Meeting environmental justice

A critical review of environmental policies' challenges in the European Union

Contributions by

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Abstract

This report exposes the content of some of specific environmental European directives relevant to Environmental Justice in a simple and accessible manner to non experts and to provide proposals on which to build dialogue with European and national institutions. A first part synthesizes directives' content and functioning, illustrating their application in the legal system with examples of Court cases. The second part presents a few critical observations and recommendations based on the idea that environmental protection must be a european top priority and it cannot be pursued if not by establishing all due connections between the state of the environment and human health.

Keywords

Environmental Policies
European Union
Environmental Justice
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Participation
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Environmental law
Environmental liability
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Emission
Energy
Contamination
Aarhus convention
Polluter Pays Principle
Prevention
Precautionary principle
Industrial hazards
Environmental assessment

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Acronyms

AAU	Assigned Amount Unit (carbon unit, Kyoto Protocol)
BAT	Best Available Techniques (EU and USA)
CDM	Clean Development Mechanism (Kyoto Protocol)
CER	Certified Emission Reductions (Kyoto Protocol)
CFC	Chlorofluorocarbon
CITL	Community Independent Transaction Log
CJEU	Court of Justice of the European Union
CLP	Classification, Labelling and Packaging
CLTAR	Convention on Long-range Trans-boundary Air Pollution (United Nations)
DPSI	Driving forces, Pressure, State, Impact and Response framework
DSO	Distribution System Operator
ECD	Environmental Crimes Directive (EU Directive 2008/99/EC)
EEA	European Environmental Agency
EIA	Environmental Impact Assessment (EU directive 2011/92/EC)
EJO	Environmental Justice Organisation
ELD	Environmental Liability Directive (EU directive 2004/35/EC)
EMAS	Eco-Management Union and Audit Scheme
EMEP	European Monitoring and Evaluation Programme
ERU	Emission Reduction Units (Kyoto Protocol)
ETS	Emission Trading System
EU ETS	European Union Emissions Trading System
EU	European Union
EUAA	European Union Aviation Allowances
EUA	European emissions quota
EUA	European Union Allowances
GHS	Globally Harmonised System
IPCC	Intergovernmental Panel on Climate Change (United Nations)
IPPC	Integrated Pollution Prevention and Control (EU directive 2010/75/EU)
JI	Joint Implementation (Kyoto Protocol)
MAPP	Major-Accident Prevention Policy (European Council Directive 96/82/EC)
NAP	National Allocation Plan (European Union)
NEPA	National Environmental Policy Act (USA)
PECL	Protection of the Environment through Criminal Law (EU directive 2008/99/EC)
RES	Renewable Energy Sources (EU directive 2009/28/EC)
SCI	Site of Community Importance (EU)

SEA	Strategic Environmental Assessment (EU directive 2001/42/EC)
SPA	Special Protection Area (EU)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TSO	Transmission System Operator
UNECE	United Union Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	The United Nations Framework Convention on Climate Change
WCRP	World Climate Research Programme (United Nations)
WMO	World Meteorological Organization (United Nations)

Foreword

Conflicts over resource extraction or waste disposal increase in number as the world economy uses more materials and energy. Civil society organizations (CSOs) active in Environmental Justice issues focus on the link between the need for environmental security and the defence of basic human rights.

The EJOLT project (*Environmental Justice Organizations, Liabilities and Trade*, www.ejolt.org) is an FP7 Science in Society project that runs from 2011 to 2015. EJOLT brings together a consortium of 23 academic and civil society organizations across a range of fields to promote collaboration and mutual learning among stakeholders who research or use Sustainability Sciences, particularly on aspects of Ecological Distribution. One main goal is to empower environmental justice organizations (EJOs), and the communities they support that receive an unfair share of environmental burdens to defend or reclaim their rights. This will be done through a process of two-way knowledge transfer, encouraging participatory action research and the transfer of methodologies with which EJOs, communities and citizen movements can monitor and describe the state of their environment, and document its degradation, learning from other experiences and from academic research how to argue in order to avoid the growth of environmental liabilities or ecological debts. Thus EJOLT will increase EJOs' capacity in using scientific concepts and methods for the quantification of environmental and health impacts, increasing their knowledge of environmental risks and of legal mechanisms of redress. On the other hand, EJOLT will greatly enrich research in the Sustainability Sciences through mobilising the accumulated "activist knowledge" of the EJOs and making it available to the sustainability research community. Finally, EJOLT will help translate the findings of this mutual learning process into the policy arena, supporting the further development of evidence-based decision making and broadening its information base. We focus on the use of concepts such as ecological debt, environmental liabilities and ecologically unequal exchange, in science and in environmental activism and policy-making.

The overall **aim** of EJOLT is to improve policy responses to and support collaborative research on environmental conflicts through capacity building of environmental justice groups and multi-stakeholder problem solving. A key aspect is to show the links between increased metabolism of the economy (in terms of energy and materials), and resource extraction and waste disposal conflicts so as to answer the driving questions:

Which are the causes of increasing ecological distribution conflicts at different scales, and how to turn such conflicts into forces for environmental sustainability?

This report is part of the final outcomes of EJOLT's WP9 (Law and institutions). This WP is centred on cross-cutting methodological activities feeding into the capacity of EJOs working in different thematic areas of the project. This report follows the publication of two previous reports developed by the Centre of Environmental Law (CEDAT) at the Universitat Rovira i Virgili, in 2012 and 2013: "Legal avenues for EJOs to claim environmental liability" (EJOLT report 4) and "International law and ecological debt. International claims, debates and struggles for environmental justice" (EJOLT report 11) and report 17 "A legal guide for communities seeking environmental justice" developed by CDCA.

This new report gathers an overview on specific European environmental law Directives setting mandatory provisions for Member States and private enterprises and corporations and an analysis of recurring weaknesses and critical issues undermining the effectiveness of Environmental Law at the European level. As a practical example of the application of EU Environmental Law, each Directive is accompanied by a judgement of the European Court of Justice. The aim of this report is not to give an academic and exhaustive view on Environmental Law at the European Level, rather it is to collect some European legislative tools regarding the environment and exploring through this review strengths and weaknesses of the European environmental law framework.

1. Introduction

In the Charter of the Fundamental Rights of the European Union, a pillar of European legislative inspiration, the environment is not *per se* subject to protection nor related to human health and it always ascribes environmental protection policies within economic development requirements. In its preamble, the Charter asserts that the European Union - EU - "seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital" and it ratifies in article 37 on Environmental Protection that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

The same spirit drives the Treaty on the European Union (TEU) and the later Treaty of Lisbon, also know as the Treaty on the Functioning of the European Union (TFEU) entered into force in December 2009, where environmental issues are only related to "sustainable development" requirements, implying a sort of undeniable primacy of economic necessity over the environment. It establishes in article 3 (ex Article 2 TEU) that the European Union "shall work for the sustainable development of Europe based on balanced economic growth" and contribute in the wider world to the "sustainable development of the Earth".

The article 11 (ex article 6) of the Treaty on the Functioning of the European Union (TFEU) – ex Treaty establishing the European Community (TEC) - "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". Again, the economy appears as the only channel through which to convey a less environmentally impacting development rather than real environmental protection.

Article 191 of TFEU offers a better understanding of environmental protection requirements, stating "Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change". Notwithstanding, after affirming that "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental

damage should as a priority be rectified at source and that the polluter should pay", the weigh of economic requirements counterbalances again environmental priorities as it is established that "in preparing its policy on the environment, the Union shall take account of: available scientific and technical data, environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action, the economic and social development of the Union as a whole and the balanced development of its regions".

In order to deepen the insights into the European environmental legislative framework, this reports reviews some core environmental European policies covering major environmental challenges, namely: Directive 2009/28/EC on the promotion of the use of energy from renewable sources (RES), Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading (ETS), Directive 2011/92/EU on Environmental Impact Assessment (EIA), Directive 2001/42/EC on Strategic Environmental Assessment (SEA), 2010/75/UE on Integrated Pollution Prevention and Control (IPPC), Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances (SEVESO III), the Environmental Liability Directive 2004/35/EC (ELD), and Directive 2008/99/EC on the protection of the environment through criminal law (PECL).

The objective of this report is to explore the content and the functioning of some of the most relevant environmental European Directives with regards to Environmental Justice while providing policy recommendation. On one hand, CDCA wants to provide a format accessible to non-experts, synthesizing Directives content and illustrating their application in the legal system with examples of Court cases so to ease their understanding and interpretation. On the other hand, the second part of the report dedicated to the critical analysis of the Directives and the elaboration of recommendations to the European Union aims to contribute to the public debate for the reinforcement of environmental protection. In this sense, this report also provides observations and proposals on which to build dialogue with European and national institutions through for example hearing or advocacy activities.

2. Review of core environmental UE directives

2.1 Directive 2009/28/EC on the promotion of the use of energy from renewable sources

Directive 2009/28/EC on the promotion of the use of energy from renewable sources, published on 23 April 2009, mandates levels of renewable energy use within the European Union, "establishing a common framework for the production and promotion of energy from renewable sources (RES)". It sets mandatory national targets for the share of energy from renewable sources in gross final consumption of energy (20%) and in transport (10%). Directive 2009/28/EC – commonly referred to as *RES Directive* – has the scope to encourage investments and R&D for the production of renewable energy. In order to facilitate those countries that had recently joined the EU in 2004 and 2007, the target to be reached is divided in 2: a part equal for all and a second part that varies in relation to countries' population and GDP.

Directive 2009/28/EC sets mandatory national targets for the share of energy from renewable sources in gross final consumption of energy (20%) and in transport (10%).

The Directive is integrally part of the *2020 Climate and Energy Package* (setting the so-called '20-20-20' targets[1]) and – as well as all Directives included in the Climate and Energy Package – also represents a core element of *Europe's 2020 Growth Strategy*, of the *2030 Framework for Climate and Energy Policies* and of the *2050 Roadmap for moving to a low-carbon economy*.

In a nutshell, Directive 2009/28/EC – addressed to Member States rather than private actors – lays down a number of rules and measures with reference to administrative procedures, training and information, access to the electricity grid for RES, infrastructure development, sustainability criteria for biofuels. In addition to this, it introduces three "cooperation mechanisms" that Member States can use to achieve their national RES target in cooperation with other Member States.

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2.1.1 Legislative History

In view of the "Third Conference of the Parties to the United Nations Framework Convention on Climate Change" held in Kyoto in December 1997, in **November 1997** the European Commission published a White Paper setting out a Community strategy and Action plan aimed at reaching an indicative objective of 12% for the contribution by renewable sources of energy to the European Union's gross inland energy consumption by 2010.

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From 1997 to 2008 several preparatory actions took place, with the participation of various actors who have contributed to the definition of a shared European energy strategy that resulted in the publication of a number of relevant Directives:

- 2001/77/EC on the development of renewable electricity, setting the objective of a 21% contribution of renewables to electricity production;

[1] These targets, known as the "20-20-20" targets, set three key objectives for 2020: A 20% reduction in EU greenhouse gas emissions from 1990 levels; Raising the share of EU energy consumption produced from renewable resources to 20%; A 20% improvement in the EU's energy efficiency.

- 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport, establishing the goal of reaching a 5,75% share of renewable energy in the transport sector by 2010[22];
- 2004/8/EC on the promotion of cogeneration;
- 2005/32/EC on eco-design of energy-using products;
- 2006/32/EC on energy end-use efficiency and energy services.

The EC Renewable Energy Roadmap outlines a long-term strategy and calls for a mandatory target of a 20% share of renewable energies in the EU's energy mix by 2020.

This legislative package represented EU's strategy to comply with the commitments made under the Kyoto Protocol. Nevertheless, the targets being not binding, it became evident that they would not be easily met. In 2007, 10 years after the publication of the White Paper, the Commission published a Renewable Energy Roadmap outlining a long-term strategy and finally calling for a mandatory target of a 20% share of renewable energies in the EU's energy mix by 2020.

The European Union has since then embarked in a “green-reform” process which has its legislative basis in the above-mentioned *Climate and Energy Package*, adopted in the spring of 2009. Considering the great differences characterizing the National legislation for the environment and energy sectors throughout the EU, the EU Commission managed to pass a legislative package consisting of four pieces of legislation each providing compelling targets for its Member States: the reform of the European Emission Trading System - ETS (Directive 2009/29/EC), the introduction of a legal framework for the non-ETS sectors (Decision 406/2009/EC), the caption carbon storage (Directive 2009/31/EC) as well a new, complete, Directive on renewable energies: Directive 2009/28/EC in April 2009, amending and repealing Directives 2001/77/EC and 2003/30/EC.

The Energy Roadmap 2050 reaffirms the fundamental role of energy efficiency and energy savings towards a more "European" approach to renewable energy.

The resolution of March 14, 2013 of the EU Parliament on EU’s Energy Roadmap 2050 reaffirmed the fundamental role of energy efficiency and energy savings towards a more "European" approach to renewable energy.

2.1.2 Objectives and main actors and stakeholders involved

As regards the *Climate and Energy Package* subjects, the European Union shares its competences with Member States: the implementation activity that States are required to carry out is of crucial importance for achieving the targets outlined in the 2009/28/EC Directive.

Member States are subject to a range of obligations under the RES Directive, in particular:
- To reach an overall renewable energy target;
- To reach a minimum energy target in the transport sector;
- To prepare a national renewable energy action plan.

[2] Under the Directive 2009/28/EC on the promotion of the use of energy from renewable sources this share rises to a minimum 10%.

In case a Member State feels to be unable to comply to the mandatory targets due to "force majeure" reasons it must inform the Commission that is then required to decide what adjustment should be made to the renewable energy target of that particular Member State.

It is worth noting that the Directive defines only general accounting rules for using its mechanisms, but the details of their practical implementation are of responsibility of the Member States, that are therefore free to determine who the beneficiaries of the incentives (producers, distributors, users) should be and to define which of the renewable energy sources, can or cannot be subject to incentives.

The Directive indirectly addresses private operators and other relevant stakeholders such as consumers, builders, installers, architects and suppliers of heating, cooling and electricity systems. They are the likely beneficiaries of all kinds of support schemes and incentives set up by Member States to comply with their National targets and they can and should be involved in joint projects between Member States and between Member States and third countries (Articles 7 and 9).

"Energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases"

2.1.3 Overview of main provisions and mechanisms

Prior to go deeper in the description of the mechanisms introduced with Directive 2009/28/EC, it is due specifying the definition of "renewable energy sources" offered by Art. 2 of the Directive : "Energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases".

2.1.3.1 Mandatory National overall targets and measures for the use of energy from renewable sources

As stated in Art. 3 of the RES Directive, all Member States "shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative national trajectory". Even if the Directive is commonly known for its 20% target, National targets vary considerably and are listed in part B of Annex I and go from the 10% of Malta to the 49% required from Sweden). In addition to this, each Member State shall ensure that the share of energy from renewable sources will represent at least 10 % of its final consumption of energy in transport by 2020. In particular, the contribution to the total share made by biofuels produced from wastes, residues, non-food cellulosic material, and lignocellulose material are considered double.

Each Member State shall ensure that the share of energy from renewable sources will represent at least 10 % of its final consumption of energy in transport by 2020.

In compliance to the Directive, by June 2010 Member States were each to establish a National Action Plan setting national targets for the share of energy from renewable sources consumed in transport, as well as in the production of electricity, cooling and heating, for 2020 and establishing procedures for the reform of planning and pricing schemes and access to electricity networks. These

action plans had to take into account the effects of other energy efficiency measures on final energy consumption. At the end of 2011 and every two years thereafter, Member States were/are required to submit a progress report to explain the state of the implementation of the Directive and their progress towards meeting their national targets.

Prior to the publication of its National Action Plan, each Member State had to publish a forecast document indicating its estimated excess production of energy from renewable sources compared to the indicative trajectory which could be transferred to other Member States as well as its estimated potential for joint projects and its estimated demand for energy from renewable sources to be satisfied by means other than domestic production until 2020.

Cooperation mechanisms of the RES Directive have the scope to allow Member States with low or expensive RES potential to use renewable energy produced in countries with higher RES potential and lower production costs to comply with their national target.

In order to achieve their national targets, Member States may apply the following measures:

1. Support schemes;
2. Cooperation mechanisms between Member States and with third countries.

The joint mechanisms set up with the RES Directive are designed along the lines of the flexible mechanisms introduced under the Kyoto Protocol: a Member State can implement joint projects in collaboration with another Member State, in analogy to Kyoto Protocol's Joint Implementation Mechanism, and with third countries, as foreseen by Kyoto's Clean Development Mechanism. Also, EU Member States can statistically transfer units of energy produced from renewable sources, just as the International Emissions Trading allows the transfer and trade of emission shares under the Kyoto protocol.

All cooperation mechanisms of the RES Directive have the scope to allow Member States with low or expensive RES potential to use renewable energy produced in countries with higher RES potential and lower production costs to comply with their national target.

Statistical transfers between Member States (Article 6)

The mechanism of statistical transfers allows the renewable energy produced in a Member State to be ex-post and virtually transferred to the statistics of another Member State, thus counting towards the achievement of the latter State's national RES target. The transferred is deducted from the amount of energy from renewable sources calculated for the Member State *making* the transfer and added to the amount of energy from renewable sources taken into account in measuring compliance by the Member State *receiving* the transfer. Any renewable energy generated in surplus that is not required by a country to comply with its own target can be traded with this tool.

Joint projects between Member States and/or with third countries

Member States (two or more) – also in collaboration with private operators – can work in cooperation on joint projects concerning the production of electricity, heating or cooling from RES. In particular, a Member State can financially support a project in another Member State and count a share of the project's energy production towards its own target. The Directive does not set a detailed definition of joint projects, so the specific terms of the joint agreement have to be defined by the involved States.

Member States also have the possibility to cooperate on all types of joint projects with third countries. In this case, electricity from RES produced in outside the borders of the EU can be taken into account only if the electricity is consumed in the Community and if the electricity produced and exported has not already received support from a support scheme of the third country.

Joint support schemes

Member States can combine a part of their RES electricity, heating and cooling support schemes to achieve their national RES targets together. Support schemes are all those instruments applied by States to promote RES by reducing its production cost or increasing the price at which it can be sold. Support schemes include, among others, investment aids, tax reductions and refunds, green certificates, feed-in tariffs. The RES energy produced thanks to the support schemes (as long as it is not fuel) can be then taken into account for the achievement of the states' targets in two different ways:

- Performing a statistical transfer of specified amounts of energy from renewable sources from one Member State to another Member State;
- Setting up a distribution rule that "allocates amounts of energy from renewable sources between the participating Member States".

2.1.3.2 Guarantee of origin

Each Member State should be able to guarantee the RES origin of electricity, heating and cooling and the information contained in the guarantees of origin should be standardized and therefore recognized in the whole EU. Guarantees of origin may also prove very useful to inform consumers on the composition of the different electricity sources.

2.1.3.3 Access to the electricity grid for energy from renewable sources

As the promotion of renewable energy necessitates an adequate energy transport and grid infrastructure, the Directive stresses the importance for Member States to take all necessary measures to allow the secure operation of the electricity system as it accommodates the development of electricity production from renewable energy sources. In particular, Member States should ensure that transmission system operators (TSOs) and distribution system operators (DSOs) guarantee the transmission and distribution of electricity produced from RES; provide for either

priority access or guaranteed access to the grid-system of electricity produced from RES; ensure that when dispatching electricity generating installations, TSOs give priority to generating installations using renewable energy sources. Finally, TSOs and DSOs must make public their rules – based on objective, transparent and non-discriminatory criteria – for the integration of new producers feeding electricity produced from renewable energy sources into the interconnected grid.

The Directive sets a number of criteria to be used to qualify biofuels and bio liquids as "sustainable".

