



# Meeting environmental Justice

## A critical overview of environmental policies' in the European Union

### Keywords

- > Environmental Policies
- > Participation
- > Information
- > Contamination
- > Prevention
- > Precautionary principle
- > Industrial hazards
- > Environmental assessment

### State of the art of the European environmental law framework.

The Charter of Fundamental Rights of the European Union, a pillar of European legislative inspiration does not mention any connection between environment and human health and the protection of the environment is ascribed to economic development within the framework of sustainable development. The Treaty of Lisbon states among the EU priorities in environmental policies the protection of the environment and human health, the rationalisation of natural resources' use and recognises the importance of the precautionary principle. Even though in the practice we witness an undeniable primacy of economic necessity over the environment, the European Union has developed in the years many directives aiming to provide member states with a framework for environmental policies and laws that are fundamental for the harmonisation of basic environmental requirements and norms at Union level.

### Aim of Policy Brief

The objective of this policy brief is to describe some core principles, critical issues and recommendations in regard with specific European Environmental Policies:

- SEA Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment;
- EIA Directive 2011/92/EU on the assessment of the effects of certain public and private

projects on the environment;

- IPPC Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control);
- Seveso III Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances;
- ELD Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage;
- PECL Directive 2008/99/EC on the protection of the environment through criminal law.

### Aarhus Convention:

The Aarhus Convention (United Nations Economic Commission for Europe - UNECE - Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998) establishes a number of rights of the public (individuals and their associations) with regard to the environment. Accordingly, several environmental directives have been amended in order to include rights stated in the Convention directed at ensuring public access to environmental information held by the public authorities; fostering public participation in decision-making which affects the environment; extending the conditions of access to justice in environmental matters.

### Polluter pays principle:

The 'polluter pays' principle provides that those who produce pollution



should be held responsible for and therefore should bear the costs of managing it to prevent damage to human health or the environment. In the EU legal framework, the polluter pays-principle is set out in the Treaty on the Functioning of the European Union (Article 191(2) TFEU).

### **Preventive principle:**

Aims of the preventive principle in European law are to avoid trans-border pollution, prevent pollution at the source, minimize environmental damage and reduce risk of harm. The means to ensure prevention are: “Environmental Impact Assessment - EIA, emission standards; best available techniques; environmental quality standards; authorisation of hazardous activities; information, participation, access to justice; liability law and criminal law”. (European Commission COM 2012 Principles of EU Environmental Law)

### **Precautionary principle:**

In Communication 2000(1) the European Commission defines that “the precautionary principle enables rapid response in the face of a possible danger to human, animal or plant health, or to protect the environment. In particular, where

scientific data do not permit a complete evaluation of the risk, recourse to this principle may, for example, be used to stop distribution or order withdrawal from the market of products likely to be hazardous”. Whatever measures is decided by the competent authorities (soft or binding measures) they must respect the principles of proportionality, non-

discrimination, consistency of the measures, examination of the benefits and costs of action or lack of action and review of the measures in the light of scientific developments.

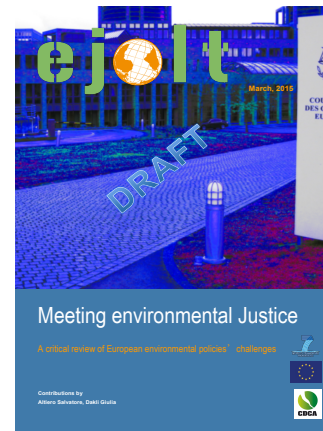
### **Recurring critical issues in EU environmental law:**

The preventive, precautionary and the polluter pays principles are present in several provisions set by EU Directives and are all mentioned in art.191 of the Treaty on the Functioning of the European Union (TFEU). While the Treaty mentions these fundamental principles, no real definition is given for them in secondary law, leading to interpretation and transposition issues which prevent their effectiveness at national levels.

Despite some progress over the last 10-15 years, the European institutions still have to tackle several critical issues preventing the full transposition, implementation and application of Environmental Law, among which:

- Ineffective and burdensome infringement procedures;
- Difficulties and delays in transposition of EU Directives into national Law;
- Generic and vague notions and key definitions in Environmental Directives;
- Incomplete implementation of the principles listed in the Aarhus Convention;
- Lack of explicit mention of the cause-effect connections between health and environment in EU Environmental policies;

- Limitation in participation and access to environmental information and to access to justice in environmental matters (compare to Aarhus Convention provisions);
- Subordination of the protection of health and the environment to economical interests;
- Excess of power of operators in self-certification;
- Lack of transparency.



