAS in comparison with other management schemes and less formal approaches<sup>22</sup>. Special emphasis of EMAS should be placed on encouraging SMEs (small and medium sized enterprises with less than 250 employees) to participate in the scheme. SME specific support by the Member States and on the EU level should be achieved by facilitating access to information, to existing support funds and to public institutions and by promoting technical assistance measures. A report of EU Commission DG enterprises in the so called BEST-project<sup>23</sup> describes and analyses different good practice examples of public policies, programmes and initiatives ("framework conditions") to encourage the uptake of environmental management systems (EMSs) in small and medium-sized enterprises (SMEs). The report states that at present this uptake of EMAS, ISO and of less formal approaches to environmental management by SMEs across Europe

is low, largely on account of a number of barriers SMEs face in this respect. A similar study is running at present in Germany<sup>24</sup>.

Other input will come from a three years LIFE-project named "remas"<sup>25</sup>. Aim of the project is to investigate whether industrial sites that have implemented a robust environmental management system (EMS) have improved environmental performance. In particular, the project will examine whether EMAS (and other established EMS's) lead to: improved environmental performance and improved regulatory compliance. Whilst in theory, implementing an EMS should improve a company's environmental performance, there is at present little data to back this up. In addition, remas shall demonstrate ways of avoiding duplication from the overlap of regulatory process work and that of EMS implementation to enhance environmental management practice.

Additionally, the Commission has launched a restricted call for tenders for a study aiming at generating a new guidance document for verifiers on connecting EMAS and environmental product policy dimension. This could pass 2005/6 comitology procedures for adoption.

### 4 Revision 2008

The EMAS Regulation consist of 18 Articles and 8 Annexes. Additionally, there is guidance in 8 further annexes<sup>26</sup>. Two older decisions about recognition of procedures and accreditation requirements are still in force<sup>27</sup>. One aim of the revision should be to streamline the regulation and the guidance to make the use of the scheme simpler for all clients but first and foremost for small organisations.

There are some themes to be discussed e.g.<sup>28</sup>:

- Connecting EMAS with or developing to a sustainability management and reporting scheme or to corporate social responsibility,
- compulsory EMAS for a few well defined sectors,
- staged approach to a high level EMS<sup>29</sup>,

<sup>18</sup> By administrative committee pursuant to Art. 14, see Art. 15 para. 2 EMAS Regulation. But full revision is required for adaptation of definitions in Article 2 to definitions in chapter 2 of EN ISO 14001:2004.

<sup>19</sup> The objectives of ISO revision were to increase clarity of some requirements, higher compatibility and alignment with quality management system EN ISO 9001:2000 and to add no new or additional requirements to the standard, see preface of the EN ISO 14001:2004.

<sup>20</sup> After transition plan of International Accreditation Forum (IAF) reference shall only be made to the new standard after 6 month of publication date (15 may 2005).

<sup>21</sup> Information on 10<sup>th</sup> meeting of Art. 14 committee in Budapest 5/6 November 2004.

<sup>22</sup> Less formal approaches are for instance "Oekoprofit" in Germany and Austria or "Eco-lighthouse" in Norway which are more or less management checks with a one time analysis and a one year measure plan. They don't provide with tools or a scheme for permanent management tasks.

<sup>23</sup> Public policy initiatives to promote the uptake of environmental management systems in small and medium-sized enterprises - final report of the best project expert group, DG Enterprises, January 2004.

<sup>24</sup> See <http://www.ums-fuer-kmu.de>.

<sup>25</sup> The remas project commenced on 1 November 2002 and over the following three years will collect data from sites throughout Europe with the aim of documenting the evidence to link the presence of an EMS to environmental performance. See <http://remas.ewindows.eu.org/REMAS/en/project/about.htm>.

<sup>26</sup> See Annexes of COM Decision 2001/681/EC from 7 September 2001, OJ No L 247, p. 24; COM Recommendation 2001/680/EC from 7 September 2001, OJ No 247, p. 1; COM Recommendation 2003/532/EC from 10 July 2003, OJ No L 148, p.19.

<sup>27</sup> COM Decisions from 16 April 1997, OJ No L 104, p. 35 and p. 37.

<sup>28</sup> Themes from first brainstorming with member states, 9th Art. 14 committee meeting, Brussels, June 2004.

- global access to EMAS,
- separate or regroup EMAS and Eco-label scheme,
- streamline accreditation, registration and verification procedures,
- EMAS promotion / incentives,
- lowering costs for enterprises / participants<sup>30</sup>.

On the other hand there should be a close look to other regulations, directives and political programmes of the EU. There have been set a hand full of links to EMAS in other relevant EU policy instruments during the last few years<sup>31</sup>. However, there is missing a systematic uptake<sup>32</sup>.

Commission has set up a master schedule for EMAS revision<sup>33</sup>. From the schedule a draft regulation could be adopted by the Commission in mid of 2006. Procedure for adoption in Council<sup>34</sup> and European Parliament will take two years so that a revised version could come into force in 2008. All interested parties shall be invited to give their thoughts and comments within the revision process<sup>35</sup>.