2.1.3.4 Sustainability criteria for biofuels and bio liquids

As biofuels and bio liquids are produced using raw materials also coming from outside the EU, they should not be produced using materials originating from lands with a high biodiversity value or with high carbon stocks. The Directive therefore sets a number of criteria to be used to qualify biofuels and bio liquids as "sustainable". Bio liquids and biofuels that are not certified as sustainable should not benefit from any support scheme.

In accordance with the Directive, "sustainable" bio liquids should contribute to a reduction of 35% of GHG emissions to be taken into account, and from 2017, their share in emissions savings should be increased to 50%.

2.1.3.5 Information and training

Member States must make sure that all relevant actors should have access to information or must be directly informed on:

- Net benefits, cost and energy efficiency of equipment and systems for the use of heating, cooling and electricity from renewable energy sources
- Certification schemes or equivalent qualification schemes
- The list of installers who are qualified or certified

Member States shall also ensure that appropriate guidance is made available to all the above-mentioned actors. For this purpose it Member States are asked to develop suitable information, awareness-raising, guidance and training programs in collaboration with local and regional authorities.

The text of the Directive does not foresee a specific enforcement or penalty mechanism in case a Member State fails to reach its target but the European Commission could open an infringement procedure

2.1.3.6 Failure to comply with targets, penalties and infringement procedures

While the national targets to reach by 2020 are legally binding, the trajectory for the years up to 2020 is not binding so Member States can use it as guidance but are not even required to justify any deviation from the intermediary targets set out in the above-mentioned trajectory, which are not binding. It is therefore very difficult to know – before 2020 – what non-complying States will have to undergo in case they have not reached their national target. The text of the Directive does

not foresee a specific enforcement or penalty mechanism in case a Member State fails to reach its target but based on Art. 258 of the Treaty on the Functioning of the European Union[3], the European Commission could open an infringement procedure.

Infringement procedures can be started based on a complaint or the Commission can start proceedings out of own initiative in one of the following cases:

- Failure to produce a credible national action plan;
- Failure to implement all aspects of the Directive;
- Significant deviation from the national action plan or trajectory;
- Valid complaints from any EU citizens regarding incorrect implementation or enforcement by Member States.

During the preliminary investigations the Member State has a first chance to reach a solution together with the Commission, putting an end to the procedure. The second step is a *letter of formal notice* notifying the Member State of the infringement and asking the Member State to submit its observations. Based on the response from the Member State concerned, the Commission can skip to step 3 and send a *reasoned opinion* to the Member State asking the Member State to comply within a specified period.

Only when a Member State does not comply with the reasoned opinion, the case can be brought before the European Court of Justice, putting an end to the administrative steps of the procedure and starting the judicial stage. If the Court of Justice determines that a provision of European law has been violated, it can order the Member State to end the infringement and ensure compliance. If the Member State fails to comply, the Commission can ask the Court for a second judgment and to impose a financial penalty on the Member State.

While all attempts to introduce direct penalty mechanisms have not yet been taken up by the Commission, what still needs to be explained is what happens in case a financial penalty is actually imposed to a non-complying State, that is how the Commission can enforce the penalty. Seen how the infringement procedure is characterized by very long timing (it can take more than 5 years from the beginning of an infringement procedure to the decision of the EU Court of Justice to impose a financial penalty), the deterrent effect of penalties is not sufficiently high compared to the benefits of non-compliance with agreed targets.

[3] Article 258 TFEU reads: "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

Legislative References

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- Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market;
- Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport;
- Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC;
- Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council
- Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC;
- Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC

2.1.4 Judgement on Directive 2009/28/EC on the promotion of the use of energy from renewable sources

Case: Court of Justice of the European Union, C-2/10: Judgment of the Court (First Chamber) of 21 July 2011

Period of the dispute: 2008-2011

Plaintiff: Eolica di Altamura Srl

Counterpart: Apulia Regional administration

Normative References: Directive 92/43/EEC — Conservation of natural habitats and of wild fauna and flora, Directive 79/409/EEC — Conservation of wild birds, Special areas of conservation forming part of the Natura 2000 European Ecological Network, Directives 2009/28/EC and 2001/77/EC — Renewable energy sources

Fact and object of the application: The company Eolica di Altamura Srl gained the rights for the construction of a wind turbine on some lands owned by the Agro-Zootecnica Franchini Sarl company and included in the Alta Murgia National Park territory, classified as a SCI (Site of Community Importance) and SPA (Special Protection Area) area. The permit and the environmental compatibility requests presented to the Apulia region, however, were rejected citing the directions 'habitat' and 'birds' and declaring the SCI and SPA areas as "unfitting" for wind turbines.

The Agro-Zootecnica Franchini Sarl and the Eolica di Altamura Srl companies filed an appeal against those decisions before the Apulia Regional Administrative Tribunal. Meanwhile, the Apulia Region approved the Regional Regulation 18 July 2008, n. 15 on the conservation measures under Directives 92/43/EEC "habitat" and 79/409/EEC "birds".

In this regard, with the appeal, the Agro-Zootecnica Franchini Sarl and the Eolica di Altamura Srl companies were asking the cancellation of provision 1, letter. n), as well as 4 and 4 bis, of art. 5 of the Regional Regulation n.15 establishing the prohibition to build new wind turbines plants up to a safe area of 500m from the SPAs.

The companies were disputing the violation of Directive 2001/77 principles on the promotion of electricity produced from renewable energy sources in the internal electricity market, while the Apulia Region pleaded such application was unfounded. In addition, with Regional Law n. 31 art. 2, paragraph 6, in accordance with the 'habitat" Directive, building new wind turbines not intended for self consumption on SCI was banned.

The Regional Administrative Tribunal considered that Article. 2, paragraph 6, of regional law 31 was applicable to the case and the Court of Justice of the European Union - CJEU was ask to decide on the compatibility with European laws of "regional and national legislation prohibiting the location of any wind energy systems not intended for self consumption in the sites of Community importance (SCIs) and special protection areas (SPAs) forming part of the 'Natura 2000' network".

Result: The Court stated that, in respect with the Directives on renewable sources and the promotion of electricity produced from renewable sources, as well as the 'habitat' and 'birds' Directives, Member States are allowed to prohibit the installation of wind turbines for commercial purposes on SCI or SPA areas, without prior environmental impact assessment of the specific projects, as long as the principles of non-discrimination and proportionality are respected.

2.2 Fighting climate change and the Directive 2003/87/EC as amended by Directive 2009/29/EC

2.2.1 Legislative History

2.2.1.1 Air quality in early European policies

The planning of EU policies on environment relies on the Union Action Program, which outlines strategies for the EU action in accordance with the principles established by the Treaties. Until 31 December 2020, the Seventh Environment Action Programme, adopted by Decision No. 354/2013 of 28 December 2013 applies. It aimed to contribute to a high level of environmental protection and a better quality of life and well being of citizens. It also pursued the transformation of the European Union in a low-carbon, resource-efficient, green and competitive market. In collaboration with industry, social partners, representatives of civil society and citizens, the relevant institutions of the Union and of the Member States are responsible to adopt the necessary measures to comply with such purposes in accordance with the principles of conferral, subsidiary and proportionality.

In the last two decades, the safeguard of air quality has taken major importance. On the basis of the Convention on Long-range Trans-boundary Air Pollution (CLTAR) signed in 1979, the European Monitoring and Evaluation Programme - EMEP was established to monitor the range transport of pollutants to the atmosphere. Some measures were then taken to reduce the concentration of lead in the atmosphere by limiting its concentration in gasoline and obliging, since 1992, the car manufacturers to equip vehicles with catalytic converters.

The political focus was later shifted from the need to reduce emissions of harmful gases (particularly those from motor vehicles) to the urgency to act against the reduction of the ozone layer. In view of this ultimate goal, the EU adopted regulation that imposed the total elimination of chlorofluorocarbon (CFCs) from 1 January 1995. The matter falls now under Regulation n.1005/2009 and its subsequent amendments.

Another important area on which the UE focused its policy action is atmospheric contamination from industrial plants, covered by the Directive 1984/360/EEC revoked by Directive 2008/1/EC and currently by Directive 2010/75/EU, which determines the new rules on industrial emissions as we will review in chapter 2.5. With the subsequent development of the EU legislation on air quality, and in the light of the latest developments in the scientific and medical field, Directive 2008/50/EC on ambient air quality and cleaner air for Europe was enacted. The Directive aims to protect human health and the environment as a whole, by fighting emissions of pollutants at their source and to identify and implement the most effective measures to reduce emissions at the local, national and EU levels. To safeguard the application of this Directive, Member States are required to create a system of penalties.

2.2.1.2 The United Nations Framework Convention on Climate Change (UNFCCC)

The first "World Climate Conference" was held in Geneva in February 1979. On this occasion, the World Meteorological organisation (WMO) presented a final declaration which emphasizes on the needs to control human interference in climate change, including: the use of fossil fuels, deforestation, changes in land use. When it became clear that the human activities were responsible for climate changes, it appeared necessary to organise a First World Climate Research Programme (WCRP), under the guidance of the UN. In 1988, the same World Meteorological organisation and the United Nations Environment Programme (UNEP) constituted the Intergovernmental Panel on Climate Change (IPCC) with the task of assessing the scientific, technical and socio-economic causes and consequences of climate change. Since then, the UN recognised the IPCC as a scientific and advisory body. IPCC experts set a target of 50% reduction in greenhouse gas emissions compared to 1992 by 2050

The United Nations Framework Convention on Climate Change (UNFCCC) is signed on 9 May 1992 by 165 of the 183 countries participating to the World Conference on the environment in Rio de Janeiro and came into force in 1994.

On 9 May 1992, within the UN, the United Nations Framework Convention on Climate Change (UNFCCC) is finally signed by 165 of the 183 countries participating to the World Conference on the environment in Rio de Janeiro (1992), and came into force in 1994. Under the UNFCCC, the Member States set a generic common goal to reduce emissions. In particular, art. 2 of the Convention addressed the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner".

The Kyoto Protocol had planned reduction obligations for industrialized countries until 2012 was based on the "principle of common but differentiated responsibilities of the Parties".

Art 3 of the Convention sets out some guiding principles: the precautionary principle; the principle of equity (according to which all decisions and their implementations must be based on the participation and cooperation of the contracting countries); and the principle of common but differentiated responsibility of Parties (which implies greater responsibility for industrialized countries to consider the special needs of developing countries).

According to these principles, the UNFCCC divides the Member States in three groups:

- Annex I lists the most industrialized countries, including the European Union, and those in transition to a market economy. These countries have binding obligations regarding the emissions' reduction.

- Annex II lists the industrialized countries committing to provide financial and technological benefits to developing countries;

Directive 2003/83/EC establishes a regulation system at EU level for the exchange of green gases emission allowances.

- The countries not included in any attachment (less developed and developing countries) are not subject to any obligation of reduction.

The obligations common to all Parties include: monitoring of national emissions of greenhouse gases; implementing national programmes for the mitigation of climate change; promoting technologies and processes that counteract emissions.

Art 7 of the UNFCCC also established the Conference of the Parties, convened annually, whose task is to examine and monitor the implementation of the Convention. On the "principle of common but differentiated responsibilities of the Parties" is also based the Kyoto Protocol which, until 2012, had planned reduction obligations for industrialized countries only.

From the Kyoto Protocol to the Directives 2003/87/EC and 2009/29/EC

The European Union has not waited for the official entry into force of the Kyoto Protocol (16 February 2005) to establish, as from 1 January 2005, a system to regulate at EU level the exchange of greenhouse gases emission (listed in Annex II of the Directive) allowances between companies located in member countries. This has been realized with the approval of the Directive 2003/87/EC, known as the "Emission Trading Directive".

Since Directive 2003/87/EC entered into force before the official Kyoto Protocol, the first phase of the latter (2008-2012), coincided with the second phase of the European Union Emissions Trading System - EU ETS, which has thus been well integrated in the emissions international trading system falling under the Protocol through the conversion of EUAs (European quotas) in AAUs (Kyoto's quotas).

Article 25 of Directive 2003/87/EC provides for agreements with third countries listed in Annex B of the Kyoto Protocol, "which have ratified the Protocol to provide for the mutual recognition of allowances between the Community scheme and other greenhouse gas emissions trading schemes in accordance with the rules set out in Article 300 of the Treaty".

With the entry into force of the Lisbon Treaty in 2009, the fight against climate change has been included among the EU's objectives (art. 191 TFEU). The objective of stabilizing greenhouse gases at EU level, pursued by the Directive 2003/87/EC, has been amended by Directive 2008/101/EC and, most recently, by Directive 2009/29/EC. The latter is part of the so-called "Climate-energy package", approved on 17 December 2008, and consisting of six measures against air pollution. The objectives that the EU Member States are committed to achieve by 2020 can be summarized as follows: "a 20% reduction in EU greenhouse gas emissions from 1990 levels; raising the share of EU energy consumption produced from renewable resources to 20%; a 20% improvement in the EU's energy efficiency". From this strategy derives the name "20-20-20". The new Directive n. 2009/29/EC was established to improve and extend the greenhouse gas emission allowance-trading scheme of the Community.

Furthermore, the European Union addresses the reduction of greenhouse gas emissions through other sectors not covered by the system of trading such as the commitment of Member States to reduce to meet EU targets (Decision no. 406/2009/EC); the increasing use of renewable energy (by setting mandatory national targets to achieve the overall goal of 20% of the increase in the consumption of renewable sources in Directive 2009/28/EC as reviewed in the previous chapter); the geological storage of carbon dioxide (Directive no. 2009/31/EC); the specification of petrol, diesel and gas-oil, introducing a mechanism to monitor and reduce greenhouse gas emissions, and the specification of fuel used by inland waterway vessels (Directive 2009/30/EC); and the reduction of CO2 emissions from light-duty vehicles (Regulation (EC) no. 443/2009).

2.2.2 Objectives and main actors and stakeholders involved

The system of emissions' reduction is based on the principle that, in a first phase, the implementation of the Kyoto Protocol should be first actuated in the sectors responsible for more greenhouse gas emissions. These industry sectors and activities are identified in Annex I of Directive 2003/87/EC. Though, this directive does not cover installations or parts of installations used for research, development and testing of new products and processes, as well as those using only biomass. In general, Annex I establishes the scope of the Directive for plants that exceed a limit value that refers to plants' production and their productive capacity but not directly to their emissions. May be excluded from the ETS hospitals and small emitters, in other words plants emitting less than 25,000 tonnes of CO2 equivalent and, in the case of combustion installations with a rated thermal input below 35 MW, excluding emissions from biomass.

The main amendments made to Directive 2003/87/EC concerned precisely the fields of application, the greenhouse gas emissions reduction targets and the timing for the implementation of the Directive. In particular, Directive 2008/101/EC included air transportation and its specific procedures for reducing greenhouse gases.

However, main changes were introduced by Directive 2009/29/EC to the field of application of the Directive adding new industrial activities; the timing of implementation of the Directive; the greenhouse gases reduction targets so that Member States emissions decrease by a linear factor of 1.74% for the period from 2008-2012 (art. 9) in accordance with the Commission Decisions on their national allocation plans.

2.2.3 Overview of main provisions and mechanisms

2.2.3.1 Air transportation

As for air travel, the Directive states that it is for the Member States to establish regulations for the auctioning of allowances that do not required to be allocated free of charge and the use of the revenues generated from the auctioning of

allowances. Those revenues should however aim at combating climate change in the EU and in third countries, for the reduction of greenhouse gas emissions, to facilitate adaptation to climate change in the EU and developing countries, to fund research and development for mitigation and adaptation, etc.

In accordance, the Member States shall ensure that each aircraft operator informs the competent authority about a monitoring plan to monitor and report emissions' and tonne-kilometre's data for the allocation of bonus units.

2.2.3.2 Greenhouse gases permits

Article 4 of Directive provides that from January 1, 2005 the installations listed in Annex I cannot function without a greenhouse gases permit. Permits shall be reviewed at least every five years by the competent authority (art. 6). Therefore all installations carrying out any activity listed in Annex I of the Directive and emitting greenhouse gases in relation to such activities should have an appropriate permit issued by the competent authorities.

The authorities grant permits if they consider that the operator is able to monitor and report emissions. A permit may cover one or more installations on the same site by the same operator. The permit contains: the name and address of the operator; the description of the activities and emissions; a monitoring program; the provisions on reporting of emissions; the obligation to return, in the first four months of each year, allowances equal to the total emissions of the previous year. Art. 8 specifies that, for the installations carrying out activities that are included in Annex I of Directive 96/61/EC on the categories of industrial activities, "the conditions of, and procedure for, the issue of a greenhouse gas emissions permit are coordinated with those for the permit provided for in that Directive".

The permit application must include a description of the installation, its activities and the technology used; the raw and auxiliary materials used likely to lead to emissions; the sources of emissions of gases within the system and the measures planned to monitor and report emissions in accordance with the rules of art 14, as well as a non-technical summary of the data.

Under section 14 and according to the criteria of Annex I to Directive 2003/87/EC, the Commission has therefore adopted the Regulation (EU) No. 601/2012 on the monitoring and reporting of emissions of greenhouse gases that applies, as from 1 January 2013, to both installations and aircraft. Monitoring and reporting emissions are obligations related to the permit received, as well as the obligation to return an annual quantity of allowances corresponding exactly to the CO2 emissions of the installation, calculated for the preceding calendar year. Each installation permitted must monitor their emissions annually and compensate them with emission allowances (European Union Allowances - EUA - and European Union Aviation Allowances - EUA A - both equivalent to 1 tonne of CO2 eq.) that can be bought and sold on the market. The Member States and the Commission

shall ensure that all decisions and reports related to the quantity and allocation of allowances and to the monitoring, reporting and verification of emissions are immediately disclosed in an orderly manner ensuring non-discriminatory access.

In order to have a sufficient number of quotas, operators can choose between these options: not to issue an extent greater than the amount of allowances allocated to them (for example by investing in systems for energy saving) or to buy quotas on the market. The emissions will be reduced where the reduction can be obtained at a lower cost. Companies that reduce their emissions will have a surplus of allowances to be sold to companies that cannot reduce emissions except at a high cost and to which it would be cheaper to buy quotas. In general, the result is the same, but the total cost is less, since the trade of quotas will balance the costs between individual operators. If an operator has a lower amount of allowances than the reported emissions, he will have to buy allowances in the market. If, on the contrary, the operator possesses a quantity of allowances in excess with regards to the reported emissions, he can sell its quotas or keep them for the next years. If the operator does not return the exact amount of quotas, he will irrevocably face the payment of specific penalties for each tonne of CO2 not covered by the quotas' allowances.

The EU ETS Directive is a "cap and trade" system setting a maximum limit ("cap") of total emissions permitted to all parties bound by the system, allowing participants to buy and sell on the market ("trade") rights CO2 emission ("quotas") according to their needs, within the limit set. 2003/83/EC establishes a regulation system at EU level for the exchange of green gases emission allowances.

2.2.3.3 Market quotas

According to the ETS Directive, each Member State shall decide upon the total quantity of allowances it will allocate for that period and the allocation of those allowances to the operator of each installation. This decision shall be taken at least three months before the beginning of the period and be based on its National Allocation Plan (NAP). The NAP is drawn regularly: the first period was the period 2005-2007; and thereafter every five years (2008-2012; 2013-2017). By 28 February each year, the competent national authority shall issue a proportion of the total quantity of allowances each year, according to its NAP. Under this decision, each Member State shall also account the emissions allowances to be set aside as a reserve for new entrants. One purpose of the ETS Directive is that emissions from the interested industrial sectors remain within the limits of the total quantity of emissions defined in the NAP.

