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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
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Why patents are crucial for the access of developing countries
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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>

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

Christian Schaible

1 Introduction

In December 2007, the Commission presented its proposal for an Industrial Emissions Directive (IE-D). The proposal revises the IPPC Directive and integrates 6 sectoral directives into the Industrial Emissions Directive as annexes. The sectoral directives address Large Combustion Plants, Solvents, Waste Incineration and Titanium Dioxide. IPPC is the centre piece of this legislation, covering about 44,000 of the biggest industry installations. It is estimated that these installations are responsible for 83% of SO₂, 55% VOC, 34% NO_x and 25% of dioxins and mercury emissions in the EU, for example. Total annual damage costs relating to 5 key pollutants are estimated at between 53-164 billion EUR (health costs).¹

The key of the proposal is to strengthen the dynamic Best Available Techniques (BAT) standards. The relevant industry groups, Member States experts and NGO discuss what is considered as BAT i.e. techniques that, taking into account cost and advantages in the industry in question, can be used to achieve a high level of environmental protection under economically acceptable and technically feasible conditions. The BATs are then considered in technical documents, the BAT reference documents (BREFs) in the so called "Sevilla process".

The intention of the IPPC was for each installation to have permit conditions with a requirement to attain emission levels that can be achieved by using BAT (BATael). Unfortunately, this basic approach was not followed because of the non-binding nature of BREFs and because 'derogations' from BAT were always possible because of local conditions. Art. 9(4) IPPC Directive² states that "[...] emission limit values [...] shall be based on the best available techniques, without prescribing the use of any technique or specific technology, **but taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions [...]**" (emphasis added).

2 Lessons learned from IPPC

The review process of the current IPPC Directive put the implementation deficit in the spotlight when it

comes to setting BAT-based performance requirements within permit conditions.

On the one hand, several Member States failed to fulfil a formal requirement – i.e. that Annex I installations shall hold a permit – by the implementation deadline. Based on figures from March 2009 4.618³ permits are still outstanding, despite the implementation deadline of October 2007 for all installations. In response, the Commission initiated infringement procedures.

On the other hand, it becomes even more interesting to do a qualitative assessment of the permit conditions, especially in checking whether the Emission Limit Values (ELVs) are in line with BAT based requirements under the relevant BREFs. The Commission carried out implementation studies;⁴ the worrying and striking result was that 50% of the 30 permits checked are not setting permit conditions which are based on BAT.

Another interesting finding of several studies conducted on industrial activities also covered by sector legislation (i.e. Large Combustion Plants and Waste Incinerators) showed that Member States frequently ignore BAT-based requirements set out in the relevant BREF, but rather apply 'by default' the minimal binding requirements set out in the sector legislation.

3 Drivers of the problem

The European Environmental Bureau (EEB) thinks that the vague formulations regarding the status of BREFs in the current IPPC Directive will not enable the Commission to actually pursue on qualitative grounds whether BAT performance is required by the permit or not. For example, some Member States consider that a BREF cannot be considered as an official document if it is not translated into the official language. More importantly, justifications for derogation from BAT were not provided by competent authorities as this is not required under the current Directive.

The main finding of the Commission was that "as a result, a number of competent authorities and opera-

¹ Commission Impact Assessment to the IED proposal, SEC(2007) 1679, 21 December 2007. A critical review of the proposal is given by Robesin, elni Review 2008, 54-59.

² Directive 96/61 of 24 September 1996 concerning integrated pollution prevention and control (IPPC) CODIFIED 2008/1/EC of 15 January 2008, OJEU L24/8 of 29 January 2008.

³ Monitoring of Permitting Progress for Existing IPPC installations, Final Report, March 2009, ENTEC and IEEP http://eea.eionet.europa.eu/Public/irc/eionet-circle/reporting/library?l=ippc/ippc_permitting&vm=detailed&sb=Title.