## 5 Conclusion and further Perspective

After 10 years practice of a new and proactive instrument in voluntary environmental management a

turning point is reached. The commission has to decide whether to give EMAS a permanent place within the canon of environmental policy instruments and to strengthen its use by different means or to restrain from EU management requirements and leave further decisions on development of environmental management tools to the private market.

As ISO doesn't show up as driving force in the new developments of environmental management systems the zero-option would be a missed chance. Within the next three years it could be mainly EMAS to lead the actual discussion on environmental management in Europe and even world wide.

The opening of EMAS to all branches since 2001 and the link with ISO management schemes was a wise decision. But EMAS should not turn to a scheme for public organisations and services. The interest of "classical" clients from industry and SME has to be regained. EMAS must keep up with new developments and present challenges of enterprises: corporate social responsibility, sustainability reporting and integrated management tools.

Central answers to EMAS revision will be consolidation, simplification and mass market targets<sup>36</sup>. Legal compliance and environmental performance are solid and central pillars for a profiled revised Regulation.

<sup>29</sup> Example for a staged approach is the British Standard BS 8555 Environmental management systems — Guide to the phased implementation of an environmental management system including the use of environmental performance.

<sup>30</sup> German Environmental Verifiers Committee (UGA) has laid down first Suggestions for Revision of the EMAS Regulation in a meeting on December 2004, see [www.uga.de](http://www.uga.de): UGA likes to contribute to a consolidation of EMAS. EU shall avoid new or substantial changed requirements and gain more SME. The revision should help to reduce the expenditure of the participating organisations establishing the environmental statement. UGA speaks against a staged approach and for keeping it voluntary. Revision shall maintain with both production- and product oriented environmental instruments as they are represented in eco-label and EMAS scheme. Europe shall determine promotion of EMAS and incentives for EMAS-registered organisations directly from EU level.

<sup>31</sup> EMAS is mentioned in Art. 52 para. 3 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134/1; Art. 50 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114; Art. 17 Proposal for a Directive on Batteries and Accumulators and spent Batteries and Accumulators COM (2003) 72 final of 21.11.2003; Annex V of Proposal for a Directive on establishing a framework for the setting of Eco-design requirements for Energy-using products and some communications: COM (2002) 347 final, COM (2003) 302 final, COM (2003) 354 final, COM (2004) 38 final, COM (2004) 60 final.

<sup>32</sup> There is no actual link to IPPC directive (apart from level of BREF documents), to Seveso II directive, to Cross Compliance Approach on farming, to annual accounts and annual reports of enterprises etc.

<sup>33</sup> Firstly presented at 8th meeting of Art. 14 committee in Brussels.

<sup>34</sup> Common Position.

<sup>35</sup> In Germany UGA is planning a conference with enterprises, EMAS-participants and all other interested parties in 2005.

<sup>36</sup> it doesn't seem reasonable to turn EMAS to a "best performers" scheme with a few clients. Environmental management should become a broad movement within all sectors and for enterprises/organisations of any size.

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

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

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

#### **The Environmental Law Division of the Öko-Institut:**

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

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

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

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing 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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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 conservation
- 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 Nature 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 with environmental initiatives and organisations or as legislators, but have limited contact with other lawyers abroad, although such contact and communication is vital for the successful and effective implementation of environmental law.*

*In 1990 a group of lawyers from various countries therefore decided to initiate the Environmental Law Network International (elni) to promote international communication and cooperation worldwide. Since then elni has grown to a network of about 350 individuals and organisations from throughout the world.*

*Since 2005 elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities:*

### **Coordinating Bureau**

The Coordinating Bureau was originally set up at and financed by the Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit making research institute. The Bureau is currently hosted by the University of Applied Sciences in Bingen. The Bureau acts as an information centre where members can obtain information about others working in certain areas thus promoting the development of international projects and cooperation.

### **elni Review**

The elni Coordinating Bureau produces and sends to each member the elni Review twice a year containing members' reports on projects, legal cases and developments in environmental law. elni therefore encourages its members to submit such articles to be published in the Review in order to allow the exchange and sharing of experiences with other members.

### **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 bring together scientists, policy makers and young researchers, giving the opportunity to exchange views and information as well as developing new perspectives.

### **Publication Series**

The elni publications series contains 12 volumes on different topics of environmental law.

- Environmental Law and Policy at the Turn to the 21st Century, Liber amicorum, Betty Gebers, Ormond/Führ/Barth (eds.) Lexxion 2006.
- Access to Justice in Environmental Matters and the Role of NGOs, de

Sadeleer/Roller/Dross, Europa Law Publishing 2005.

- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd. London 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd. London 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wil-mowsky/Roller, P. Lang 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

### **elni Website: elni.org**

The elni website at <http://www.elni.org> contains news about the network and an index of elni articles, gives an overview of elni activities, and informs about elni publications. Internships for young lawyers/law students at the Öko-Instituts environmental law division are also offered on the web.