The EU ETS Directive is a "cap and trade" system setting a maximum limit ("cap") of total emissions permitted to all parties bound by the system, allowing participants to buy and sell on the market ("trade") rights CO2 emission ("quotas") according to their needs, within the limit set. The total emission allowances are attributed to installations falling under the Directive, which sets out various trading phases. In the first phase, which coincides with the period 2005/2007 Member States have allocated about 2.2 billion tons of CO2 per year. During this first phase, also understood as the preliminary one, the allocation system EU-ETS was based on the allocation of free quotas, according to the principle of grandfathering. It means free allocation based on the previous emissions of the existing installations covered by the Directive. For the new installations, the benchmarking approach has been adopted, based on a standard rate of performance that is

represented by the emission factor[4] or a rate of energy efficiency/carbon per unit of product, input or technology used.

From 2013, the entitled installations receive free allowances based on reference parameters expressed in tonnes of CO2 per tonne of product (benchmark) and defined *ex ante* on the basis of the average performance of 10% of the most efficient European plants in the period 2007-2008. Where it has not been possible to define benchmarks according to final products, reference was made on the heat or fuel consumed, and the issue of the process of the installation.

Quantification was based on the historical production of each installation. For the first year they were awarded 80% of the quotas resulting from the product between the benchmark and annual historical production of the installation. The percentage will decrease by 6.25% per year, to reach 30% in 2020 and 0% in 2027. The changes introduced by the EU ETS Directive provide that from 2013 the main criterion for the allocation of allowances to installations is the appointment through auction, with certain exceptions related to the protection of competitiveness on international markets manufacturing sectors. The producers of electricity and installations carrying out carbon capture, transport and storage activities, will have to get quotas for the whole of their needs. The installations related to the manufacturing and air transportation sectors will have to resort to auctions for the needs in excess of the amount of quotas that will be assigned to them free of charge. In the manufacturing sector, the auction system was introduced since 2013. This sector most exposed than the electricity sector to competition from countries without binding emission regulations have benefited from temporary allocations of parts of its quotas requirement for free.

The EU ETS model is based on political decisions, which can significantly affect the price of the quotas; the amount of emissions also depends on the general economic development in Europe, the weather conditions and the price of fuel.

2.2.3.4 Registries and exchange platforms

From a legal standpoint, the trading system of the quotas does not establish how and when the exchanges take place. Companies tied by the Directive can trade quotas with each other directly or through intermediaries. They can also develop markets organised to this end. The price of quotas is determined according to supply and demand as in any other market. But there are factors that can affect it: the ETS model, in fact, is based on political decisions, which can significantly affect the price of the quotas; the amount of emissions also depends on the general economic development in Europe, the weather conditions and the price of fuel.

The first condition necessary for the implementation of EU ETS is the creation and the management of a system of electronic registries. The registries are electronic databases: each Member State shall establish its own National registry where the quotas are held. The system is composed of the registries of the EU Member States interconnected through a central registry at the European level, the

[4] The emission factor is the emission per unit of activity of the source, expressed for example as the quantity of pollutant emitted per unit of processed product, or as the quantity of pollutant emitted per unit of fuel consumed, etc

Community Independent Transaction Log - CITL. Such registry is similar to an online banking system, which keeps track of the ownership of money in accounts but not of the agreements made in the market for goods and services, which are at the source of the transfers of money.

The national competent authority opens an account in the National registry for each installation that falls within the ETS Directive competence. Then it pours on each account the quotas established under the National Allocation Plan. The quotas can be transferred between different accounts within the same registry or between different registries. The registry is used to track the issue, holding, transfer, surrender and cancellation of allowances. In addition to plants subjected to reduction targets, any person or entity interested in buying or selling quotas on the market, can open an account in the registry.

Because of their market value, the emission allowances must be included in the accounts as industrial production costs. Free allocations represent a potential income according to their market value, since it is possible for allocated companies to sell them if they reduce their emissions.

In 2010, the European Commission adopted Regulation n. 920/2010 for a standardised and secured system of registries. It has been chosen for such an end to use the form of electronic databases that track the issue, holding, transfer and cancellation of allowances. These registries will also guarantee public access to information, privacy and compliance with the provisions of the Kyoto Protocol.

Directive 2004/101/EC reinforces the links between the European allowance-trading scheme for greenhouse gas emission and the Kyoto Protocol's project mechanisms, including Joint Implementation (JI) and the Clean Development Mechanism (CDM).

2.2.3.4 Relationship between the EU ETS and the Kyoto Protocol

With the entry into force of ETS at international level following the Kyoto Protocol, the trade of quotas occurs between companies but also between countries. As the costs of reducing emissions of greenhouse gases are higher for some countries, these countries will be able to obtain additional allowances by investing in projects that reduce emissions in other countries or by simply buying quotas on the international market. A country that reaches a significant reduction of greenhouse gases emissions thanks to effective policies and measures can sell the surplus of allowances to other countries that have exceeded the volume of emissions allowed by the Kyoto Protocol.

Directive 2004/101/EC, known as the Linking Directive, reinforces the links between the European allowance-trading scheme for greenhouse gas emission and the Kyoto Protocol's project mechanisms, including Joint Implementation (JI) and the Clean Development Mechanism (CDM). This allows operators to use these two mechanisms in the trading system to meet their obligations.

The Directive recognizes the validity of the credits granted from JI and CDM on the same basis of emission allowances, except for those generated by nuclear installations and those arisen from the use of land, changes in land's use and forestry. Credits from JI projects are called "Emission Reduction Units" (ERU), while credits from projects under the clean development mechanism are called

"Certified Emission Reductions" (CERs). The Directive takes measures to prevent the double accounting of ERUs and CERs where they result from activities that also lead to a reduction or limitation of emissions of installations under Directive 2003/87/EC. The use of CERs and ERUs are similar to that of EAUs. In the second phase of the EU ETS each Member State must set within in NAP a limit to CERs and ERUs use.

Directive 2009/29/EC Article 11b(1) establishes the fact that installations can use non-Europeans emission credits from projects under the Kyoto Protocol project mechanisms such as CDM and JI only up to 2020 and in certain percentages.

2.2.3.5 Direct and indirect carbon leakage

The ETS Directive addresses the risk of relocation of European companies. The expression "direct carbon leakage" refers to the risk of outsourcing because of high carbon prices, while "indirect carbon leakage" refers to outsourcing due to increasing electricity prices caused by the high carbon prices used by European companies.

Article 10a, paragraph 6, of the ETS Directive provides on this point that " Member States may also adopt financial measures in favour of sectors or subsectors determined to be exposed to a significant risk of carbon leakage due to costs relating to greenhouse gas emissions passed on in electricity prices, in order to compensate for those costs and where such financial measures are in accordance with state aid rules applicable and to be adopted in this area".

On the Official Journal of the European Union n. C 158 of 5 June 2012 were published the "Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012". The Guidelines specifies the types of measures covered (1.) and their maximum level (3.). Annex II addresses the "sectors and subsectors deemed ex-ante to be exposed to a significant risk of carbon leakage due to indirect emission costs".

2.2.3.6 New climate-energy targets

The European Council of 23-24 October 2014 endorsed a binding EU target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990. The conclusions of the Council guarantee continuity measures against carbon leakage and reconfirm the support to the introduction of a "Market Stability Reserve" that would make the EU ETS more efficient and resilient to shocks arising from changes in the macroeconomic environment. They also introduce some new features that open the way for greater osmosis between ETS and "non-ETS" obligations.

To continue its action against global warming, the European Commission recommended the EU to double the reduction of CO2 emissions and other greenhouse gases, from 20% to 40% by 2030. This target can be achieved only

with measures taken at national level by States and their industries. Targets difficult to reach since the European states seem determined to maintain competitiveness and fear an increase in electricity costs.

The Commission's proposal also includes a target of 27% binding European quotas for renewable energy and an indicative target of 25% for energy savings that will be finalized in the fall. This proposal leaves Member States free to decide whether to use their reserves of shale gas. It also announces the strengthening of the market for emission allowances (ETS), the main financial instrument of the EU energy policy, with the establishment in 2021 of a permanent mechanism of reserves representing 12% of the certificates in circulation at this time.

Legislative References

- Commission regulation (EU) No 1123/2013 on determining international credit entitlements pursuant to Directive 2003/87/EC of the European Parliament and of the Council
- Commission regulation (EU) No 550/2011 on determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, certain restrictions applicable to the use of international credits from projects involving industrial gases
- Commission regulation (EU) No 601/2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council
- Commission Regulation (EU) No 920/2010 for a standardised and secured system of registries pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and of the Council
- Convention on Long-Range Trans-boundary Air Pollution
- Decision 406/2009/CE on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020
- Directive 1984/360/CEE on the combating of air pollution from industrial plants (84/360/EEC)
- Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC
- Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms Text with EEA relevance
- Directive 2008/1/EC concerning integrated pollution prevention and control
- Directive 2008/50/EC on ambient air quality and cleaner air for Europe
- Directive 2009/28/CE on the promotion of the use of energy from renewable sources
- Directive 2009/29/CE amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community
- Directive 2009/30/CE amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions
- Directive 2009/31/EC on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006
- Directive 2010/75/UE on industrial emissions (integrated pollution prevention and control) (Recast)
- IPCC Convention

- Regulation (EC) No 1005/2009 on substances that deplete the ozone layer
- Regulation CE n. 443/2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO2 emissions from light-duty vehicles
- Regulation n.1005/2009

2.2.4 Judgment on Directive ETS no. 2003/87 / EC as amended by Directive 2009/29/EC

Case: Court of Justice of the EU, October 17 2013. In Joined Cases C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11

Period of the dispute: 2011-2013

Applicants: Iberdrola SA, Gas Natural SDG SA, Endesa SA, Tarragona Power SL,

Respondent: Administración del Estado, Spain

Legal References: These requests for a preliminary ruling concern the interpretation of Article 10 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32). The requests have been made in proceedings between a number of electricity producers and the Administración del Estado (the national administration) concerning the reduction in the remuneration for electricity production.

Basic facts and objective of the action: Directive 2003/87 was transposed into the Spanish law by Law 1/2005 regulating the greenhouse gas emissions trading scheme in Spain. That law imposes an obligation on every operator of a production unit exceeding 20 MW to return, by 30 April each calendar year, a number of emission allowances equal to the total verified emissions of greenhouse gases from that installation during the preceding calendar year. For the purposes of such pay back, the operators may use both the allowances that were allocated to them for each installation under the NAP and those bought on the emission allowances market. Article 16 of Law 1/2005 provides that the allocation of allowances under the NAP 'is to be free' during the period from 2005 to 2008. Subsequently, article 2 of Royal Decree-Law 3/2006, entitled 'Greenhouse gas emission allowances under the 2006-2007 NAP', provides for the remuneration of electricity production to be reduced by an amount equivalent to the value of the emission allowances allocated free of charge to electricity producers in accordance with the 2005-2007 National Allocation Plan, during the corresponding periods.

The applicants in the main proceedings – electricity producers in Spain – brought actions before the Chamber for Contentious Administrative Proceedings of the Audiencia Nacional (High Court) for annulment of Ministerial Order ITC/3315/2007, claiming, inter alia, that the order is contrary to Directive 2003/87 as it neutralises the 'free of charge' nature of emission allowances. Those claims were dismissed by the Audiencia Nacional, which held that the order did not neutralise the 'free of charge' nature of emission allowances.

The applicants brought appeals before the Tribunal Supremo (the Supreme Court) against the judgments. The Tribunal Supremo questioned the concept of 'allocation free of charge' as used in Directive 2003/87/EC. On the one hand, it is arguable that Directive 2003/87/EC does nothing to stop Member States from precluding electricity producers from passing on in the wholesale price for electricity the cost of emission allowances allocated to them free of charge. On the other hand, according to the Tribunal Supremo, those measures could have the effect of neutralising the 'free of charge' nature of the initial allocation of emission allowances and undermining the very purpose of the scheme established by Directive 2003/87, which is to reduce greenhouse gas emissions by means of an economic incentive mechanism.

Accordingly, the Tribunal Supremo decided to suspend the proceedings and to refer the following question, which is framed in the same terms in Cases C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, to the European Court of Justice for a preliminary ruling:

'May Article 10 of Directive [2003/87] be interpreted as not preventing application of national legislative measures of the kind under review in these proceedings, the purpose and effect of which are to reduce remuneration for electricity production by an amount equivalent to the value of the [emission allowances] allocated free of charge during the relevant period?'

Results: The Court of Justice of the EU ruled that article 10 of Directive 2003/87/EC "must be interpreted as not precluding application of national legislative measures, the purpose and effect of which are to reduce remuneration for electricity production by an amount equal to the increase in such remuneration brought about through the incorporation, in the selling prices offered on the wholesale electricity market, of the value of the emission allowances allocated free of charge".

2.3 The Strategic Environmental Assessment Directive 2001/42/EC

Procedures for Strategic Environmental Assessment – SEA are an evolution of those related to Environmental Impact Assessment - EIA. EIAs assess the environmental impacts (i.e. the changes in status of environmental components) caused by certain categories of projects or activities. This means that they intervene only when decisions implying potential environmental risks may have been already taken at strategic, plan or program level. The Strategic Environmental Assessment is instead a process that acts to assess the environmental effects (the determinants, the pressures and especially environmental responses) produced from plans or programs. In general, SEA precedes but not necessarily determines EIA. The two types of evaluation act in two stages and with different aims but they are complementary. This means that the assessment of environmental effects should flow through successive approximations in all steps of the planning of a given activity.

Directive is directly connected with the Directive 2011/92/EU on Environmental Impact Assessment. The permits for projects listed in Annexes I and II may be preceded by planning tools. It is also connected with Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora as it also includes an assessment on plans that could impact on flora and fauna. Both tools are, therefore, planning tools that may have significant effects on the environment and should go through systematic environmental assessment tools. Other Directives associated (Water, Nitrates, waste, noise, air quality) are those that contain requirements for the establishment and the evaluation of plans/programs.

The Strategic Environmental Assessment is instead a process that acts to assess the environmental effects produced from plans or programs.

2.3.1 Legislative History

The SEA Directive on the assessment of the effects of certain plans and programs on the environment" aims "to ensure a high level of environment protection and contribute to the integration of environmental considerations into the preparation and adoption of plans and programs, in order to promote sustainable development".

The implementation process of Directive 2001/42/EC occurred in different times: many Member States that have a strong tradition of environmental permits' procedures, such as Denmark, Netherlands, Finland and Sweden, have ratified the SEA Directive in a very short time, while all Member States have transposed the Directive by 2009.

The European Commission periodically checks the status of implementation and the Directive‘s effectiveness. The first audit report indicates that the Commission has initiated studies to verify the conformity of the directive transposition and has conducted several infringement proceedings for incorrect transposition. Most Member States have indicated that the Strategic Environmental Assessment has helped to improve the organisation of project planning procedures. Some Member States highlighted the need for further guidance, in particular regarding the link between Strategic Environmental Assessment and Environmental Impact Assessment. In the future, the Commission could consider some changes to enhance synergies with other acts of environmental legislation and to widen the scope of the Directive (i.e. on climate change, biodiversity and risks), as in the case of the recent changes made by Directive 2014/52/EU amending EIA Directive 2011/92/EU.

In 2003, the UNECE Convention on Environmental Impact Assessment in a Transborder Context (Espoo EIA Convention) adopted in 2001 setting out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning, was complemented in 2003 by the Protocol on Systematic Environmental Assessment that, in addition to the plans and programs, is applicable to various policy instruments and legislation currently not included in the procedure of Strategic Environmental Assessment, thus creating the context for expand its application at the EU level.

2.3.2 Objectives and main actors and stakeholders involved

The SEA Directive applies to the assessment of plans and programs' environmental effects, not on policies or laws (although some of the policies expressed in the plans are evaluated and the SEA procedure can be voluntarily applied to other territorial government instruments containing policies as the "guidelines"). Another SEA fundamental purpose is to promote social participation in environmental matters during the process of plan/program, to improve the overall quality of decision-making process.

2.3.2.1 Objectives of Directive 2001/42/EC

Under Article 1 the Directive's objective is to ensure a high level of environmental protection and contribute to the integration of environmental considerations into the preparation and adoption of plans and programs that can have significant effects on the environment in order to promote sustainable development. Point 4 of the preamble explains that "environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programs […] because it ensures that such effects of implementing plans and programs are taken into account during their preparation and before their adoption". Therefore, unlike the Environmental Impact Assessment, Strategic Environmental Assessment states the concept of "sustainable development" through preventive analysis of the environmental effects not of a single project or a single work, but of the implementation of certain planning and programming instruments directed to development.

A SEA fundamental purpose is to promote social participation in environmental matters during the process of plan/program, to improve the overall quality of decision-making process.

In particular, the main objective of the SEA is to assess the environmental effects of plans or programs, before approval, during and at the end of their period of validity. This is mainly intended to overcome the lack of other partial environmental assessment procedures, introducing the examination of the environmental aspects already in the strategic phase that precedes the design and implementation of single works. Other objectives of the SEA concern the information improvement and the promotion of public participation in the planning-programming.

2.3.2.2 The Strategic Environmental Assessment: planning, sustainable development and the precautionary principle

The Strategic Environmental Assessment acts on the basis of the precautionary principle under Article 191 of Title XX – Environment of the Treaty of Lisbon, also called the Treaty on the Functioning of the EU (ex Article 174 TEC)[5].

[5] In the absence of a definition of the precautionary principle in the Treaty or in other Community acts, the Council, with 13 April 1999 resolution, asked the Commission to develop clear and effective guidelines for the principle application that led to the 2000/1 communication on the precautionary principle of 2 February 2000. The document states: "the precautionary principle is not defined in the Treaty, which prescribes it only in reference to the environment protection. The Commission believes that its scope is, in practice, much broader and extends it to human, animal and plant's health

The latter states that the Union's environment policy helps to pursue the objectives of: preserving, protecting and improving the environment; protecting human health; prudent and rational utilization of natural resources and international promotion of measures to solve environmental problems with particular attention to climate change. In pursuing these objectives, the Article 191 explicitly refers to the reconciliation of environmental protection with economic needs and therefore refers to sustainable development as described in Article 11 of the European Union Treaty, according to which "the needs of environmental protection must be integrated in the defining and implementing of the Union policies and actions, in particular with a view in promoting sustainable development". Therefore, under Article 191 TFEU, while aiming at a high level of environmental protection, it is necessary to take into account the diversity of situations in the various regions of the Union, the available scientific and technical data, the different environmental conditions in the various regions of the Union, but also the advantages and burdens which may result from the action or lack of action and socio-economic development of the Union as a whole, as well as the balanced development of its regions.

"The needs of environmental protection must be integrated in the defining and implementing of the Union policies and actions, in particular with a view in promoting sustainable development".

Environmental protection, therefore, has to be balanced with economic needs, and within these limits, it is based "on the principles of precaution and preventive action, on the principle of correction, in priority at source, environmental damage, as well as on the 'polluter pays' principle".

In general Directive 2001/42/EC acts on planning tools through which the Member State operates the geographical distribution of population and economic activities in order to pursue objectives that can be various: to homogenize the territory; accelerate or regulate the development; regulate waste management; allocate certain areas in industrial plants or agricultural activity; plan the network of roads or construction of major public works.

As plan or program, the SEA Directive intends planning tools, including those co-financed by the European Community, as well as their variations. They can be adopted and / or processed by an authority at national, regional or local level, or prepared by these authorities and then approved by legislative procedure. Alternatively, there may be plans or programs required by laws, regulations or administrative provisions.

2.3.2.3 Distinctions between Strategic Environmental Assessment and Environmental Impact Assessment

protection. The Commission highlights that the precautionary principle should be considered within a structured approach to risk analysis, including assessment, management and communication of risk, and intends to continue the discussion at European and international level. The recourse to the precautionary principle applies where scientific evidences are insufficient, inconclusive or uncertain and the scientific assessment shows that effects may be unacceptable and inconsistent with the high level of protection chosen by the European Union". The use of the principle therefore enters into the general framework of risk analysis (which includes, risk assessment, management and risk communication), and more particularly in the context of risk management that corresponds to decision-making.