⁴ E.g. Assessment of the Implementation by the Member States of the IPPC Directive, February 2007, ENTEC http://eea.eionet.europa.eu/Public/irc/eionet-circle/reporting/library?l=ippc/ippc_permitting&vm=detailed&sb=Title.

tors take a different legal interpretation of the provision on BAT-based permitting and a lenient approach to BAT implementation **clearly focussing more on local considerations**" (emphasis added).⁵

This led to wide variety of interpretations of 'local conditions' and derogations from BAT, leading to a situation where industry operates under different requirements across the EU. This divergence means an unlevel playing field for industry and especially an uneven level of environmental protection for EU citizens, who ultimately 'pay the prize'.

4 New proposal: Stronger role for BAT?

Some elements have been brought to the table throughout the co-decision process: for instance, the European Parliament supports a straightforward maximum 8 years review frequency of the BREFs. In addition, BAT conclusions – all BREFs upon Member State request – need to be made available in all the official languages of the EU.

The Council supports a system of quality assurance of BREFs with regard to content and format. EEB supports clear specifications on the reference periods and averaging period used regarding BATael so that the permit writer can use this information without difficulty. Ideally, short-term averages (hourly, daily) should be used as they are more precise in terms of real performance. EEB also supports that industrial operators should provide a report - at least annually - on their compliance with permit conditions and their performance compared to BAT. The European Parliament supports that this information shall be made available on the internet. This will provide valuable information to inspection authorities and will foster ongoing dialogue between operators and authorities on BAT.

Central to the new proposal was that the Commission proposed to remediate the problem by providing a stronger role for BREFs and that permits should set Emission Limit Values (ELVs) that do not exceed the BAT-associated emissions levels (BATael). It also introduced some requirements that will ease compliance, bearing in mind that the thematic strategies (on air and soil) need to be achieved. However, the use of the derogation facility because of local conditions is retained without clarification. The proposal merely states that the Commission 'may' propose criteria for the granting of derogations (Art. 16.4).

The Common position makes a differentiation between existing BREFs and new BREFs. Regarding the existing BREFs awaiting adoption through comitology, they shall be the reference for permit conditions. However, permit writers are free to decide on how to set ELVs.

For "new" BREFs, the permit writers have to ensure that emissions do not exceed the BAT-associated emissions levels (BATael) as adopted through comitology. The permit writer can either set ELVs that do not exceed BATael (same reference conditions and time periods need to be observed) or set ELVs in such a way that the resulting emissions do not exceed the BATael (proven by annual monitoring results assessed by the competent authority). In all the cases derogations because of 'local conditions' are still possible.

The common position (Art. 15.4) reads as follows:

"By derogation from paragraph 3 [ELVs not to exceed the BATael/ELVs ensuring emissions do not exceed BATael], the competent authority may, in specific cases, on the basis of an assessment of the environmental and economic costs and benefits taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions, set emission limit values deviating from those set by the application of paragraph 3.

The competent authority shall provide the reasons for the application of the first subparagraph including the result of the assessment and the justification for the conditions imposed.

Emission limit values shall, however, not exceed the emission limit values set out in Annexes V to VIII, where applicable.

The Commission may establish guidance specifying the criteria to be taken into account for the application of this paragraph.

The competent authorities shall reassess the application of the first subparagraph as part of each reconsideration of the permit conditions pursuant to Article 21 [permit review]."

5 Unresolved issues: Derogation from BAT

According to the EEB, the Commission and the Council failed to deal with derogations from BAT performance. The Presidency proposal even weakens the Commission's mandate to remediate this problem. The Council allows the Commission to establish "guidance specifying the criteria to be taken into account" for this derogation (Art. 15.4). The remaining question is: When will the Commission set these criteria/guidance and how will these look like?

What is new – compared to the existing IPPC – is that derogations should be in 'specific cases' and can be granted according to a cost-benefit assessment.

With regard to 'specific cases', it is not clear what these specific cases refer to. As it stands this provision does not serve any purpose when it comes to implementation since it is not further specified how it should be interpreted.

