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elni

REVIEW

EU Enforcement Policy of Community Environmental law
as presented in the Commission Communication
on implementing European Community Environmental law

Marta Ballesteros

The direct effect of the Aarhus Convention
as seen by the French 'Conseil d'Etat'

Julien Bétaille

Practical application of Article 9 of the Aarhus Convention
in EU countries: Some comparative remarks

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Environmental Inspections at the EU:
The imperative to move forward

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Current discussions on the proposal for an Industrial Emissions
Directive: Stronger role for Best Available Techniques?

Christian Schaible

Aberthaw Power Station: An IPPC case study

Lesley James

Why patents are crucial for the access of developing countries
to Environmentally Sound Technologies

Michael Benske

Conference Reports

CONTENTS

Editorial	53
<i>Conference on Environmental Law and Policy in the European Union: The Legacy of the Treaty of Amsterdam</i>	
Articles with focus on the Aarhus Convention	
EU Enforcement Policy of Community Environmental law as presented in the Commission Communication on implementing European Community Environmental law	54
<i>Marta Ballesteros</i>	
The direct effect of the Aarhus Convention as seen by the French 'Conseil d'Etat'	63
<i>Julien Bétaille</i>	
Practical application of Article 9 of the Aarhus Convention in EU countries: Some comparative remarks	74
<i>Pavel Černý</i>	
Environmental Inspections at the EU: The imperative to move forward	79
<i>Ana Barreira</i>	
Articles with focus on the Industrial Emissions Directive and other topics	
Current discussions on the proposal for an Industrial Emissions Directive: Stronger role for Best Available Techniques?	83
<i>Christian Schaible</i>	
Aberthaw Power Station: An IPPC case study.....	86
<i>Lesley James</i>	
Why patents are crucial for the access of developing countries to Environmentally Sound Technologies	88
<i>Michael Benske</i>	
Conference reports	
elni forum 2009 - The EU Directive on Industrial Emissions and its implementation in national law key issues and practical experiences, 14th May 2009 in Brussels, Belgium.....	93
<i>Nicola Below</i>	
Report of the Congress "European Environmental Law in Belgium and the Netherlands" of 15th May 2009	95
<i>Marie-Catharine van Engelen</i>	
Latest News	
Access to Justice in Slovakian Environmental Impact Assessment proceedings: NGOs strengthened	82
Report from the European Commission on the application and effectiveness of the EIA Directive	82
Germany fails again to codify its fragmented environmental law	97
Special edition of elni	98
elni Conference 2010 on the Industrial Emissions Directive (IED/ current IPPC Directive)	98
Imprint	99
Authors of this issue	99
elni Membership	100

Editorial

It has been nearly ten years now since the *Aarhus Convention* entered into force and imposed on parties and public administrations obligations regarding access to information, public participation in decision-making and access to justice. Since then, practitioners have gained diverse experiences on the practical application of the three pillars' provisions, and their implementation into national laws and related issues, e.g. enforcement. This issue of the *elni Review* includes valuable insights into this matter.

Special focus in this issue is placed on the currently discussed revision of the *IPPC Directive* takes a special place in this issue of the *elni Review*. This topic will also be continued in the next issue of the journal to reflect the ongoing discussion. As previously announced, *elni* is planning an *elni Conference* (see page 46 of this journal), a major event by the end of 2010, on the Industrial Emissions Directive. Therefore, you are invited to send us your contribution for the *elni Review* and, if you are willing to discuss it with others, you are naturally welcome to submit a proposal for the event, too. Soon, there will be an official call on our webpage (www.elni.org) providing further information on the conference.

This issue 2/2009 of the *elni Review* offers the following contributions:

In her article on the Conference "EU Enforcement Policy of Community Environmental law as presented in the Commission Communication on implementing European Community Environmental law" which took place on 8 July 2009 in Brussels, *Marta Ballesteros* discusses the implementation of European Community Environmental Law enforcement and its interaction with the Aarhus Convention and other European Laws.

"The direct effect of the Aarhus Convention as seen by the French 'Conseil d'Etat'" is the subject of the article by *Julien Bétaille*. His article provides detailed insights on the implementation and practical application of the Aarhus Convention in France.

"Practical application of Article 9 of the Aarhus Convention in EU countries: Some comparative remarks" by *Pavel Černý* discusses several specific topics from this field which can be considered crucial to legal protection of the environment in practice. The article also addresses the contributions and discussions presented at the „International conference on the implementation of the Aarhus Convention in practice“.

The article "Environmental Inspections at the EU: The imperative to move forward" by *Ana Barreira* reflects the point of view of the EEB on compliance and enforcement of European Environmental Law.

Further *Christian Schaible* addresses the EEB's position on the revision of the IPPC Directive in his article "Current discussions on the proposal for an Industrial Emis-

sions Directive: Stronger role for Best Available Techniques?".

National specifics of the IPPC Directive in practice are shown from a British point of view by *Lesley James*. She comments on the "Aberthaw Power Station: An IPPC case study".

"Why patents are crucial for the access of developing countries to Environmentally Sound Technologies" is explained by *Michael Benske*.