As mentioned, Directive 2001/42/EC is based on the precautionary principle, and this is what distinguishes it from the Directive 2011/92/EU on the Environmental Impact Assessment based instead on the principle of prevention. The difference is that the concept of "prevention" refers to the limitation of objective and demonstrated risks, while the concept of "precaution" refers to the limitation of hypothetical risks or risks based on evidence. The precautionary principle applies to dangers already identified but to potential dangers.

From the Treaty of Lisbon reference, the precautionary principle is a principle of interpretation valid in the Member States regardless of individual Directives' transposition acts in which it is summed up by obliging competent authorities to take appropriate measures in order to prevent public health, safety and environment from potential risks. The application of this principle means that, when the risks of a potentially dangerous activity are not known with certainty, the government action results in an "early prevention" with respect to the consolidation of scientific knowledge. The precautionary principle is distinguished from principle of prevention by "putting protection before the phase of the application of the best techniques". On this concept is instead concentrated the EIA, which, by evaluating a specific project, aims also to limit the assessed impact through the application of best available techniques.

If the precautionary principle had been applied as a political tool of risk management to the first suspicions on the carcinogenicity of asbestos (dating back to the sixties), it would have prevented the excessive spread of harmful building materials that generated health damage (asbestosis and lung mesothelioma) and huge costs for subsequent decontaminations. Other sensational examples are lead and benzene (additives in gasoline), cadmium (in batteries), chlorofluorocarbons (in cooling circuits).

It is needed therefore to account for these aspects, in particular those relating to environmental and health costs as part of the cost-benefit balance instead of seeing the principle as an excessive limit to development and diffusion of new technologies.

2.3.3 Overview of main provisions and mechanisms

The concept of "prevention" refers to the limitation of objective and demonstrated risks, while the concept of "precaution" refers to the limitation of hypothetical risks or risks based on evidence.

2.3.3.1 Plans and programs subject to Strategic Environmental Assessment

As for projects in the EIA Directive, plans and programs are distinguished in the SEA Directive between those directly subject to the SEA directive and those that may be or not according to the criteria or thresholds established by individual Member States.

Under Article. 3, the first category includes all plans and programs which set the framework for the permits of projects listed in Annexes I and II of the EIA Directive and covering the areas of agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, or projects "for which, in view of the likely effect on sites, have been determined to require an assessment under Articles 6

and 7 of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora".

Annexes I and II of Directive 2011/92/EU respectively include projects for which Environmental Impact Assessment is needed and those for which such obligation can depend on criteria, thresholds or study case by case of individual Member States. Since Directive 2001/42/EC provides that the plans and programs that form the framework for the authorization of both categories of projects are subject to Strategic Environmental Assessment, it may happen that a project does not require Environmental Impact Assessment despite being part of a plan subject to Strategic Environmental Assessment.

For the following categories of plans and programs, however, it is up to the Member States to decide on their possible negative effects on the environment and if they are subject to Strategic Environmental Assessment:
- Plans and programs for which in general is expected subjection to SEA but determine the use of small areas at local level;
- Minor modifications to plans and programs expected to be subject to SEA;
- Plans and programs other than those for which the subjection to SEA is generally expected

For the types listed above, Member States may examine case by case or specify the types of plans and programs excluded from SEA or combine the two approaches to determine whether plans or programs referred to in paragraphs 3 and 4 are likely to have significant environmental effects. For this purpose it is still needed to take into account the criteria set out in Annex II of Directive 2001/42/EC to ensure that Member States can not exclude, from the application of the Directive, plans and programs with likely significant effects on the environment.

These criteria cover two aspects. Firstly, the "plan or program Features" with regard to the extent to which, on the location, nature, size and operating conditions, or with respect to the allocation of resources, the plan or program sets a framework for projects and other activities. Always with respect to the characteristics of the plan or program, should be considered: the influence of other plans and programs; the relevance for the integration of environmental considerations, in particular in order to promote sustainable development; environmental problems relevant to the plan or program; the relevance to the implementation of Community legislation on the environment (i.e. plans and programs linked to waste management or water protection).

Then there are the criteria for: the "characteristics of the effects and areas likely to be affected" with respect to probability, duration, frequency and reversibility of the effects; cumulative nature of the effects; cross-border nature of the effects; risks for human or environment health (i.e. in case of accident); magnitude and spatial extent of the effects (geographical area and the population potentially affected); the value and vulnerability of the area potentially affected due to special natural characteristics or cultural heritage, exceeded environmental quality standards or limit values, intensive land use; effects on areas or landscapes which have been recognized as national, Community or international protected areas."

The mechanisms of information, consultation and participation, aimed to guarantee transparent decision-making and the reliability of the information shall be provided by the Member States in favour of the authorities responsible for the environment and the public during the assessment of plans and programs and with adequate time to formulate opinions. In particular, Article 4 states that the environmental assessment should be carried out during the preparation of the plan or program and before the legislative procedure. Equally, at the time of the plan or program adoption, the public and the competent authorities must have information and relevant data.

The environmental report resulting from the Strategic Environmental Assessment and the opinions expressed by the public and the competent authorities have no binding effect but the Directive calls for them to be taken into account in the preparation of the plan or program prior to its adoption or before they start the legislative process. With respect to consultations, Article 6 states that the proposed plan or program, along with the environmental report prepared within the environmental assessment procedure must be made available to the public and competent environmental authorities designated by the Member States for consultation. Unlike what happens in Directive 2011/92/EU, no immediate distinction are established between "public" and "public concerned" and it seems that the limitation on the interest on environmental effects of implementing plans and program is reserved for the authorities designated by the Member States.

2.3.3.2 The Environment Report

At this point it is important to understand what is the environmental report that along with the plan or program is subject to consultations. Article 2 defines environmental report as "the part of the plan or program documentation containing the information required in Article 5 and Annex I". Already from this brief definition we understand that this is not a report in which the observations arising from the mechanisms of consultation with the public and with the competent authorities are already included. It is, instead, the result of a particular way in which the Strategic Environmental Assessment procedure has to be implemented by Member States. Unlike the Environmental Impact Assessment, it does not evaluate a given project from the outside, but fits within the various processing steps prescribing a step-by-step collection of information and data. So, the environmental report is a constituent part of the plan or program documentation. In the implementation of the Environmental Report are therefore involved the competent authorities designated by the Member State but not the public. Article 5, paragraph 4, provides that "the Authorities referred to in Article 6 shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report".

Only once the plan or program is closed and the Environmental Report is created, the consultation phase with the public and again, with the competent authorities can start. The Environmental Report is therefore the result of a series of steps by which an early stage of preparation of the plan or program the authority concerned (the one that has to write the plan or program) enters into consultation with the

competent authority and the other entities competent on environmental matters. The consultation aims to define jointly, the structure, scope and level of detail of the information to be included in the Environmental Report attached to the plan or program in relation to the objectives and the effects that its implementation could generate on the environment and to acquire data, information and specific proposals, useful for the preparation of the Environmental Report and the integration of the environmental component in the construction of the plan.

While the Strategic Environmental Assessment is structured as a procedure, the Environmental Impact Assessment is a process. The first is part of the various stages of planning or programming leaving out data and information on environmental impacts, territorial socio-economic needs, characteristics of the affected areas, alternative hypotheses, etc. The EIA intervenes directly at a later stage to the presentation of a project by a public or private proponent and is in this sense a "process" of environmental assessment to a project already formalized. Consistent with this distinction, “the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9” stated in Article 2, letter b, could be seen as a definition of 'environmental assessment'.

The Environmental Report is the result of a series of steps by which an early stage of preparation of the plan or program the authority concerned enters into consultation with the competent authority and the other entities competent on environmental matters.

Therefore, once it is established under Article 5 that a plan or program should be subject to environmental assessment, it is necessary to drawn up an Environmental Report “in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated”. It is clear that the identification of possible alternatives and the best technologies in EIA procedure of a specific project does not take place during the various phases of the project but only upon its presentation. With the SEA, the assessment is provided in the various stages of planning.

Article 5 (2), provides that "in order to avoid duplication of the assessment" the environmental report, at its various implementation stages, should take into account the "stage" in which it is inserted into the decision-making regarding the program or plan and should consider “the extent to which certain matters are more appropriately assessed at different levels in that process”. The information collected should be those reasonably required, taking account of the above, and the level of “current knowledge and methods of assessment” as well as “the contents and level of detail in the plan or programme”.

The information on which to focus the environmental report is listed in Annex I. In particular, these regard: the content and objectives of the plan or program; an evaluation of the current state of the environment and its possible evolution in the absence of plan or program; the environmental characteristics of the affected areas; the effects on the environment including issues concerning population and human health as well as biodiversity, flora, fauna, soil, water, air, climatic factors, landscape and the interaction between these factors.

The competent authorities and the public should have a real opportunity to express their opinions on both the proposed plan or program and the environmental report.

Not only the environmental aspects but also relevant connections between natural elements, human health and man-made environments have to be taken into account. The environmental report must contain:
- Measures envisaged preventing, reducing and offsetting any significant adverse effects of the plan on the environment;
- A summary in which are indicated the reasons for the choice and the assessment made with respect to possible alternatives ;
- The arrangements for monitoring in compliance with Article 10 ;
- A non-technical summary of all the information contained in the Environmental Report.

2.3.3.3 Non-technical summary and Article 10 monitoring measures

The non-technical summary is expressly required by law and must always be prepared; it is essential to encourage the public participation at decision-making. The non-technical summary shows the most important issues about the environmental effects of the plan/program under evaluation that still need to be answered.

As for the measures provided by Article 10, it must be said that, as a procedure, the Strategic Environmental Assessment is also involved in a stage following the adoption of the plan or program, therefore, unlike the EIA in which there is no provision of a monitoring following the approval and implementation of the project, the SEA requires under Article10 that " Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action".

The non-technical summary shows the most important issues about the environmental effects of the plan/program under evaluation that still need to be answered.

2.3.3.4 Public consultation and environmental effects

Once the draft plan or program, accompanied by the environmental report is ready and before their adoption or submission to the legislative procedure, Article 6 states that the competent authorities and the public should have a real opportunity to express their opinions on both the proposed plan or program and the environmental report. It is necessary to define what "public" for the purposes of Directive 2001/42/EC means. Article 2 defines public as "one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups".

The distinction between "public" and "public concerned" contained in the EIA Directive disappears. Indeed, Directive 2001/42/EC would seem to offer an opportunity to broaden the subjects qualified to express opinions in the consultation phase comparing to Directive 2011/92/EU where only concerned ones were involved. Article 6, paragraph 4, provides that Member States identify, according to the national legislation, the "public sectors" to be "included" and not only those that will be affected, even if only in a probable manner, by implementing the plan or program. The public to consult may also include sectors of the public concerned not only by the effects related to the implementation of the plan or program, but also concerned by decision-making in the observance of the

Directive, including relevant non-governmental organisations such as those promoting environmental protection and other interested organisations. This suggest that the public concerned should not only come from sectors interested in environment protection and could include non-governmental organisation in defence of health or the promotion of ecological conversion of productions.

As stated in Article 8, when the consultations are concluded, the decision making process can be started taking into account the environmental report and the opinion expressed as under Article 6 “during the preparation of the plan or programme and before its adoption or submission to the legislative procedure”. Once the decision is taken, Member States shall ensure that “when a plan or programme is adopted, the authorities referred to in Article 6, the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed: a) the plan or programme as adopted; b) a statement summarizing how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and c) the measures decided concerning monitoring in accordance with Article 10” (Article 9).

The Directive does not apply to plans and programs co-financed by the European Community, for which the environmental assessment is carried out according to specific provisions of Community law (Article11). Directive 2001/42/EC never speaks of environmental "impacts", as meant by Driving forces, Pressure, State, Impact and Response framework (DPSI[6]) as is the case of the Directive on Environmental Impact Assessment, but only of environmental "effects".

These environmental effects can be: the determining factors (drivers), like the socio-economic activities provided and relevant to the environment (such as the number of people present in a basin, or the physical extension of a settlement); pressure factors, like actions planned that can cause changes on state of environmental components (such as withdrawals of natural resources, water or gravel, emissions of polluting effluents discharged into a river). This is because, in a Strategic Environmental Assessment, given the general level of the choices to be evaluated, it is hardly possible to estimate the changes in the state of environmental quality. In SEA it is often not possible to predict the induced environmental "impacts" (which are the primary and fundamental target in the process of Environmental Impact Assessment). To assess the environmental effects is therefore necessary to study with particular attention environmental indicators, select the most significant changes from the environmental point of view, and interact with various experts and social partners to compare alternative hypotheses, apply models to predict the environmental effects.

[6] The scheme is adopted by the EEA (European Environmental Agency), in order to provide an integrated approach in the process of reporting on the state of the environment, carried out in any European or national level. It allows representing the set of elements and relations that characterize any theme or environmental phenomenon, by relating it to the set of policies pursued towards it.

Legislative References

- Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
- Directive 1992/43/CEE on the conservation of natural habitats and of wild fauna and flora
- Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
- UNECE Convention on Environmental Impact Assessment in a Transborder Context (Espoo EIA Convention)
- UNECE Protocol on Strategic environmental assessment
- The Treaty of Lisbon

2.3.4 Judgement on the SEA Directive 2001/42/EC

Case: Court of Justice of the EU, Chamber IV 20 October 2011, in case C-474/10

Period of the dispute: 2010-2011

Plaintiff: Department of the Environment for Northern Ireland

Counterpart: Seaport (NI) Ltd, Magherafelt District Council, F P McCann (Developments) Ltd, Younger Homes Ltd, Heron Brothers Ltd, G Small Contracts, Creagh Concrete Products Ltd

Normative references: The reference for a preliminary ruling concerns the interpretation of Article. 6 of the Directive of the European Parliament and of the Council of 27 June 2001 2001/42/EC on the assessment of the effects of certain plans and programs on the environment (OJ L 197, p. 30).

Facts and aim of the action: The reference has been made in proceedings between, on the one hand, the Department of the Environment for Northern Ireland and, on the other, Seaport (NI) Ltd and Magherafelt District Council, F P McCann (Developments) Ltd, Younger Homes Ltd, Heron Brothers Ltd, G Small Contracts and Creagh Concrete Products Ltd, concerning the validity of the draft plans for Northern Ireland entitled «Draft Northern Area Plan 2016» and «Draft Magherafelt Area Plan 2015».

At the time of the facts, the Department of the Environment comprised four executive agencies, each of which, under its control, was responsible for the exercise of some of its statutory powers and functions.

In particular, the statutory functions conferred by law to the Department of the Environment with regard to the establishment of regional development plans and decisions on specific applications for the issue of planning permit, were carried out by the Planning Service. The Environment and Heritage Service - EHS was instead the agency responsible for the exercise of most powers

relating to the regulation of the environment, excluding the planning.

The Planning Service started, in accordance with the national procedures in force at the time, the process, which was conducted prior to the date by which Member States were required to transpose Directive 2001/42, of preparing the «Draft Northern Area Plan 2016» and the «Draft Magherafelt Area Plan 2015». However, the two draft plans were ultimately published after the entry into force of Directive 2001/42. During the development of each draft regional plans, the Department of the Environment worked very closely with the Environment and Heritage Service in gathering relevant environmental information and seeking advice upon the proposed contents of the plans.

So, the Department of Environment, through the Planning Service and the Environment and Heritage Service, seemed to be, at the same time, the authority from which derived the proposed plans and their environmental impact assessment and the consultation procedures.

In that regard, the Court of Appeal in Northern Ireland referred to the Court of Justice of the EU a question to determine whether the Directive 2001/42/EC must be interpreted as meaning that a Member State may refuse to appoint, under Article 6 (3) of Directive 2001/42/EC, an authority that has to be consulted for the purposes of Articles 5 and 6 of the Directive, when the national authority who prepare a plan, falling within Article 3 of the Directive, also holds overall responsibility for environmental matters.

It was also ask to determine if, in this case, the obligation to ensure that there is an advisory body to be designated by the competent authority other than for the preparation of plans and programs loomed on the Member State.

Results: The judgment states that, when a single authority is designated under Article 6 (3) of Directive 2001/42, this provision does not require that another advisory authority under that provision is created or designated, provided that, in the Authority usually responsible for the consultation on the environment and designated for this purpose, a functional separation is organised to ensure real autonomy, administrative and human resources and that the tasks assigned to the advisory authority under Article 6 (3) of Directive 2001/42/EC are carried out in order to provide an objective opinion on the plan or program envisaged by the authority from which they arise.

2.4 Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

The term "effect" emphasizes the impact that an action (anthropogenic or natural) produces on an environmental or human target. In broad terms, environmental effects are to be understood as changes to individual components or whole environmental systems, produced by external interventions. The EU legislation contextualizes all the implications and relations between the existing environmental legislative tools and emphasizes the preventive character of environmental law.

The EIA is a technical and administrative procedure designed as a decision support tool aiming to analyse significant environmental impacts produced by certain projects and to dictate appropriate solutions to ensure that projects are compatible with the environmental context in which they are located. The EIA process ends with the enactment of EIA measure, issued by the competent authority and including all necessary requirements to mitigate the effects of the implementation of a project.

In those cases where the impact on the environment is assessed as too burdensome and where the project is not leading to substantial benefits for the community, the EIA procedure may end with a negative EIA measure, preventing the development of the project. Within the EIA procedure, the evaluation of the environmental compatibility of a given project is carried out by the competent public authority which bases its decisions on the information provided by the project's proponent, on technical advice and on the inputs provided by all relevant stakeholders and social groups.

The EIA is a technical and administrative procedure designed as a decision support tool aiming to analyse significant environmental impacts produced by certain projects and to dictate appropriate solutions to ensure that projects are compatible with the environmental context in which they are located.

2.4.1 Legislative History

The first legislation to address the need for a national assessment of the environmental impacts of facilities connected to production activities or major projects was enacted in the US in the late '60s. The “Environmental Impact Assessment” introduced the first forms of control over all activities interacting with the environment (both directly and indirectly), through the use of mechanisms and procedures useful to predict and assess the consequences of specific operations.

In 1969, the National Environmental Policy Act (NEPA), art. 102, introduced in the United State of America a procedure of environmental impact assessment for any significant initiative that fell within the competence of the Federal Agencies and the Environmental Protection Agency and a “Council on Environmental Quality” was established. In 1978 an implementing regulation providing for a mandatory EIA process for all public or publicly funded projects was approved - "Regulations for Implementing the Procedural Previsions of NEPA". According to these regulations, environmental impact studies must be issued by a competent authority and should consist of two acts: the environmental impact assessment and the final authorization for the construction of the project. The EU then adopted the same structure in its legislation.

In 1976, law n. 76-629 on the protection of the environment was enacted in France. This law has the characteristic of introducing three different levels of evaluation: environmental studies, notices of impact and impact studies.

In 1977, the European Community adopts the US regulatory approach, indicating among the aims of its Second Environmental Action Programme the need to establish rules to analyse the impact that the implementation of certain projects may have on environmental resources in order to carry out an effective preventive action.

The first Directive on the subject is Directive 85/337/EEC of 27 June 1985 on the environmental impact assessment of specific public and private projects. Subsequently, in 1991 in Espoo, Finland, the UN Convention on Environmental Impact Studies in Transborder Contexts was adopted and signed by the European Community with the aim to adopt specific mechanisms in order to assess the impact of activities that may produce environmental implications in more than one country. The European Council EU then adopted Directive 1997/11/EC amending Directive 85/337/EEC with the scope to complete and improve the rules for EIA procedures introduced by the former Directive.