Another major concern relates to the introduction of a cost-benefit assessment concept, to be done at the

⁵ Commission Impact Assessment to the IED Proposal, *supra* note 1, p. 20.

local level when derogating. This is a new element compared to the current IPPC. The EEB is very sceptical about this. As it is stated in the BREF on Economics and Cross Media Effects the question of economic viability of a technique is only applicable in the determination of BAT (which is performed in the Sevilla Process). The Directive makes no provision for an additional test of economic viability in the local situation. Moreover, much concern has been expressed about values for external costs. For instance, it is difficult to monetise benefits/damages to ecosystems and it is unclear which of the multitude of cost-benefit methodologies would be acceptable and appropriate. Some external factors or attitudes such as giving more attention to the economic crisis compared to the environmental one should also be considered in this context.

The Council thinks that one way of controlling the derogations would be to require the competent authority to provide the justification for that assessment. EEB welcomes that the three institutions recognize the need for transparency when granting derogations (the European Parliament demands that this information should be available on the internet). However, from a practical perspective how and if local NGOs can make use of this requirement will remain a challenge, e.g. it is unclear to what extent a permit without a coherent justification can be challenged by legal actions, ENGOs suffer also from under-capacities.

6 Conclusion

For the moment we could put the concept of the Commission/Council approach very bluntly as follows: The principle is that ELVs should not exceed BATAel. However, Member States may derogate from this principle in specific cases. We have no idea of what these specific cases may be; this will be left to the discretion of the permit writer. The competent authority will have to provide information on how they derogate, hoping that the Commission will receive some 'useful' justifications. This information will be processed and possibly the Commission could derive from this basis some guidelines/criteria.

The EEB thinks that the ongoing review process should be used to come up now with EU-wide criteria that would clarify when derogations could be justified. This would lead to a more harmonised permitting practice at EU level. The European Parliament stood firm behind the restriction of the derogation facility and called for the extension of the 'European Safety Net' to other sectors not yet covered by sectoral legislation. According to this approach, the Commission shall propose minimal requirements within one year of the BREF publication that are based on the BATAel; these minimal requirements would be adopted through comitology and may not be exceeded. It is a concept based on the current Art. 19 of IPPC which allows the

Commission to set Community-wide emission limit values.

The issue of the level of flexibility to derogate from BAT is probably one of the most crucial ones. On the 25th June there was a blocking minority on this particular issue at the Environment Council. If the Netherlands would not have conceded, we probably would not have this wide flexibility in the wording right now that will enable many derogations. Not having clear criteria for derogations and the current level of 'flexibility' will lead to a 'business as usual' approach (i.e. permits not reflecting BAT and therefore creating an unlevel playing field in the EU and downgrading environmental ambition).

Ultimately, this issue has not yet been resolved and will certainly constitute the key article debated in the second reading.

Further information on this issue

- Timeline:
The European Parliament had its plenary reading on 10 March 2009 and the Council had its first reading agreement on 25 June 2009. We expect a second reading to start at the end of February 2010 with a plenary vote in the middle of May 2010 under Spanish Presidency.
- EEB discussion paper:
EEB discussion paper on the issues surrounding the Commission's proposal for an IED;
<http://www.eeb.org/publication/2008/IPPC-CleanerIndustry-1208-FINAL.pdf>
- NGO reactions to votes:
<http://www.eeb.org/press/2009/IPPC-PR-230109-FINAL.doc> (ENVI vote 22 January 2009)
<http://www.eeb.org/press/2009/090311-IPPC-PR-FINAL.pdf> (plenary vote 10 March 2009)
<http://www.eeb.org/press/2009/090625-IPPC-Council-PR-FINAL.pdf> (Council vote 25 June 2009)
- NGO demands before the ENV Council:
http://www.eeb.org/activities/General/documents/0906_Annexes_Letter_Environment_Council.pdf (Annex II)

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

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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.

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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:

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- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

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 - Effectiveness of legal and economic instruments
 - European governance
- **Environmental advice in developing countries**
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 - 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 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.
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