This issue of *elni Review* also provides two conference reports:

Nicola Below reports on the *elni forum 2009* "The Directive on Industrial Emissions and its implementation in national law – key issues and practical experiences", which took place at CEDRE in Brussels on 14th May 2009.

The contribution by *Marie-Catharine van Engelen* reports on the congress "European Environmental Law in Belgium and the Netherlands", which took place in Rotterdam on 15th May 2009.

Moreover, this edition of *elni Review* covers some interesting news on the German failure to codify its fragmented environmental law, a special edition of *elni Review*, which will be published next year, the *elni Conference 2010*, recent EIA developments, and positive developments in Slovakian access to justice.

The next issue of the *elni review* will not have an overarching focus. Contributions on the IED/IPPC revision process are nevertheless very welcome. Please send contributions on this topic as well as other interesting articles to the editors by mid-January 2009.

Nicolas Below/Martin Führ

October 2009

Conference on Environmental Law and Policy in the European Union

on Thursday 19th of November 2009

at the *University of Amsterdam, The Netherlands*

***"Environmental Law and Policy in the
European Union:
The Legacy of the Treaty of Amsterdam"***

On the occasion of the inaugural lecture of Professor Marc Pallemmaerts on 20 November 2009, the Centre for Environmental Law is organising a conference.

Please confirm your participation under:
<http://www.jur.uva.nl/cel>

elni forum 2009
The EU Directive on Industrial Emissions and its implementation in national law
key issues and practical experiences
14th May 2009 in Brussels, Belgium

Nicola Below

1 Introduction

The elni forum 2009 took place on the 14th of May 2009 at the Facultés universitaires Saint-Louis in Brussels, Belgium. The event, which concentrated on the topic “The Directive on Industrial Emissions and its implementation in national law – key issues and practical experiences”, gave the participants the opportunity to discuss the revision process of the Directive on Industrial Emissions (IPPC)¹ and the related six sector directives². The key issues discussed in greater depth were the opportunities for derogation from “Best available techniques” (BAT) associated emission levels, the role and position of the BAT Reference Documents (BREF), the European Safety Net³ i.e. the relation with the Large Combustion Plants Directive (LCPD) and the Waste Incinerating Directives (WID), and the relation with the National Emissions Ceiling Directive⁴ (NECD).

2 Opening Speeches

At the beginning Delphine Misonne from the Centre d'étude du droit de l'environnement (CEDRE) at the Facultés universitaires Saint-Louis in Brussels, Belgium welcomed the attendants to the elni forum. This was followed by a short presentation of the Environmental Law Network International which was carried out by Gerhard Roller from I.E.S.A.R. located at the University of Applied Sciences in Bingen, Germany.

3 Perspective of NGOs and EEB

The first speaker Marga Robesin from the Netherlands Society for Nature and Environment (Stichting Natuur en Milieu) located in Utrecht, the Netherlands, began with a short introduction on the IPPC.

She pointed out the NGO perspective on the key issues as well as the point of view of the European Environment Bureau (EEB) and referred briefly to the fact that there are more issues to be taken into account in the revision process and that one must bear in mind that despite the IED proposal one must not lose sight of the IPPC Directive. In summary, the current IED proposal⁵ contains some shortcomings.

The statuses of BREFs are varying in the different Member States. According to Art. 15(3) of the IED proposal, BREFs shall be the reference for the setting of permit conditions. In addition, the EEB claims to make BREFs more accessible and more frequently revised.

Furthermore, Art. 16(3) of the IED proposal contains too many opportunities for derogation from BAT. The current situation with a view to Art. 9(4) IPPC is also unsatisfactory due to the different approaches of various Member States. From the point of view of the NGOs and the EEB, Marga Robesin reasoned that derogation should be allowed only in exceptional cases and the justification should be included in the permit.

According to the European Safety Net stipulated in Art. 19(2) IPPC and Art. 16(3) of the IED proposal, sector emission limit values should never be exceeded. The EEB claims that emission limit values should additionally be based on BAT.

Art. 10 IPPC and Art. 19 of the IED proposal provides for stricter conditions based upon environmental quality standards to have priority over BAT. However, it is questionable whether an emission ceiling stipulated in the NECD is considered to be an environmental quality standard. The current IED proposal contains no link with the NECD. The EEB intends to introduce a link between them.

¹ Integrated Pollution Prevention and Control Directive 96/61/EC-2008/1/EC, OJ L 24/8.

² Council Directive 78/176/EEC, 20 February 1978 on waste from the titanium dioxide industry, OJ L 54, 25.2.1978, p. 19; Council Directive 82/883/EEC of 3 December 1982 on procedures for the surveillance and monitoring of environments concerned by waste from the titanium dioxide industry, OJ L 378, 31 December 1982, p. 1; Council Directive 92/112/EEC of 15 December 1992 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry, OJ L 409, 31 December 1992, p. 11; Council Directive 1999/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installation, OJ L 85, 29.3.1999, p. 1; Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste, OJ L 332, 28 December 2000, p. 91; Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, OJ L 309, 27 November 2001, p. 1.