Directive 85/337/EEC has been further integrated by Directive 2003/35/EC, with regard to issues related to public participation, and by Directive 2009/31/EC extending the application of the EIA process also to include the transport and capture and storage of CO2. Finally, Directive 2011/92/EU of 13 December 2011 repealed Directive 85/337/EEC with the purpose to encode all recent amendments in a single text (Benacci, 2014). Further changes have been introduced by the most recent Directive 2014/52/EU.

2.4.2 Objectives and main actors and stakeholders involved

2.4.2.1 Obligations for Member States, competent authorities and developers

As for the projects listed in Annex I, in accordance with art.5, project developers (i.e. “the applicant for authorisation for a private project or the public authority which initiates a project”) must provide the information specified in Annex IV[7] “in an appropriate form” whenever requested by their Member State, that shall adopt all necessary measures to ensure that this information is correctly provided. Member States can practically deprive the developer of its power to "self-certificate". Competent authorities, defined I Article 1 as “that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive”, can give their opinion on the information provided by the developer if the latter requests it but also in response to the request of a Member State, “irrespective of whether the developer so requests”. Art.6 further provides that Member States must determine the consultation procedures and designate the authorities to be consulted and to whom the information provided by the developers in accordance with Article 5 must be addressed. By virtue of their environmental competences, competent authorities can express their opinion on the information received and on the request of authorization.

An "environmental impact" is a "relevant" or "significant" effect on the environment quality caused by an event, an action or behaviour.

2.4.2.2 Public consultation, information and participation procedures

[7] The information to be provided by the developer in accordance with paragraph 1 shall include at least: (a) a description of the project comprising information on the site, design and size of the project; (b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects; (c) the data required to identify and assess the main effects which the project is likely to have on the environment; (d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects; (e) a non-technical summary of the information referred to in points (a) to (d).

Alongside the stages of gathering information on the client, consulting the competent authorities and collecting opinions and studies prepared by them, Article. 6, paragraph 2, establishes the "modality of public consultation."

The art.1 distinguishes between ‘the public’, which means “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups”, and ‘the public concerned’, which means, instead, “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”. This mark a difference between the generality of citizens, considered as individuals or in their social organisations ("public") and those directly affected by the potential effects of the project.

According to the Directive, the Member States have the obligation to guarantee the ‘public’ a timely access to the information, while, in addition to that, appropriate forms of consultation and participation in the environmental decision-making is ‘public concerned’ material only.

Art. 6, paragraph 2, also recognizes the ‘public’ the right to be informed promptly about questions regarding the application for authorisation, the subjugation of the project to an environmental impact assessment procedure, the competent authorities responsible for taking the decision, an indication of the times and places where they can be obtained such information and means by which they are made available, the precise modalities of the participation of the public concerned.

According to the art. 9, the competent authorities must guarantee the ‘public’ the following information regarding: the decision and conditions attached to the adoption or the refusal of the authorization, the reasons and considerations on which it is based and the description of the main measures to avoid and reduce the major adverse effects.

To the "public concerned" are guaranteed, instead, broader access rights to "any" information collected, like those hidden from the "public" but are relevant to the decision and that, according to the art. 8, must be taken into consideration in the consent procedure. This one is defined as a "decision of the competent authority, which gives the buyer the right to implement the project", so the distinction between the EIA process and the act of consent for the project is clear. The EIA Directive intervenes only indirectly on consent procedures, it sets the general principles of environmental impact assessment and through them trying to complete and coordinate procedures for the consent of public and private project. Reserved to the ‘public concerned’ are also the opportunity of participation to the in environmental decision-making procedures and the right to express comments and opinions to the competent authority before the decision is made.

2.4.2.3 "Public" and "public concerned": the different rights of access to information and participation provided in Directive 2011/92/EU and 2003/4/EU

At this point a discrepancy about the amount of information that should be provided to the 'public concerned' emerges. According to the Directive 2011/92/EU, art. 6, paragraph 3, letter. c), which refers to art. 1 of the Directive 2003/4/EC of the European Parliament, it seems no distinction is made between "public" and "public concerned" and it establishes the goal of guaranteeing the basic conditions for the exercise of the right of access to environmental information held by the public authority or on behalf of it and make it available to the "public" and spread it so as to ensure "the widest possible systematic availability and dissemination".

Environmental impacts of public or private projects are the execution of construction works or of other installations or schemes as well as other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.

2.4.3 Overview of main provisions and mechanisms

2.4.3.1 Aims of the EIA procedure

It is noteworthy to mention that, according to the EIA Directive in all its versions, an "environmental impact" is to be understood as a "relevant" or "significant" effect on the quality of the environment (taking into account not only the natural environment but also man-made environment), caused by an event, an action or a behaviour. The goal then is to show what changes in the environmental conditions can be produced by anthropogenic actions and pressures. Directive 2011/92/EU requires all projects that produce an "important", "relevant" or "significant" but not necessarily "negative" impact on the environment to be subject to the EIA procedure. This means that all changes that a project can produce on the environment must be estimated, also in those cases where these effects are expected to be positive.

2.4.3.2 Projects subject of the EIA Directive

Directive 2011/92/EU deals with the assessment of the environmental impacts of specific public or private projects, defining these in art.1 as the execution of construction works or of other installations or schemes" as well as "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".

According to the approach of the Directive, it is possible to distinguish between two categories of projects: those that have "significant repercussions on the environment" and should be always evaluated on principle and those that are having supposedly no significant impact, shall be subject to assessment only if Member States consider them likely to have significant effects on the environment (preamble, paragraph 9). For this second category of projects, Member States may set thresholds or criteria in accordance with the principle of subsidiarity, to determine which projects should be subject to the assessment.

Art. 2 thus establishes that, before granting a project with consent to proceed, those projects that by virtue of their nature, size and location, have a significant environmental impact must obtain an authorization and be subject to an environmental impact assessment. These projects are listed in Annex I of the Directive. Annex II instead, lists all those projects for which Member States may determine whether or not to apply the EIA procedure, even if the potential environmental impact of several activities listed in Annex II is difficult to be ignored. To this end, Member States may either examine projects case-by-case or establish general thresholds or criteria or, finally, apply both procedures together.

For the latter kind of projects, in Annex III the Directive establishes the selection criteria that Member States must take into account in the examination of single projects or when setting general thresholds or criteria. These selection criteria refer to:
- the "characteristics of the projects": size, cumulation with other projects, waste production, pollution, risk of accidents with respect to which substances and technologies are used.
- the "location of projects": the "environmental sensitivity" of geographical areas likely to be affected by projects must be taken into account, and in particular: a) the land use in the territory of the project; b) the relative abundance, quality and regenerative capacity of natural resources present in the area; c) the ability of the natural environment.
- the "characteristics of the potential impact", taking into account the 2 previous criteria, the potentially relevant effects of each project must be assessed highlighting: a) the extent of the impact by region and of the affected population; b) the cross-border nature of the impact; c) the magnitude and complexity of the impact; d) its chances to occur, the duration, frequency and reversibility.

Under Art. 2, par. 4, in exceptional cases Member States may exempt all or part of a project listed in Annex I of the EIA provisions. In such cases Member States must consider other forms of assessment, making all information obtained under the other forms of assessment referred to above available to the public concerned and providing a justification for the decision to exempt the project. Prior to giving consent to the implementation of a project, Member States must inform the Commission of the reasons justifying the exemption and provide all necessary information.

2.4.3.3 Directive 2011/92/EU: access to information and health protection

As by the Directive's preamble, the participatory process allows the public to "express opinions and concerns that may be relevant" for the decisions" and that may be taken “into account by those who are responsible for their adoption" and to increase "the responsibility and transparency of the decision-making process" and promote "public awareness of environmental issues and support for the decisions taken".

On the participation matter, the Directive recalls the “Aarhus Convention”, signed by the European Community June 25, 1998 and ratified on 17 February 2005, and the articles 6 and 9. The Article. 6 inspired the Directive 2011/92/EU in the division between the projects for which the environmental impact assessment has to be

applied in any case and those for which the decision is reserved to the States. The 'public concerned' is, again, the only one that can access to information and to the provisions on participation.

The Article. 9 relates to the procedures designed to challenge the substantive or procedural legality of decisions, acts or omissions subjected to the public participation and contained in the article 6. It is recognized to the "public" the right to access to an appeal procedure before a Court of law if it is believed that its request for information [...] has been ignored, wrongfully refused wholly or in part, or if it has not received an appropriate response. Only the "public concerned" has the "access to a complaint procedure [...] to challenge the substantive or procedural legality of decisions subjected to the provisions of the Article 6".

In the Convention, the public has the right to participate to the environmental decision-making solely to "contribute to protect the right to live in an environment that can ensure the health and the well-being of every person." The purpose of jointly pursuing the goal of environmental protection and quality of life, only appears in some parts of the preamble of the Directive 2011/92/EU. The 14th paragraph, for example, states that "the effects of a project on the environment should be evaluated to protect human health", but it does not appear elsewhere in the Directive 2011/92/EU. Only weakly, art. 3 can be attributed to that purpose, by establishing that the environmental impact assessment also evaluates the effects of a project on human life.

An "environmental impact" is a "relevant" or "significant" effect on the environment quality caused by an event, an action or behaviour.

2.4.3.4 The new EIA Directive 2014/52/EU

On May 16th 2014, the new Directive 2014/52/EU containing amendments to Directive 2011/92/EU came into force and will need to be transposed by Member States by May 16th 2017. In accordance with art. 3 of the new Directive, art. 4 of Directive 2011/92/EU will continue to be valid for all those projects subject to an EIA procedure initiated before the deadline for the transposal of the new Directive, while Articles 3 and 5 to 11 of Directive 2011/92/EU will be applied only if the procedure for the opinion of art. 5, par. 2 or the information as listed in Art. 5, Par. 1., have been initiated and provided prior to May 16, 2017. The new Directive is composed of 5 Articles, each explaining in detail all changes applied to the former Directive. Several amendments seem to effectively address Directive 2011/92/EU's main critical issues.

Compared to what was said above about the lack of consideration of human health, Directive 2014/52/EU quotes explicitly "human health" which is also listed on the first place among the factors for which the 'significant effects' of a project need to be identified, described and evaluated. Another improvement is made with the reference to the effects on a "population". It also includes the 'biodiversity' factor.

Fundamental is the insertion made to art. 1, paragraph 2 with the definition of "Environmental Impact Assessment". At first, it defines the nature of the "process" of the Environmental Impact Assessment, an element that distinguishes it from the

Integrated Environmental Assessment, which has a procedural nature. This process includes:
- the preparation of a report on environmental impact assessment by the developer (Article 5, paragraphs 1 and 2);
- the conduct of consultation processes according to the Article 6 and, where relevant, to Article 7;
- the examination, by the competent authority, of the information presented in the environmental impact assessment and of any other additional information provided, if necessary, by the developer in accordance with Article 5, paragraph 3, as well as all other relevant information received in the framework of the consultations under Articles 6 and 7;
- a reasoned conclusion of the competent authority regarding the significant effects of the project on the environment, which takes into account the results of the examination of information and, where applicable, additional examination; and
- an integration of the reasoned conclusion of the competent authority in all the decisions referred to the Article 8 bis.

Compared to the Directive 2011/92/EU, the new process of environmental impact assessment includes a new document, the Environmental Impact Statement, whose content is established by paragraphs 1 and 2 of the new version of the art. 5 of the Directive 2011/92/EU, as amended by the art. 1 point 5 of the Directive 2014/52/EU.

Previous art. 5 listed the minimum information that the developer was required to provide for projects subject to the Environmental Impact Assessment. More precise information, listed in the attachment IV, were instead required only if appropriate for the consent procedure. The new version of article 5 lists more precisely the information to include in the EIA report. The most significant changes are made in the "additional information" listed in the attachment IV, now mandatory and no longer subjected to conditions, such as those in the "description of the project": the location, the energy requirements, the natural resources employed, the waste produced during the phases of construction and operation. It is also important the inclusion of the “description of the likely significant effects on the factors specified in Article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transborder, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project.”

Directive 2014/52/EU establishes a new process of environmental impact assessment and includes the Environmental Impact Statement.

If the developer requests it, the competent authority shall give an opinion on the scope and the level of details on the information to be included in the environmental assessment report. Member States may request an opinion from the competent authorities even if the developer has not requested it. When the developer or the Member State requests said opinion, the Environmental Impact Statement must be based on it.

Art. 6 establishes a minimum time of 30 days to consult a public inquiry about the Environmental Impact Statement. The integration of the art. 8 bis establishes that the competent authority is obliged to ensure that, when adopting a decision, the

results of examination of the information presented in the report are still relevant at the time.

This Directive does not have to be applied to projects whose only purpose is responding to emergencies involving civil protection. For projects listed in the attachment II, for which is up to the Member States decide the liability to environmental impact assessment, fundamental is the new version of the article. 4, which states that among the selection criteria listed in the attachment III, only the 'relevant' ones are taken into account.

Paragraphs 5 and 6 are added to the art. 4 and they establish the competent authority determination procedure. The developer provides the information on the characteristics of the project and its likely significant effects on the environment. The competent authority issues a determination based on the information provided by the developer, such determination shall be made public, and determines whether the environmental impact assessment is needed or not for the project subject, specifying the reasons in both cases.

Among the new features included in the new attachment III, there are the new letters f) and g). The first relates to the risk of serious injury and/or natural disasters related to the project in question. In the letter g), instead, the risks to human health are mentioned again.

By inserting the art. 9 bis, the Member States shall ensure that the competent authority fulfil its duties according to the Directive objectively and do not find themselves in a situation that can lead to a conflict of interest. If the competent authority coincides with the developer, the Member States shall ensure at least to separate appropriately the conflicting functions related to the performance of their duties according to this Directive. The Article. 1, point 13 of the Directive 2014/52/EU also inserts the art. 10a according to which Member States set penalties applicable due to infringements of the national provisions applying to the Directive.

Legislative References

- Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment
- Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006
- Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
- Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance
- Directive n. 1985/337/EEC on the Environmental Impact Assessment of certain public and private projects
- Directive n. 2003/35/EC providing for public participation in the drawing up of certain plans and programs relating to the environment and amending Council Directives 85/337 / EEC and 96/61 / EC relating to public participation and access to justice
- The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).
- United-States' National Environmental Policy Act (NEPA)
- Council Directive 1997/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment
- Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information

2.4.4 Judgment on the EIA Directive 2011/92/EU

Case: EU Court of Justice, Sec. IV 1 March 2013, in Case C-420/11

Period of the dispute: 2011-2013

Applicant: Jutta Leth

Counterpart: Republic of Austria

Normative References: Article 3 of the Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects, as amended by the Directives COUNCIL Directive 97/11/EC of 3 March 1997, and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003.

Fact and object of the appeal: The decision was originated by an appeal filed by the owner of a property located in the security perimeter of the airport of Vienna-Schwechat. The owner asked, on one hand, a compensation of € 120,000 for the decrease in the value of her real estate, in particular because of the aircraft noise, and on the other hand, the recognition of responsibility for future prejudices - such as damage to her own health - due to a late and incomplete application of Directives 85/337, 97/11 and 2003/35, and consequent to the lack of environmental impact assessment at the time of the release of the permits concerning the infrastructure renewal of the airport of Vienna-Schwechat.

At first, the woman's claim is dismissed, but then the Vienna Court of Justice (Oberlandesgericht Wien) recognises the non-prescription of the application for a declaration of responsibility for the future prejudices. The revision of the case identified the need for the EU Court of Justice's interpretation on whether the EIA was also meant to protect individuals against financial losses caused by the decrease in the value of their property.

Result: The European Court of Justice, with the judgment of 14 March 2013, n. C-420/011, ruled that Article 3 of the Directive 85/337/EC does not include the assessment of the impact of the project on the value of material goods.

Even though a property damage, if a direct economic consequence of the environmental impact of a proposed public or private project, is indeed part of the Directive, generally the violation of the provisions of the Directive itself does not confer the right to an individual compensation.

2.5 Integrated Pollution Prevention and Control Directive 2010/75/EU on industrial emissions

2.5.1 Legislative History

Directive 1996/61/EC of the Council of the European Union concerning Integrated Pollution Prevention and Control (IPPC) introduced in Europe the legislation on Integrated Environmental Permits. With this measure was introduced that all industrial and agricultural activities with a high pollution potential should adopt integrated permit and respect some minimum requirements, in particular with regard to emissions of pollutants in different environmental matrices.

The innovation introduced by the Directive 1996/61/EC is to overcome different approaches to controlling emissions into air, water or soil, believing that they can encourage the transfer of pollution from one another.

The innovation introduced by the Directive 1996/61/EC is to overcome different approaches to controlling emissions into air, water or soil, believing that they can encourage the transfer of pollution from one another. With the "integrated approach" emissions from the most polluting plants in different environmental matrices are jointly taken into account.

At the European level, the approach based on various "sectorial" permits (i.e. permissions to atmospheric emissions, discharge authorizations, disposal facilities and recovery of waste, etc.) governed by individual regulatory measures is abandoned in favour of one measure gathering the previous ones.

The integrated approach requires taking into account, in the assessment of the impacts of a complex IPPC, the so-called cross-media effects, in order to prevent and control in a coordinated manner the various forms of pollution. The term "cross effect" is used to describe the effects of more complex environmental pollution cases, in particular in order to assess the effect due to multiple pollutants that can and / or are released in one or more receiving bodies.

Atmospheric emissions from installations subject to integrated environmental authorization represent a significant share of total emissions of key pollutants annually released into air, water and soil, far exceeding the limits set out in the Community Strategy on air pollution. With this in mind, in 2007, started a review work of Community legislation on industrial emissions, with the aim of merging into a single legal text seven Directives.

In 2008, with the Directive 2008/1/EC concerning Integrated Pollution Prevention and Control was intended to coordinate in a single measure the amendments made over the years to the 1996 Directive. Are so unified in a single text: Directives 78/176/EEC, 82/883/EEC and directive 92/112/EEC from the Council of the European Union, all regulating the waste production, the supervision and monitoring of environments concerned by waste, and the reduction pollution of titanium dioxide industry; Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control ("IPPC"); Directive 1999/13/EC on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations; Directive 2000/76/EC on the incineration of waste; Directive 2001/80/EC on the limitation of emissions of

certain pollutants from large combustion plants. Later, Directive 2010/75/EU was approved and introduced important changes regarding integrated environmental permits.

2.5.2 Objectives and main actors and stakeholders involved

2.5.2.1 Objectives and activities involved

Directive 2010/75/EU regulates the industrial pollution integrated prevention and control with the objective to avoid or reduce the production of waste, join the elimination or, if not possible, to reduce pollution from industrial activities.

Directive 2010/75/EU regulates the industrial pollution integrated prevention and control with the objective to avoid or reduce the production of waste, join the elimination or, if not possible, to reduce pollution from industrial activities.

The Directive applies to industrial activities referred to in Chapters II (Provisions for activities listed in Annex I) to VI (Special provisions for waste incineration plants and waste co-incineration plants), while it does not apply for research, development or testing of new products and processes (art. 2).

In particular, Chapter II concerns the rules applicable to the activities listed in Annex I, divided into: energy activities; production and processing of metals; mineral products industry; chemical industry; waste management; other activities[8]. In Chapter III, can be find the "Special provisions for combustion plants" defined as “any technical apparatus in which fuels are oxidised in order to use the heat thus generated” (art. 3, (25)). Chapter IV provides special provisions for incineration and co-incineration of waste plants. The first are defined as “any stationary or mobile technical unit and equipment dedicated to the thermal treatment of waste, with or without recovery of the combustion heat generated, through the incineration by oxidation of waste as well as other thermal treatment processes, such as pyrolysis, gasification or plasma process, if the substances resulting from the treatment are subsequently incinerated” (art. 3, (40)).