## Recommendations for improvement

### To overcome the flaws/short-comings in the infringement procedure

The EU Commission should adopt the practice of invoking Art. 279 TFEU (that allows the European Court of Justice to order interim measures before its final ruling and subsequent appeals) in all cases where there is the certainty, or serious threat, that an activity will cause an irreversible damage to the environment during the process of the infringement procedure.

### To overcome the slow and uneven transposition and implementation of EU environmental law

- New and improved training methods for regulators, inspectors, prosecutors, judges, should be introduced;
- Access to information and justice for the public and especially for Environmental Justice Organisations should be improved. Provided with adequate tools, the public and civil society will be enabled to take action against failures of compliance, transposition and implementation of EU Environmental Law, as “formal complaints” have proved to be insufficient.

### To overcome the difficult transposition of financial and non financial penalties provisions

Art. 83(2) of the TFEU includes an explicit legal basis for the establishment of minimum rules regarding definition of criminal offences and sanctions under certain conditions. Seen that both the ELD and the PECL Directives are facing several transposition and enforcement difficulties in this regard, more precise indications on the nature and entity of financial and non-financial penalties would strengthen a common framework, guaranteed it does not jeopardize the achievements reached so far by such Directives.



### **In order to widen the range of potential public sectors participating in decision processes**

- The distinction between “public” and “concerned public” represents a limit to the access to information and justice regarding environmental issues. In the Aarhus Convention such distinction is made in relation to who can access environmental information (public) and who can access justice (concerned public);
- In the cases of the SEA, EIA and IPPC directives for example, the distinction made between “public” and “concerned public” implies differences in the quality and quantity of information accessible by each category. In this regard, European environmental directives should guarantee equal access to information to the public, irrespective of whether they are directly concerned or not;
- In regard to the access to justice, measures to prevent Member States from ascribing too restrictive definitions of “concerned public” in national laws are needed in order to guarantee a major access to justice for environmental issues;
- CDCA believes the directives could establish mechanisms to bind final decisions to the results of participation processes.

### **In regards to participation and access to justice and information:**

- In order to guarantee a major circulation and comprehension of environmental information, in particular with regard to environmental and health impact assessment of plans, projects and plants, CDCA believes texts of the EIA Directive 2011/92/EU, SEA Directive 2001/42/EC and IPPC Directive 2010/75/EU could be complemented with more binding measures, i.e. establishing evaluation criteria in EU policies in regards Member States' actions towards preventive information;
- All environmental information should be provided without distinguishing between the “public” and the “public concerned”. Following the spirit of the Aarhus Convention in respect to the improvement of decisions' quality and implementation and to the promotion of awareness on environmental issues, environmental information should aim at the widest diffusion and accessibility;
- The distinction between the categories of plants, projects, plans and programmes covered by directives 2011/92/EU, 2001/42/EC and 2010/75/EU should be abolished, as well as those for which Member States are to decide on their assessment. In particular, access to environmental information cannot depend on the presumed significance of its effects and should be guaranteed in any case;
- It is necessary to widen the potential access of citizens to legal tools, actuating on the restrictive faculty of Member States at national law level and establishing criteria for the definition of concepts like “sufficiently concerned” and “impairment of rights” with the objective to increase the group of applicants able to access or situations eligible for legal proceedings.



**The political issue of the subordination of health and environmental protection to economical interests**

The EU should supplement Directives 2011/92/EU, 2001/42/EC and 2010/75/EC with binding tools to ensure the protection of human health. CDCA believes health protection should prevail over economic requirements, providing for the suspension of plants when health risks are identified until those risks are eliminated or reduced to a minimum level.

**Concerning excess of power of operators in self-certification**

It is necessary that the collection of data on the condition of the premises before, during and after the cessation of an activity, or in the planning stage, should be carried out by the public administration rather than to be left to the operator. The same applies to the identification of measures necessary to restore the premises after cessation of an activity.

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