³ See *supra* note 2.

⁴ Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, OJ L 309/22, 27 November 2001.

⁵ Proposal for a directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) (recast) COM (2007) 0844.

The identified shortcomings should be taken into account when drafting the IED.

4 Perspective of the European Commission

The second speaker Keir McAndrew from the European Commission, an expert on issues related to industrial emissions, referred to the core principles of the IPPC in the beginning of his speech, going on to point out the current situation of industrial emissions in Europe from the perspective of the legislator, the European Commission.

According to his presentation, the legal situation concerning the significant installations is unclear in places due to the fact that some European Directives cover the same subject.

On the one hand permits relating to the emission limit values must be based on BAT, and on the other hand certain flexibilities are intended because of the technical characteristics of the installation, its geographical location, and the local environmental conditions.

The 'realities' of the installations are likely to deviate from the models set down in the IPPC. In broadening the scope other European initiatives are also taken into account.⁶ Additionally, the problems with regard to IPPC also result from compliance and enforcement issues.⁷

In summary, the opportunities for derogation should be reviewed by granting a certain degree of flexibility so as to take into account certain specifics. Minimum requirements based on BREFs are likely to reduce this flexibility.

Currently, the European Commission takes a closer look at the BAT and the BREFs, as well as Large Combustion Plants and soil provisions. Current considerations with respect to broadening the scope of the European Safety Net to other sectors are taken into account.

According to Keir McAndrew the new Industrial Emissions Directive (IED) can be expected by the end of 2010.

5 Perspective of the practitioners

The third speaker, Lesley James, an expert from Friends of the Earth in Derbyshire, Great Britain, provided the point of view of a practitioner on the key issues.

She opened her speech by presenting the Aberthaw case study carried out by Friends of Earth, which showed practical issues related to the role of the BREFs and opportunities for derogation arising out of the current legal situation. Due to the BAT assessment methodology in the United Kingdom, the Aberthaw

Power Station NOx controls escaped the selective catalytic reduction (SCR).⁸ Furthermore, the decision was based on a study that breached the specific ECM BREF. Due to the fact that BREFs are not legally binding and that Member States choose BAT assessment methodology at their own discretion, Friends of Earth were not in a position to take legal action. The case study led to the conclusion that the role of BREF needs strengthening and that derogation from BAT strongly depends on the setting of international BAT standards. Furthermore, a public justification of all derogation is needed as well as guidance criteria to form an adequate ground for derogation.

According to the European Safety Net and the question of whether it is practical to extend it to other industrial sectors, she reasoned that the current safety net provides important minimum standards and the extension to other sectors is practical in some cases, but not in all.⁹

The relationship between IPPC and NECD should also be made clear in the EU Industrial Emissions Directive to promote clarity and to remind the authorities that there are links between them.

6 Open discussion

Following the three presentations, the audience had the opportunity to ask questions. A lively discussion arose. The general findings are presented below:

- BREF – the setting of standardised and legally binding BREF could be influenced by political motivations. The more binding these standards are, the more likely it is that political interests of the stakeholders will be implemented into these standards.
- BAT – Best available techniques cannot be applied to every technical installation. Therefore, certain flexibilities must be held up. There is no doubt about the impact of political influence on BAT. However, there is a trend towards the "good argument".
- REACH¹⁰ and IPPC/IED – The interface between REACH and IPPC/IED should be carefully considered. In particular, the PNEC¹¹ regulated in REACH should be taken into account in the permit process of the Directive on Industrial Emissions. Otherwise PNEC would not have legal effect. However, the participants agreed that a strong link between REACH and IPPC/IED is generally not conducive.

⁶ E.g. the Better Regulation Initiative with regard to the quantity of information needed for a permit to be granted.

⁷ E.g. environmental inspections: detecting of infringements.

⁸ SCR is a BREF BAT standard concerning large combustion plants.

⁹ E.g. production and processing of metals-industry, mineral industry, basic organic chemicals industry, to name just a few.

¹⁰ Regulation (EC) No. 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ 29 May 2007, No. L 136/3.

¹¹ Predicted No Effect Concentration.

Imprint

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Manuscripts should be submitted as files by email to the Editors using an IBM-compatible word processing system.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed twice a year at the following prices: commercial users (consultants, law firms, government administrations): €52; private users, students, libraries: €30. Non-members can order single issues at a fee of €20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

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

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elni membership

If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the **elni Coordinating Bureau**, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

The membership fee is €52 per year for commercial users (consultants, law firms, government administration) and €21 per year for private users and libraries. The fee includes the bi-annual elni Review. Reduced membership fees will be considered on request.

Please transfer the amount to our account at **Nassauische Sparkasse** – Account no.: **146 060 611, BLZ 510 500 15**, IBAN: DE50 5105 0015 0146 0606 11; SWIFT NASSDE55XXX.

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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
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Main areas of research:

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 - Research on implementation of European law
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- **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 as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

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

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

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further 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 gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in

the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- 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. Wilimowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/Roller (eds.), P. Lang, 1991.

Elni Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.