The meaning of "waste co-incineration plant “ lies in “any stationary or mobile technical unit whose main purpose is the generation of energy or production of material products and which uses waste as a regular or additional fuel or in which waste is thermally treated for the purpose of disposal through the incineration by oxidation of waste as well as other thermal treatment processes, such as

[8] Including: i) industrial plants for the production of pulp from timber or other fibrous material and industrial plants for the manufacture of paper and paperboard; ii) systems for the pretreatment or dyeing of textile fibers; iii) facilities for the tanning of leather; iv) slaughterhouses, processing facilities intended for the production of food products from animal or vegetable raw materials and treatment and processing of milk; v) installations for the disposal or recycling of carcass and animal waste; vi) installations for the intensive rearing of poultry or pigs; vii) equipment for the surface treatment of materials, objects or products using organic solvents; viii) plants for the production of hard coal or graphite for electronic use by burning or graphitization.

pyrolysis, gasification or plasma process, if the substances resulting from the treatment are subsequently incinerated" (art. 3, (41)).

Chapter V, includes special provisions for installations and activities using organic solvents while Chapter VI concerns provisions for installations producing titanium dioxide.

Under Article 4, the Member States have a duty to take the necessary measures to ensure that no installation, no combustion plant, incineration or co-incineration of waste plants, as defined under Article 3, operate without a permit. By permit, Article 3 means the written document authorising the operation all or in part of an installation or a part of this, or of a combustion, incineration or co-incineration of waste plant. By installation, the directive intends "a stationary technical unit within which one or more activities listed in Annex I or in Part 1 of Annex VII are carried out, and any other directly associated activities on the same site which have a technical connection with the activities listed in those Annexes and which could have an effect on emissions and pollution" (art. 3, (3)).

Directive 75/2010/EU imposes however certain measures to enable the communication, mitigation and prevention of environmental damage.

2.5.2.2 Obligations and responsibilities of the operator

Regarding the possibility of accidents or mishap the Directive says nothing regarding the environmental responsibilities and damage prevention, referring, instead, to Directive 2004/35/EC establishing a general framework on these issues based on the "polluter pays" principle and on prevention and repair of the damage.

Directive 75/2010/EU imposes however certain measures to enable the communication, mitigation and prevention of environmental damage mechanisms. The operator is so obliged to inform the competent authority and to take the necessary measures to limit the environmental consequences and prevent further incidents, as well as the obligation to provide internal rules to the Member States to enable the competent authority to require an operator the adoption of additional measures to those taken by the operator himself.

Clearly the failure in complying with these rules may have legal consequences for the operator. Firstly, because by not notifying the competent authority the accident or incident and not taking the necessary measures to limit or prevent the environmental consequences entail switching from an accidental to cognizant pollution and, therefore, directly subject to the application of the "polluter pays" principle. Secondly, the Directive 2004/35/EC, under art. 3, applies to upcoming environmental damage caused or threatened by one of the activities listed within its Annex III. These include, in fact, the operation of installations subject to authorization under Directive 96/61/EC on integrated pollution prevention and incorporated in Directive 2010/75/EU.

2.5.2.3 Non compliance and health protection

Important provisions are found under Article 8 with respect to the ability to suspend the exercise of a given installation, incineration or co-incineration plants when violations of the permit conditions representing an immediate danger or threat to human health or able to cause serious and immediate repercussions on the environment are verified. Two observations on this article's provision can be made.

Firstly, suspension is not provided until any threat to health and the environment is eliminated but until a) the operator has taken the necessary measures to ensure the restoration of compliance with permit conditions and b) the competent authority requires the operator to take appropriate additional measures. It is well understood that the adoption of measures by the operator and the competent authority and the restoration of compliance with the permit does not imply that any threat of harm to the environment or human health have been eliminated, especially if prolonged non-compliance of emission resulted in an accumulation of pollutants in environmental matrices.

Secondly, the reference to the need of the dangers to human health and environmental effects connoted as "immediate" raises concerns because the majority of health and environmental problems related to the exercise of the activities ruled by Directive 2010/75/EU does not occur immediately but is the result of prolonged exposure of the environment and health to contaminants.

2.5.2.4 Carbon dioxide emissions

With respect to carbon dioxide emissions an exception to the provisions of Directive 2010/75/EU is established in favour of the application of Directive 2003/87/EC establishing a scheme for greenhouse gas emissions trading within the Community. In the event that the emissions of greenhouse gas come from installations for which the Directive 2003/87/EC sets the limits in Annex I, the permit under Directive 2010/75/EU contains limit values for emissions only if it is essential to avoid local pollution.

Equally for the activities listed in Annex I of the Directive 2003/87/EC, Member States may decide not to impose requirements for energy efficiency provided in Directive 2010/75/EU regarding the combustion units or other units emitting carbon dioxide on site. These are activities such as energy, combustion installations with a rated thermal input exceeding 20 MW (excluding plants for hazardous or municipal waste), oil refineries, coking plants, ferrous metals production and processing.

This implies the application of different principles from those on which the Directive 2010/75/EU is based, because Directive 2003/87/EC is not concerned with the integrated pollution prevention and control but with the establishment of a system for the greenhouse gas emissions trading. Also while the limits imposed in the IPPC directive's permits have as a reference the respect of a comparison between the environmental benefits and economic costs, Directive 2003/87/EC provides for "validity criteria in terms of cost and economic efficiency."

Installations can be suspended when violations of the permit conditions representing an immediate danger or threat to human health or able to cause serious and immediate repercussions on the environment are verified.

2.5.3 Overview of main provisions and mechanisms

2.5.3.1 Changes introduced by Directive 2010/75/EU

Chapter II of Directive 2010/75/EU provides the structure of the integrated pollution prevention and control system. It is therefore necessary to emphasize that such a system concerns certain categories of specific activities listed in Annex I of Directive 2010/75/EU that introduced changes with respect to the provisions of Directive 2008/01/EC.

On one hand, Annex I was amended by extending the scope of the IPPC regulations in some activities. These include, for example, gasification and liquefaction of fuels other than coal, in installations with a total rated thermal input equal to or greater than 20MW; the capture of CO2 streams from installations covered by this Directive for the purposes of geological storage in accordance with Directive 2009/31/EC; independent treatment operations of waste water not covered by Directive 91/271/EEC and discharged by an installation under Chapter II. On the other hand, Directive 2010/75/EU excludes from the scope of the IPPC regulations activities previously subjected to it.

The conditions of permits are expanded. In particular, it is stated that, in addition to the limit values for pollutants and provisions to ensure the protection of soil and groundwater, as well as to manage the waste generated by the installation, environmental permits must include: suitable requirements of emission control, the obligation of communicate to the competent authority regularly, at least once a year, information on the results of emissions monitoring and a summary of the results “of emission monitoring which allows a comparison with the emission levels associated with the best available techniques”, "appropriate requirements for the regular maintenance and surveillance of measures taken to prevent emissions to soil and groundwater” and "conditions for assessing compliance with the emission limit values or a reference to the applicable requirements specified elsewhere".

The possibility for the competent authority to determine, in specific cases, "less strict emission limit values" is provided, stating that this exemption "may apply only where an assessment shows that the achievement of emission levels associated with the best available techniques as described in BAT conclusions would lead to disproportionately higher costs compared to the environmental benefits due to the geographical location or the local environmental conditions of the installation concerned or the technical characteristics of the installation concerned”.

The duration of temporary derogations that the competent authority may allow for the testing and use of "emerging techniques” is extended from 6 to 9 months. In the 2008 Directive, the forecast for exemption was reserved in case of submission of a "rehabilitation plan approved by the competent authority" to allow "to reduce

pollution". Two articles devoted to "monitoring requirements" and "environmental inspections" are inserted.

An article is inserted on the conditions of the permit to apply to the "site closure", with the obligation to submit, in cases of intended use, production or release of hazardous substances and, in view of the possibility of contamination of soil and groundwater at the site of the installation, a "baseline report before starting operation of an installation" containing "the information necessary to determine the state of soil and groundwater contamination" in order to make a comparison in quantitative terms with the state of the environmental matrices upon definitive cessation of activities.

2.5.3.2 The Integrated Pollution Prevention and Control system

Currently, the legislation on integrated environmental permits provides the application of the principle of integrated pollution control on activities listed in Annex I. In this annex there are some installations to which is associated a threshold and the other for which that threshold is not defined.

Hence, the system of integrated pollution prevention applies to activities with larger dimensions than the threshold defined in Annex I except for the following types of systems subject to the issue of integrated environmental authorization regardless of size: coking plants, coal gasification and liquefaction plants, mineral roasting or sintering of metal minerals including sulphide ore plants, plants for the production of non-ferrous crude metals from ore, also concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes; installations for the production of asbestos and the manufacture of asbestos products; chemical industry; industrial equipment for the manufacture of pulp from timber or other fibrous materials; installations for the manufacture of carbon or graphite for electrical use by burning or graphitisation.

For all other installations, Annex I sets out a system of thresholds, beyond which EIA is required. Such a system of thresholds refers to the potential pollution of the system according to its productive capacity, not to the real pollution produced. This should be kept in mind, because, beyond the capacity derived from the properties of a given plant, the pollution actually produced may be lower or higher than expected, depending on technological limits or choices of plant management.

For activities listed in Annex I, Article 11 states that Member States shall take the necessary measures in order to impose a management compliant with: the principles of pollution prevention; application of best available techniques; prevention of waste production in accordance with Directive 2008/98/EC concerning the protection of the environment and human health by preventing or reducing the negative impacts of the production and waste management; energy efficiency; accident prevention and mitigation. High importance has art. 11 letter h provision which requires the operator to avoid any pollution risk, once the activities are ceased, as well as their obligation to restore the site to the "satisfactory state".

To understand what is meant by "satisfactory" we refer to Article 22 provisions on the protection of the state of the site on which the plant operates.

Before updating a permit where the activity involved uses, produces or releases hazardous substances and taking into account the possibility of local contamination of soil and groundwater, the operator must process and provide the competent authority with a baseline report on the state of soil and groundwater contamination.

2.5.3.4 The baseline report on the state of soil and groundwater contamination

Article 22, paragraph 1, of Directive 2010/75/ EU on industrial emissions states that “without prejudice to Directive 2000/60/EC, Directive2004/35/EC, Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration OJ L 372, 27.12.2006, p. 19. and to relevant Union law on soil protection, the competent authority shall set permit conditions to ensure compliance with paragraphs 3and 4 of this Article upon definitive cessation of activities”.

In particular, paragraph 2 provides that, before updating a permit where the activity involved uses, produces or releases hazardous substances, and taking into account the possibility of local contamination of soil and groundwater, the operator processes and provides the competent authority a baseline report on the state of soil and groundwater contamination, which will be used to make a quantitative comparison with the state upon definitive cessation of activities.

The "quantified comparison" (Article 22, paragraph 2, second comma) requires that data related to the scope and state of contamination enable comparison between the situation described in the baseline report and the findings at the time of final cessation of activities. Therefore a purely qualitative comparison is excluded. It is in the operator interest to ensure that the state of soil and groundwater contamination described in the report is sufficiently detailed, as this information will be used to determine the contamination attributable to the exercise of the installation concerned from the moment it was established the reference level.

Under Article, 12 permit applications must include the description of: “a) the installation and its activities; b) the raw and auxiliary materials, other substances and the energy used in or generated by the installation; c) the sources of emissions from the installation; d) the conditions of the site of the installation; e) where applicable, a baseline report in accordance with Article 22; f) the nature and quantities of foreseeable emissions from the installation into each medium as well as identification of significant effects of the emissions on the environment; g) the proposed technology and other techniques for preventing or, where this is not possible, reducing emissions from the installation; h) measures for the prevention, preparation for re-use, recycling and recovery of waste generated by the installation; i) further measures planned to comply with the general principles of the basic obligations of the operator as provided for in Article 11; j) measures planned to monitor emissions into the environment; k) the main alternatives to the proposed technology, techniques and measures studied by the applicant in outline. An application for a permit shall also include a non-technical summary of the details referred to in the first subparagraph”.

In particular, the combined reading of the subparagraphs d (the conditions of the site of the installation) and e (where applicable, a baseline report in accordance with Article 22, paragraph 2), suggests that the "baseline report" is required only if the activity involves the use, production and discharge of hazardous substances and the possibility of contamination of the site's soil and groundwater.

Upon termination of the activity, the "satisfactory state" that the operator is required to restore can be determined in two ways. If a "baseline report" is due, the operator will be required to restore the conditions of soil and groundwater contamination at levels set out in the report. It is the same operator who must recognise that the installation has caused significant pollution of soil or groundwater compared to the state shown in the baseline report. The operator shall take the necessary measures to address pollution so as to return the site to its initial state, taking into account the technical feasibility of the measures.

In the event that contamination involve a significant risk to human health or to the environment, even in the absence of the "baseline report", the operator will be required to carry out the necessary actions aimed at the removal, control, containment or reduction of relevant hazardous substances so to eliminate the risk. In doing so, the operator will have to take into account as a reference the state of the installation site established in accordance with Article 12, paragraph 1, letter d and will have to take into consideration the current or future use of approved site.

In the event that no baseline report is due, the operator will still proceed with the execution of the necessary actions aimed at the removal, control, containment or reduction of relevant hazardous substances so that the site, also in virtue of its current or future conditions approved, ceases to pose a significant risk to human or environment health. Since this must be done "taking into account the state of the site of the installation established in accordance with Article 12, paragraph 1, letter d", we could conclude that in any case the degradation of environmental quality compared to the state of the site before activities of the installation, should be in any case considered to be risky to human or environment health.

The best available techniques are "the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole".

2.5.3.5 The identification of Best Available Techniques

The letter a) of art. 14, states the observance of "emission limit values" for substances listed in Annex II and for others possibly emitted by the installation. Paragraph 2 of Article 14 adds that the "emission limit values" may be supplemented or replaced by other parameters or equivalent technical measures for environmental protection. For "emission limit values", parameters or equivalent technical measures, Article 15 refers to the application of best available techniques but does not specify a specific technology or technique. This means that the competent authority should set emission limit values such that, in normal operating conditions, emissions do not exceed the levels associated with the best available techniques (BAT) and shown in the decisions on BAT conclusions.

Directive 2010/75/EU defines "best available techniques" as "the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole". In the meaning of 'Techniques' are also included design, construction, maintenance, operation and closure of the installation.

The concept of "availability" of the techniques is based on an economic criterion: "available" techniques are "those developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages". Among the available techniques are then considered the "best", i.e. those most effective in obtaining a high level of environmental protection.

The reference document on BAT lays down the conclusions on best available techniques, their description, information to assess their applicability, the emission levels associated with the best available techniques, associated monitoring, associated consumption levels and, where appropriate, relevant site remediation measures.

The "emission levels associated with the best available techniques", will therefore be "the range of emission levels obtained under normal operating conditions using a best available technique or a combination of best available techniques" in accordance with the provisions within the BAT conclusions and expressed "as an average over a given period of time, under specified reference condition".

Article 13 provides that "in order to draw up, review and, where necessary, update BAT reference documents, the Commission shall organise an exchange of information between Member States, the industries concerned, non-governmental organisations promoting environmental protection and the Commission" within a forum established and convened periodically by the Commission itself. The Commission shall make the reference document and BAT conclusions.

2.5.3.6 The "BAT conclusions" and the "BAT reference document"

The "BAT conclusions" are therefore one of the documents contained in the "Reference Document on BAT" which lays "down the conclusions on best available techniques, their description, information to assess their applicability, the emission levels associated with the best available techniques, associated monitoring, associated consumption levels and, where appropriate, relevant site remediation measures".

The "BAT reference document" is instead "resulting from the exchange of information organised pursuant to Article 13, drawn up for defined activities and describing, in particular, applied techniques, present emissions and consumption levels, techniques considered for the determination of best available techniques as well as BAT conclusions and any emerging techniques, giving special consideration to the criteria listed in Annex III". These criteria include, for example, the use of low-waste or less hazardous substances techniques, the development of techniques for the recovery and recycling of substances generated and used in the process and, where appropriate, waste, etc.

The competent authority of the Member State will be able to follow the emission levels associated with the best available techniques, apply them to a shorter period (which means stiffen limits) or, alternatively, set different values, time periods and reference conditions. In the latter case, however, it will require that the sum of emissions of the installation on an annual basis does not exceed what would have been obtained with respect for the emission levels associated with BAT.

Among the permit conditions established by Article 14, we highlight the provisions of letter c) referring to the emission control requirements which must specify the measurement methodology, frequency and evaluation procedure. Under Article 14, paragraph 1, letter d), the permit conditions should include an obligation to communicate regularly, at least once a year, the results of emission monitoring and other data that serve to checking compliance with the permit conditions, and, in the event that there were set emission limits that differ in values, periods of time and reference conditions from those associated with the best available techniques, a summary of the results to enable a comparison with the emission levels associated with the best available techniques.

The competent authorities of the Member States may derogate from the emission levels associated with the best available techniques when they involve "disproportionately high costs compared to the environmental benefits" and basing the deviation of an "assessment taking into account well-defined criteria."

Article 25 provides that Member States ensure that the "public concerned" has the possibility of recourse to challenge the substantive or procedural legality of the decisions, acts or omissions subject to the provisions of Article 24 on access to information and public participation in the permit procedure.

2.5.3.7 Inspection and consultation mechanisms system for the "public concerned"

To ensure compliance with permit conditions and examine the environmental effects from the installations, there is a system of inspections of installations to which operators are required to comply by providing all the necessary information. All Member States must ensure that all installations are part of national, regional or local level inspection plan.

As well as on the level of permit conditions compliance, the environmental risk assessment carried out by inspection must be based on the potential and actual impacts on human and environment health, taking into account the levels and types of emissions, the sensitivity of the local environment and the risk of accidents, as well as the participation of the operators in the Eco-Management Union and Audit Scheme (EMAS) under Regulation EC No. 1221/2009[9].

Articles 24 and 25 on Access to information and public participation in the permit procedure and access to justice also need to be mentioned.

[9] It is a voluntary instrument created by the European Community to which organisations (companies, public entities, etc.) can participate on a voluntary base, to assess and improve their environmental performance and provide the public and other interested parties with information on environmental management. It is one of the voluntary tools activated under the Fifth Environmental Action Programme. One primary purpose of EMAS is to contribute to the achievement of sustainable economic development, highlighting the role and corporate responsibility.

On one hand, participation is reserved for the "public concerned" as defined in point 17 of Article. 3 as “the public affected or likely to be affected by, or having an interest in, the taking of a decision on the granting or the updating of a permit or of permit conditions; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”. While, once a decision on granting, reconsideration or updating of a permit has been adopted, the relevant information must be guaranteed to "public", defined in Section 16, Art. 3 as “one or more natural or legal persons and, in accordance with national law or practice, their associations, organisations or groups”.

The Member States should provide: effective and timely opportunities for participation for the granting of a permit for new installations; the granting of a permit for any substantial change; the granting or updating of a permit for an installation in which it is proposed the appliance of Article 15, paragraph 4 (concerning the possibility of derogations from emission levels associated with the best available techniques by virtue of a disparity between economic costs and benefits); updating of a permit or permit conditions for an installation in accordance with Article 21, paragraph 5, letter a) (concerning the review and updating of permit conditions where the pollution caused by “installation is likely to require the review of the existing emission

limit values or the inclusion in the latter of new limit values”). Participation shall take the steps set out in Annex IV.

Regarding access to justice, the Article 25 provides that Member States ensure that the "public concerned" has the possibility of recourse to challenge the substantive or procedural legality of the decisions, acts or omissions subject to the provisions of Article 24 on access to information and public participation in the permit procedure. It is necessary, however, to show a "significant interest" or that it is invoked the impairment of a right. It is left to the Member States to determine what constitutes an interest "sufficient" and "a violation of a law." The only general provision provided is to give the public concerned wide access to justice.

1.

Legislative References

- Communication from the Commission. Guidance concerning baseline reports under Article 22(2) of Directive 2010/75/EU on industrial emissions
- Directive 1978/176/EEC on waste from the titanium dioxide industry
- Directive 1982/883/EEC on procedures for the surveillance and monitoring of environments concerned by waste from the titanium dioxide industry
- Directive 1991/271/EEC concerning urban waste-water treatment
- Directive 1992/112/EEC on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry
- Directive 1996/61/EC concerning integrated pollution prevention and control (IPPC)
- Directive 1999/13/EC on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations
- Directive 2000/26/EC on environmental liability with regard to the prevention and remedying of environmental damage
- Directive 2000/26/EC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC
- Directive 2000/60/EC establishing a framework for Community action in the field of water policy
- Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants
- Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC
- Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage
- Directive 2006/118/EC on the protection of groundwater against pollution and deterioration
- Directive 2008/01/EC concerning integrated pollution prevention and control
- Directive 2008/98/EC on waste and repealing certain Directives
- Directive 2009/31/EC on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006
- Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC
- Regulation EC 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC

2.5.4 Judgement on Directive 2010/75/EU

Case: Court of Justice of the EU, II Chamber 13 February 2014 in case C-530/11

Period of the dispute: 2011-2014

Plaintiff: European Commission

Counterpart: United Kingdom of Great Britain and Northern Ireland

Normative references: With regard to public participation in decision making and access to justice in environmental matters and to the notion of judicial proceeding costs not being "prohibitively expensive", an infringement proceeding under Article 258 TFEU is brought.

The European Commission asks the Court to declare that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil obligations under Community law by failing to transpose fully and apply correctly Articles 3, paragraph 7, and 4, paragraph 4 of Directive 2003/35/ EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in the drawing up of certain plans and programs relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC relating to public participation and access to justice.

Facts and aim of the action: The basic point of the action concerns the not being "prohibitively expensive requirement" that covers both the legal costs of lawyers' fees of the applicant, as well as other expenses that may be exposed to the applicant itself (including the whole costs incurred by any previous degree of judgment) and require that these different costs are reasonably predictable, as well as for their basis, as for the amount.

After careful consideration of the national law, the Court of Justice, in allowing the Commission's action, stressed on how the foundation of the failure is not to be found in the judicial system widely used in the United Kingdom national law system. In this regard, the judges of the Court, remember that "the implementation of a Directive does not necessarily require a formal and literal reproduction of its provisions in a specific law or regulation, and can be realized in a general legal context, as long as this actually ensures the full application in a sufficiently clear and precise way. "This "full implementation" of the Directive entails, particularly in the event that the provision "is intended to create rights for individuals", that recipients are "in a position to ascertain the full extent of their rights and, where appropriate, rely on them before the national courts."

The Court found the transposition of Directive 2003/35/EC carried out by the United Kingdom inadequate, because the system provided by the United Kingdom would give the national court, in the application of the system of the costs, a discretion too broad and not "addressed" by any clear and unambiguous provision. This situation could not really be challenged with the option for the applicant, to ask the judge an order of protection over procedural costs, which would result, in an early stage of the procedure, as a limitation of the amount of expenses potentially to be paid by the applicant. Since this court prerogative is not supported by a clear and precise legal rule, the discretion is left to the court. This discretion is so wide as not to ensure the "compliance with national law to the requirement laid down in Directive 2003/35". In addition, the court appears not to be required to grant protection when the cost of the proceedings is

objectively unreasonable.

In the Court opinion, then, the legal regime "not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees".

Results: By judgment of 13 February 2014, in Case C-530/11, the Court of Justice of the European Union, in sentencing the United Kingdom for incorrect transposition into national law of Directive 2003/35/EC, highlights how in regard to environmental protection it is a duty to ensure to citizens, either individually or in associations, the opportunity to exercise their right to a healthy environment, with the prediction of not excessively burdensome court proceedings.

The European Community, in order to help implement the obligations under the Aarhus Convention (signed in 1998 in Aarhus) on Access to Information, Public Participation in Decision-making and Access to Justice in matters environment, by Directive 2003/35 [Art. 3 (7), and 4 (4)] has introduced Article 10 bis in Directive 85/337/EC on the environmental assessment of certain public and private projects, and Article 15 bis in Directive 96/61/EC on integrated pollution prevention and control, codified by Directive 2008/1/EC of the European Parliament and of the Council.

Those articles provide for the obligation for Member States to ensure the "public concerned" an appeal procedure before a court to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation established by the Directives. The provisions conclude stating that "such a procedure is fair, equitable, timely and not prohibitively expensive."

All Member States, therefore, would have to transpose the content of the Directive within their national legal systems, providing the provisions that guarantee citizens easy access to the courts in protecting the environment, without being forced to face charges prohibitively expensive, both as individuals and as groups.

2.6 SEVESO Directive 2012/18/EU

The Seveso Directive rules for the prevention of major industrial accidents that involve dangerous substances and applies industrial establishments where dangerous substances are used or stored in large quantities, mainly in the chemicals, petrochemicals, storage, and metal refining sectors, with several important exceptions, such as military facilities.

Directive 2012/18/EU (effective 1 June 2015) of the European Parliament and Council on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC lays down rules for the prevention of major industrial accidents which involve dangerous substances, and the limitation of their consequences for human health and the environment.

Since 1982, the Seveso Directive legislation has been the reference framework for local and national authorities, industries and private companies with the scope to reduce exposure of the EU's workers, citizens and environment to the risk of chemical accidents and it represents a strong component of EU strategies for disaster risk reduction and sustainability of natural resources.

Seveso Directive applies to all industrial establishments where dangerous substances are used or stored in large quantities, mainly in the chemicals, petrochemicals, storage, and metal refining sectors, with several important exceptions, such as military facilities; transport of dangerous substances and intermediate temporary storage by road, rail, internal waterways, sea or air, pipeline; exploration and exploitation of minerals and hydrocarbons in mines, quarries, offshore plants (including gas storage in underground offshore sites); waste landfills.

The Directive establishes that all interested stakeholders (Member States, local and/or planning authorities and industries) must take all necessary measures to prevent accidents and limit their consequences. To achieve this goal, Directive 2012/12/EU sets a number of implications for operators and authorities that specifically address the estimation, management and oversight of chemical accident hazards and risks, emergency planning, land use planning, inspections, information to the public, public consultation and participation in decision-making and accident investigation and reporting.

2.6.1 Legislative History

The Seveso Directive was first enacted into European law in 1982, as a legislative answer to the accident occurred in 1976 at the ICMESA chemical plant manufacturing pesticides and herbicides in Seveso, Italy, where a dense vapour cloud containing tetrachlorodibenzoparadioxin (commonly known as dioxin) was released from a reactor used for the production of trichlorophenol due to an uncontrolled exothermic reaction, resulting in an immediate contamination of more than 15 km^2 of land. Over 600 people had to be evacuated from their homes and about 2000 were treated for dioxin poisoning.

The Seveso accident in 1976 prompted the adoption of a legislation aimed at the prevention and control of such accidents, and Council Directive 82/501/EEC on major-accident hazards – therefore so-called Seveso Directive – was adopted in 1982. The Directive was amended in 1987 by Directive 87/216/EEC and in 1988

by Directive 88/610/EEC in order to broaden the scope of the Directive including the storage of dangerous substances in response to the tragedies occurred in Bhopal, India with the Union Carbide factory accident in 1984 and in Basel, Switzerland with the Sandoz chemical spill in 1986.

In 1996, Directive 96/82/EC (Seveso II) replaced the original Seveso Directive. Seveso II included a new revision and extension of the scope; the introduction of new requirements related to safety management systems; emergency planning and land-use planning and a reinforcement of the provisions on inspections to be carried out by Member States. In 2003 – following the Baia Mare cyanide spill (2000, Romania), the Enschede firework disaster (2000, Netherlands) and the AZF explosion (2001, France), the Directive was extended by Directive 2003/105/EC introducing extensions to cover also those risks related to the storage/processing activities in certain mining facilities, to the processing of explosive substances and to the storage of ammonium nitrate and ammonium nitrate based fertilizers.

A new Directive was needed as the hazard-based classification system for chemicals (CLP – GHS classification), upon which the scope of Seveso is determined, is being replaced and Seveso II will no longer function unless there is a link with the new classification system. Therefore, Seveso Directive was consistently updated in 2012 with the publication of a replacement Directive - 2012/18/EU (Seveso III). Main changes concern: technical updates in order for the Directive to comply with the new EU Regulation on the Classification, Labelling and Packaging of substances and mixtures; measures to guarantee citizens a better access to information on the risks resulting from the activity of nearby industries; more effective rules on participation of public in land-use planning, introduction of measures to guarantee citizens a better access to justice to obtain information and, finally, stricter standards for inspections.

Member States will have time to transpose and implement the Directive by the 1st of June 2015. The same deadline will apply to the new chemicals classification legislation.

2.6.2 Main actors and stakeholders involved

The Seveso III Directive applies to any industry where dangerous substances are present on site at/above the threshold quantities or could be generated in case of accidents (e.g. chemical and petrochemical, fuel storage and distribution, businesses that manufacture and store explosives or have large warehouses or distribution facilities storing dangerous substances, such as agrochemicals, flammable liquids and propellants like aerosols. The Directive refers to businesses, companies, public/private establishment as Operators: “[…] any natural or legal person who operates or controls an establishment or installation or, where provided for by national legislation, to whom the decisive economic or decision-making power over the technical functioning of the establishment or installation has been delegated” (Article 3).

Member States must set up or appoint – if not already defined in the implementation of Seveso I and II Directives – the competent authority or authorities responsible for carrying out industrial accident hazard/risk related duties. Competent Authorities may vary from State to State, including different public bodies such as, e.g.: Ministries (Environment, Chemistry, Industry, Public Works, Internal Affairs, etc.); Specialized governmental agencies; Ministry Departments.

The Seveso Directive is based on a tiered approach: the larger the quantities of dangerous substances present within an establishment, the stricter the rules, therefore, 'upper-tier' establishments have bigger quantities than 'lower-tier' establishments and are therefore subject to tighter control.

Relevant stakeholders such as industry representatives, workers and non-governmental organisations promoting the protection of human health or the environment should be involved by Member States in the implementation of this Directive. Moreover, as the Directive reflects Aarhus Convention's pillars on public information, consultation and access to justice, citizens and all concerned public are guaranteed free access to key information.

2.6.3 Overview of main provisions and mechanisms

Prior to the following overview of main provisions established by Directive 2012/82/EU, it is worth specifying how the Seveso Directive is based on a tiered approach: the larger the quantities of dangerous substances present within an establishment, the stricter the rules, therefore, 'upper-tier' establishments have bigger quantities than 'lower-tier' establishments and are therefore subject to tighter control. Threshold quantities are specified for named toxic substances, categories of substances and groups of categories listed in the Annexes of the Directive. Substances are also categorized on the basis of the type of hazard their use entails. The Directive identifies 3 main hazard categories: HEALTH HAZARDS (toxic substances); PHYSICAL HAZARDS (explosives, flammable and oxidising gases, aerosols or liquids, self-reactive substances, organic peroxides, pyrophoric substances; ENVIRONMENTAL HAZARDS (hazardous to the aquatic environment). Consequently, industrial establishments are classified as Lower Tier or Upper Tier, depending on whether the lower or upper threshold is exceeded.

The Commission shall assess, where appropriate or on the basis of a notification by a Member State, whether it is impossible in practice for a particular dangerous substance covered by the Directive to cause a release of matter or energy that could create a major accident. Following this assessment, the Commission can present a legislative proposal to the European Parliament and to the Council to exclude the dangerous substance from the Directive.

The Seveso Directive sets mechanisms, responsibilities and procedures related to:

- Prevention measures
- Monitoring procedures and penalties;
- Accident Aftermath Management;
- Comprehensive and rational land-use planning;

- Measures for public information and consultation.

Prior to the construction of new establishment, operators are required to draw a Major-Accident Prevention Policy (MAPP) and to ensure that it is properly implemented. The MAPP has to be proportionate to the major-accident hazards and must include "the operator's overall aims and principles of action, the role and responsibility of management, as well as the commitment towards continuously improving the control of major-accident hazards, and ensuring a high level of protection" (art.8). The MAPP must be reviewed at least every 5 years.

In case of any significant increase or decrease in the quantity or significant change in the nature or physical form of the dangerous substance present as well as in case of construction of a new establishment or the modification or closure of an existing one, the operator must send a "notification" to the national/regional/local competent authority (Art.7).

Operators are required to draw a Major-Accident Prevention Policy (MAPP), and upper-tier establishment operators need to respond to additional requirements, such as the production of a safety report and the design of internal emergency plans.

Upper-tier establishment operators need to respond to additional requirements, such as:

- the production of a safety report prior to the construction of new establishments or in case of changes in the inventory of dangerous substances. The safety report must be reviewed at least every 5 years (Art. 10).
- the design of internal emergency plans for the measures to be taken inside the establishment. The internal emergency plans have to be delivered to the competent authorities designated for this purpose by Member States. These plans are draw with the aim to contain and control accidents in order to minimize damage to human health, environment and public/private property. They must foresee all necessary measures to "protect human health and the environment from the effects of major accidents" and to provide for the "restoration and clean up of the environment following a major accident" (Art. 12).

Competent Authorities must draw an external emergency plan for the measures to be taken outside the establishment within two years following receipt of the internal emergency plan from the operators. *Public concerned* has to be given the chance to express an opinion on the external emergency plans prior to their adoption or modifications, therefore Member States are required to ensure that all information is made accessible to public by the competent authorities (Art 12).

2.6.3.1 Monitoring procedures and penalties

It is of direct responsibility of Member States to ensure that an inspection plan at the national, regional/local level is drawn in order to monitor all establishments and must regularly review and, updated the aforesaid plan. The plans – also functional to the development of national land-use policies – must contain a general assessment of relevant safety issues; the geographical area covered by the inspection plan; a list of the establishments covered by the plan; a list of

groups of establishments with possible domino effects[10]; a list of establishments where particular external risks or hazard sources could increase the risk or consequences of a major accident; procedures for routine inspections; procedures for non-routine inspections.

Member States have to ensure that there is an inspection plan at the national, regional/local level to monitor all establishments and they can prohibit the use or bringing into use of any establishment, installation or storage facility.

Competent authorities are required to organise a system of routine inspections differentiated on the basis of the type of establishment concerned (every year for upper-tier establishments, every 3 for lower-tiers), in order to guarantee "a systematic examination of the systems being employed at the establishment, whether of a technical, organisational or managerial nature, so as to ensure in particular that: the operator can demonstrate that he has taken appropriate measures, in connection with the various activities of the establishment, to prevent major accidents; the operator can demonstrate that he has provided appropriate means for limiting the consequences of major accidents, on-site and off-site; the data and information contained in the safety report, or any other report submitted, adequately reflects the conditions in the establishment; information has been supplied to the public" (art. 20). In response to complaints, accidents and 'near misses', as well as to occurrences of non-compliance, the competent authorities are supposed to carry out non-routine inspections as soon as possible.

In case the prevention and/or mitigation of major accident procedures taken by operators prove to be inadequate, Member States have the right to prohibit the use or bringing into use of any establishment, installation or storage facility. Operators, on the other hand, must be able to "[…] appeal against a prohibition order to an appropriate body determined by national law and procedures" (art 19).

All penalties applicable in case of infringement of the national provisions implementing this Directive must be "effective, proportionate and dissuasive" and have to be determined by Member States and notified to the Commission by the 1st of June 2015 (art. 28).

In the case of a major accident, operators must provide the competent authority with the needed information so to conduct an accurate analysis of all aspects of the accident and to take appropriate action to ensure that the operator takes necessary remedial measures; make recommendations on future preventive measures; and inform the persons likely to be affected.

2.6.3.2 Accident Aftermath Management

In the case of a major accident, operators who are responsible of the establishment must immediately provide the competent authority with information on the circumstances of the accident; the quantity and type of dangerous substances involved; the data already available for assessing the effects of the accident on human health, environment and property; the emergency measures taken. At the same time, operators must identify and communicate what steps will be taken to mitigate the medium-term and long-term effects of the accident and prevent its recurrence in time (Art. 16). In parallel, competent authorities will use this, and other information in order to conduct an accurate analysis of all aspects of the accident and therefore be able to take appropriate action to ensure that the

[10] Domino effects can occur where establishments are sited in such a way or so close to increase the chance of major accidents or aggravate their consequences.

operator takes necessary remedial measures; make recommendations on future preventive measures; and inform the persons likely to be affected of the accident and of the measures undertaken to mitigate its consequences (Art.17).

2.6.3.3 Comprehensive and rational land-use planning

The scope of the new Seveso Directive takes into account the connection between major-accident hazards and a better and more rational land-use planning in Member States.

The scope of the new Seveso Directive now also takes into account the connection between major-accident hazards and a better and more rational land-use planning in Member States. Therefore the Directive foresees that Member States should consider aspects such as the siting of new establishments, the modifications to existing establishments and new developments (transport routes, locations of public use and residential areas) in their vicinity. In the development and implementation of their land-use policies Member States must consider the need "to maintain appropriate safety distances between establishments covered by this Directive and residential areas, buildings and areas of public use, recreational areas, and, as far as possible, major transport routes; to protect areas of particular natural sensitivity or interest in the vicinity of establishments; in the case of existing establishments, to take additional technical measures […] so as not to increase the risks to human health and the environment". This aim can *and should* be pursued by ensuring that adequate consultation procedures are put in place to involve citizens in land-use decision-making processes (Art. 13).

2.6.3.4 Measures for public information and consultation

The Aarhus Convention establishes a number of rights of the public (individuals and their associations) with regard to the environment, such as:

- the right of everyone to receive environmental information that is held by public authorities (information on the state of the environment, on policies taken, on the state of human health and safety) "access to environmental information"
- the right of the public affected and environmental non-governmental organisations to participate in environmental decision-making and these comments must be taken into due account , providing information on the final decisions and the reasons for it "public participation in environmental decision-making"
- the right to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").

Seveso III Directive includes a number of articles in line with the 3 main rights sated in the Aarhus Convention to ensure effective public participation in decision-making.

In respect of pillar I of the Aarhus Convention "access to information", Article 14 of the Directive set requirements for Member States to ensure the public access (online) to key information – in simple terms – on the establishments subject to the

Member States have to ensure the public access to key information on the establishments subject to the directive, competent authorities must provide all information related to the implementation of Directive available and the "concerned public" must be then given an early opportunity to give its opinion on specific individual projects.

regulations and provisions implementing the Seveso Directive in Member States, including data on the dangerous substances involved at these establishments, on how the public will be warned in case of hazard. In case of upper-tier establishment, the accessible information must include also major-accident scenarios, measures to address them, information on the external emergency plans related to that establishment.

In addition to this, competent authorities must provide all information related to the implementation of the Seveso Directive available to anyone who so requests in accordance with Directive 2003/4/EC (implementing the first pillar of the Aarhus Convention in the EU), unless

Aarhus pillar II "public participation in environmental decision-making" is reflected in Article 15 of the Seveso III Directive, that gives Member States the responsibility to identify the " concerned public" entitled to access to the consultation and participation measures listed in the Directive. This "concerned public" must be then given an early opportunity to give its opinion on specific individual projects relating to: planning for new establishments; significant modifications to establishments; new developments around establishments where the siting or developments may increase the risk or consequences of a major accident. In particular, Member States shall ensure that the public concerned is entitled to express comments and opinions to the competent authority before a decision is taken on a specific individual project, and that the results of the consultations held are duly taken into account in the taking of a decision.

The III Pillar of the Aarhus Convention (Access to justice) is taken into account with article 23, that states that all citizens who "have not been granted appropriate access to information or participation will be guaranteed access to justice in their national legal systems in order to obtain access to the safety report that operators of upper-tier establishments are required to produce and to the inventory of dangerous substances".

Legislative References

- Convention of the UN Economic Commission for Europe on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention)
- Convention of the UN Economic Commission for Europe on the Transborder Effects of Industrial Accidents, approved on behalf of the Union by Council Decision 98/685/EC
- Council Directive 82/501/EEC on major-accident hazards – therefore so-called Seveso Directive
- Directive 87/216/EEC amending Directive 82/501/EEC on the major-accident hazards of certain industrial activities
- Directive 88/610/EEC amending directive 82/501/EEC on the major-accident hazards of certain industrial activities
- On 1986: Chemical spill turns Rhine red: http://news.bbc.co.uk/onthisday/hi/dates/stories/november/1/newsid_4679000/4679789.stm
- On Baia Mare Cyanide Spill: http://www.toxipedia.org/display/toxipedia/Baia+Mare+Cyanide+Spill
- On Bhopal Disaster
- On Seveso, Italy
- On the explosion at the AZF Factory
- SEVESO I – Directive 96/82/EC
- SEVESO II – Directive 2003/105/EC
- SEVESO III - Directive 2012/18/EU
- SEVESO on DG Environment
- The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, usually known as the Aarhus Convention
- Treaty on the Functioning of the European Union, and in particular Article 192

2.6.4 Judgement on Seveso Directive 96/82/EC

Case: Court of Justice of the European Union, III Chamber 25 March 2010, in case C-392/08

Period of the dispute: 2007-2010

Plaintiff: European Commission

Counterpart: Kingdom of Spain

Normative references: Directive 96/82/EC, art. 11, n. 1, c)

Facts and aim of the action: Considering that Article 11, n. 1, letter c) of Directive 96/82 had not been complied by the Kingdom of Spain, on March 23th, 2007, the Commission initiated the infringement proceedings under Article 226 EC formally calling the Member State to submit its observations in that respect. The Spanish authorities replied to the letter of formal notice from the Commission providing the list of establishments to which the provisions of Directive 96/82 apply and those that have an external emergency plan.

Was thus found that there were plants that did not have the external emergency plan and the Commission issued a reasoned opinion requesting the Kingdom of Spain to take the necessary measures to comply with the opinion within two months. By letter of 10 January 2008, the Spanish authorities replied to that opinion by stating that, on the total of establishments concerned, corresponding to 238 in 2005 and 280 in December 2007, 186 had an external emergency plan approved. In addition, they pointed out that while it is true that Article 11, n. 1, letter (b) of Directive 96/82 puts the obligation, for the operator of a concerned plant, to provide the necessary information to the competent authorities. The same article does not provide, however, deadline for the establishment of external emergency plans. Considering that the situation remained unsatisfactory, the Commission brought the case to the tribunal.

Results: The judgment determines that, Article 11, n. 1 and 4 of Directive 96/82 does not prescribe any time limit with respect to the development of emergency plans while defining them compulsory. The absence of the deadline in the provisions of the Directive does not allows Member States to not impose one to comply obligations. Even if it was the case, the requirement would be deprived of its substance and the system of protection established by Article 11of Directive 96/82 would have no practical effect.

The developing of external emergency plans in Article 11, n. 1, letter (c) of Directive 96/82 on the control of major-accident hazards involving dangerous substances, is part of a multi-step process. This process involves: in a first step, the preparation of internal emergency plans by the operators of the plants in which there are considerable quantities of hazardous substances, and the transmission of the necessary information to the competent authorities; in a second stage, drawing-up of external emergency plans by those authorities; in a third step, the review and, if necessary, the updating of internal and external emergency plans, respectively, by the operators and authorities.

By the interdependence between the internal and external emergency plans, it results that the competent authorities are obliged to draw up the external emergency plans within a period that does not risk undermining the effectiveness of the rule, and which takes into account the time

needed to finalize these plans, then within a reasonable time from the transmission of the information needed by operators.

2.7 The Environmental Liability Directive – 2004/35/EC

Directive 2004/35/EC - hereafter “Environmental Liability Directive” or ELD – has the scope to prevent and remedy environmental damage or imminent threat of damage resulting by occupational activities by establishing a European framework for environmental liability based on the "polluter pays" principle. This principle requires that an operator causing environmental damage or creating an imminent threat of such damage has to prevent and remedy the damage and bear the cost of such necessary preventive or remedial measures.

With the aim to return all damaged environmental resources to their baseline condition, Article 2 (16) defines baseline condition as “the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available”. The ELD Directive ensures that the economic operator who causes harm to the environment is also responsible to borne the financial consequences of this harm.

The ELD complements existing EU nature conservation regimes such as the Habitats Directive 92/43/EEC and the Wild Birds Directive 2009/147/EC as well as the existing EU water protection regime under the Water Framework Directive 2000/60/EC.

Directive 2004/35/EC has the scope to prevent and remedy environmental damage or imminent threat of damage resulting by occupational activities by establishing a European framework for environmental liability based on the "polluter pays" principle.

2.7.1 Legislative History

The European Commission’s Green Paper on the Restoration of Environmental Damage of 1993 is where the ELD has its origins. From 1993, a long and controversial development process took place, where the milestones are represented by the White Paper on Environmental Liability of 2000 and the Proposal of the Commission for a Directive on Environmental Liability of 2002.

The Green Paper of 1993 did not yet offer solutions to the issue of remedying environmental damage, but it contributed to raise awareness and start a debate at a European level. Based on the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) of the European Council, the Paper suggested a civil liability system (a liability arising under private law as opposed to one arising under public law). Concerning the individual liability system, the Commission assigned two functions to civil liability for environmental damage: a repressive and a preventive function. The Commission did not make concrete proposals but rather identified several fields of problems concerning strict and fault liability, the environmental damage, the

causal link, the parties involved, the remedy available, a limitation of liability and the insurance of the environmental damage. Thus, the first step of the developmental process was very open for it merely made suggestions. However, one thing that the Green Paper inevitable put forward is that an environmental damage without damage to property or persons is not to be covered by a civil liability scheme.

It was in the White Paper of 2000 that the Commission suggested for the first time that a framework Directive would be the most appropriate means to establish the liability regime for environmental damage. The Paper set out a first possible scheme for a future European environmental liability regime, based on the "polluter pays" principle and on strict liability (in the final ELD version there are exceptions to this point). The Paper also suggests how the compensation costs paid by the polluter should be then spent on restoration of the environmental damage and how public interest groups (including NGOs) should have the right "to step into the shoes of public authorities, where these are responsible for tackling environmental damage but have not acted", in line with the 1988 Aarhus Convention.

The final text of the Liability Directive mainly follows the White Paper. Finally, in the Commission's 2002 Directive Proposal the new duty of preventive action was introduced and traditional damage was excluded from the scope of the system.

The ELD was published in the Official Journal of the European Union on 21 April 2004 with the full title: "Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage". Member States were required to transpose the Directive by 30 April 2007, but by that date only Italy, Lithuania and Latvia had notified transposition into their national law, so the Commission appealed to the European Court of Justice to judge upon the Member States failure to implement the Directive.

The ELD was amended three times through Directive 2006/21/EC on the management of waste from extractive industries, through Directive 2009/31/EC on the geological storage of carbon dioxide and amending several Directives, and through Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC. The amendments broadened the scope of strict liability by adding the "management of extractive waste" and the "operation of storage sites pursuant to Directive 2009/31/EC" to the list of dangerous occupational activities in Annex III of the ELD. The Offshore Safety Directive, containing an amendment to the ELD (extension of the scope of damage to marine waters), was adopted in June 2013.

2.7.2 Main actors and stakeholders involved

According to the Directive, primary responsibilities lie with national competent authorities and operators. The first, appointed by Member States, are responsible of the oversight and enforcement of the Directives requirements and provisions

and of the assessment of the significance of the damage and decision on which remedial measures should be taken, while the latter are responsible of ensuring an appropriate evaluation of the threat or damage and of the response, remediation, and funding. Finally, according to art.16, Member States may maintain or adopt more stringent provisions in relation to the prevention and remedying of environmental damage. Other parties, including financial security providers, technical experts and attorneys, NGOs and the public may also play contributing roles.

In case an operator, an affected person or an NGOs notifies an imminent and detected threat, competent authorities must require the operator to take preventive measures and may at require him to provide information, to take the necessary preventive measures, and to follow instructions given to him on necessary preventive measures.

Once an environmental damage is detected, the competent authorities will firstly assess if the damage can fall within the scope of the Directive and, if it does, it will identify the liable operator and establish the standard of liability (strict or fault based), the it will require the operator to provide adequate information and to take the necessary 'emergency' remedial actions in order to control, contain, remove or manage the damage factors. The competent authority shall than require the operator to follow instructions on the necessary emergency remedial actions and it will take the necessary 'actual' remedial actions (primary, complementary and compensatory remedial measures) in co-operation with the operator, identify and assess remedial options, in particular agree on the remedial action plan, and

Competent authorities must require the operator to take preventive measures and once an environmental damage is detected, the competent authorities will firstly assess if the damage can fall within the scope of the Directive and, if it does, it will identify the liable operator and establish the standard of liability.

invite interested parties to submit their views (Art. 7(4)). Finally, taking into account the views expressed by interested parties, the competent authority will design specific measures and formalise remedy selection and it will work with the operator to make sure the necessary measures are taken in terms of primary, complementary and compensatory remediation as relevant. If the operator fails to carry out remedial measures or if the operator is not even identifiable, the competent authority steps in and carries out remedial measures.

The ELD's definition of operators is: "any natural or legal, private or public person who operates or controls the damaging occupational activity or – where this is provided for in national legislation – to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity".

If the competent authority has carried out preventive and remedial actions itself, the authority may recover the costs it has borne from the operator responsible for the damage or imminent threat of damage. The same principle applies to environmental assessments carried out to determine the extent of damage and the action to be taken to repair it. The competent authority must initiate cost recovery proceedings within five years of the date on which the remediation and repair measures have been completed or the date on which the liable operator, or third party, has been identified, whichever is the later. If several operators are

jointly responsible for damage, they must bear the costs of repair either jointly and severally or on a proportional basis.

The Directive does not oblige operators to take out a financial security, such as insurance, to cover their potential insolvency. However, Member States are required to encourage operators to make use of such mechanisms.

Environmental damage is divided in three categories: damage to protected species and natural habitats, water damage, land damage.

Moreover, ELD focuses on damage to natural resources and not on damages to individuals, property, or infrastructure. Nevertheless, some aspects of public health are included and there is a mechanism for NGOs, other groups and all enabled persons to provide observations to Competent Authorities in respect of environmental damage or, in some Member States, an imminent threat of environmental damage and to request Competent Authorities to take the appropriate action. As stated in the Preamble, art. of the ELD, an “Enabled Person” is anyone who is – or is likely to be - affected by environmental damage, those whose health may be at risk from contaminants, those responsible for children or elderly persons whose health may be at risk or who otherwise has a sufficient interest or alleges the impairment of a right (including NGOs). Article 12(1) of the Directive also specifies that any NGO that promotes environmental protection and meets any requirements under national law should be deemed to have a sufficient interest and to have rights capable of being impaired.

Other stakeholders in the process, other than competent authorities, operators, enabled persons, may include financial service providers, experts and the public cooperation between Member States, as where damage or a threat of damage may affect more than one Member State, the Member States concerned must cooperate on the preventive or remedial action to be taken.

ELD focuses on damage to natural resources and not on damages to individuals, property, or infrastructure. Some aspects of public health are included and there is a mechanism for NGOs, other groups and all enabled persons to provide observations to Competent Authorities in respect of environmental damage.

2.7.3 Overview of main provisions and mechanisms

As the whole scope of the Directive is to prevent and remedy to environmental damage, it is surely worth specifying exactly how “environmental damage” is defined in the text of the Directive before going further in-depth with the description of the provisions entailed in the Directive.

Under the ELD (art. 2(2)), ‘damage’ means a “measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly”, while environmental damage is divided in three categories (art.2(1)),:

1. damage to protected species and natural habitats**,** which is “any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species”. The habitats and species concerned are protected at Community level by the 1979 "Birds" Directive or by the 1992 "Habitats" Directive.
2. water damage, which is “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological

potential, as defined in the Water Framework Directive 2000/60, of the waters concerned;

3. land damage, which is "any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms".

2.7.3.1 ELD's two liability schemes

In article 3 ("Scope") the ELD provides for two liability regimes, covering together two complementary situations, that is all occupational activities mentioned in the Annexes of the Directive and all those that are not.

The first liability scheme applies to all those dangerous or potentially dangerous activities especially in the fields of industry and agriculture (listed in Annex III) that require a licence under the Directive on integrated pollution prevention and control, to activities which can lead to a discharge of heavy metals in water or air, to installations producing hazardous chemical substances, to waste management activities (including landfills and incinerators) and to activities concerning genetic alterations (GMOs). In case a damage is caused to the environment due to one of the above mentioned activities, the liable operator conducting the activity may be held responsible even if not at fault, unless the damage is caused by an activity that falls under one of the exceptions listed in article 4 (see paragraph below).

The ELD covers action, measures and costs for environmental damage prevention and remediation.

Member States may allow the operator not to bear the cost of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by an event "expressly authorised national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III" or by "an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place".

The latter liability scheme applies instead to all other occupational activities and only where there is damage, or imminent threat of damage to species or natural habitats. In this case, the operator will be held liable only if he is at fault or negligent.

ELD liability schemes apply to: 1. all those dangerous or potentially dangerous activities especially in the fields of industry and agriculture; 2. all other occupational activities and only where there is damage, or imminent threat of damage to species or natural habitats.

2.7.3.2 Prevention and remedial action and measures

The ELD covers action, measures and costs for environmental damage prevention and remediation.

Prevention is necessary in all cases where there is an imminent threat of environmental damage:

- the operator must take all necessary preventive measures

- the competent authority may at any time require the operator to provide information and in case to take the necessary preventive measures; or it may instruct the operator on how to take the necessary measures; or, finally, it may "itself take the necessary preventive measures"
- Member States must ensure that in case of threats competent authorities are immediately informed by the operators

Remedial actions are instead to be taken whenever the environmental damage has already occurred:

- The operator shall immediately inform the competent authority; and he will "take all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services" and take all the necessary remedial measures.
- The competent authority may always require supplementary information from the operator, require him to take (or give instructions on) all practicable steps to control, contain, remove or manage the damage; "require the operator to take the necessary remedial measures" or "itself take the necessary remedial measures".

Environmental damage may be remedied in different ways depending on the type of damage, as specified in Annex II of the ELD. Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition. If measures taken on the affected site do not allow achieving the return to the baseline condition, complementary measures may be taken elsewhere (for instance, an adjacent site). In any case, the scale of the remedial measures should be determined in such a manner as to compensate interim losses, that is, losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the environment is restored.

For damage affecting the land, the Directive requires that the land concerned be decontaminated or for the relevant contaminants to be at least "controlled, contained or diminished" until there is no longer any serious risk of negative impact on human health. The "risk" referred to in Annex to will be assessed by taking into account "the characteristic and function of the soil, the type and concentration of the harmful substances, preparations, organisms or micro-organisms, their risk and the possibility of their dispersion".

For damage affecting water or protected species and natural habitats, the Directive is aimed at restoring the environment to how it was before it was damaged. For this purpose, the damaged natural resources or impaired services must be restored or replaced by identical, similar or equivalent natural resources or services either at the site of the incident or, if necessary, at an alternative site. The restoration may be achieved by way of primary (which returns the damaged natural resources and/or impaired services to, or towards, baseline condition),

complementary ("any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the habitat") and compensatory (to compensate interim losses of natural resources and services due to the damage continuing until primary remediation has effect) remediation. Also, all significant risks to human health must be removed in order to effectively "restore" a natural habitat.

2.7.3.3 Prevention and remediation costs: the financial responsibility of the operator

The liable operators held responsible of an environmental damage must (with exceptions[11]) bear the cost of the necessary preventive or remedial measures. He will do so either directly or indirectly:
- In the first case, the operator pays for the measures he takes himself or he entrusts a specialised undertaking to take them on his behalf.
- In the second situation, where a competent authority has acted, itself or through a specialised undertaking, in the place of the liable operator, that authority shall recover the costs it has incurred from the operator.

The competent authority may initiate cost recovery proceedings against the operator within five years from the date on which the measures have been completed or the liable operator has been identified, whichever is the later.

In case of multiple party causation, art.9 states that Member States are free to decide how the costs will be distributed among the operators involved.

Article 14 of the ELD requires Member States to encourage the development of financial security instruments and markets in order to enable operators to cover their responsibilities and manage the costs of remedial measures. In the Commission's report of 2010 on the effectiveness of the ELD, the necessity to harmonise national financial security instruments first emerged.

Liable operators held responsible of an environmental damage must (with exceptions11) bear the cost of the necessary preventive or remedial measures.

2.7.3.4 Exceptions

Finally, it is important to provide an overview of the main exceptions within the scope of the Directive. In particular, articles 2 ("Definitions") and 4 (Exceptions) of the ELD narrow the scope of the provisions and responsibilities set out in the text.

In defining "environmental damage", art. 2 excludes from the scope of the Directive all damages to protected species or habitats resulting from an action which is authorized under the 1979 Birds Directive or the Habitats Directive of 1992. As for what regards damage to water, in compliance with art 4(7) of Directive 2000/60/EC on water policy, it does not fall under the scope of the ELD

[11] Domino effects can occur where establishments are sited in such a way or so close to increase the chance of major accidents or aggravate their consequences.

when it results from “new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater” or from “new sustainable human development activities”.

Article 4 “Exceptions” further narrows the outreach of the provisions listed in the ELD, and in particular, environmental damage does not fall within the Directive’s provisions when it occurs as a result of “armed conflict, hostilities, civil war or insurrection”; “natural phenomenon of exceptional, inevitable and irresistible character”; “activities which serve the purpose of national defence or international security” ; or when it is impossible to clarify exactly what or who caused the damage and where it is not possible to establish a causal link between the activities of the operators and the damage. It addresses only specific and identifiable incidents attributable to an operator and not damages which are caused by society in general (e.g. “such damage caused by pollution of a diffuse character”).

Finally, and most importantly, ELD liability and compensation provisions do not apply to any damage caused by activities covered by the Treaty establishing EURATOM or by any of the International nuclear energy[12], oil pollution[13] and carriage of hazardous substances or dangerous goods Conventions.

[12] i.e. Paris Convention of 1960 on Third Party Liability in the Field of Nuclear Energy; Vienna Convention of 1963 on Civil Liability for Nuclear Damage; Convention of 1997 on Supplementary Compensation for Nuclear Damage; Joint Protocol of 1988 relating to the Application of the Vienna Convention and the Paris Convention; Brussels Convention of 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

[13] i.e. International Convention of 1992 on Civil Liability for Oil Pollution Damage; the International Convention of 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage; the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage.

Legislative References

- Directive 2009/147/EC on the conservation of wild birds
- Directive 2000/60/EC establishing a framework for Community action in the field of water policy
- Commission's Green Paper on the Restoration of Environmental Damage (COM)93
- Commission's White Paper on environmental liability COM(2000) 66 final
- Council of Europe's Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment
- Directive 2006/21/EC on the management of waste from extractive industries
- Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC Text with EEA relevance
- Directive 2006/21/EC on the management of waste from extractive industries
- Directive 2009/31/EC on the geological storage of carbon dioxide and amending several Directives
- Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC Text with EEA relevance
- Directive 2008/1/EC concerning integrated pollution prevention and control
- Questions and Answers Environmental Liability Directive
- E. K. Czech, "Liability for Environmental Damage According to Directive 2004/35/EC" in Polish Journal of Environmental Studies, 2007
- Environmental Liability Directive. Handbook for 2 Days Training Version – February 2013
- Environmental Liability Directive. Overview.
- Stakeholder & Practitioner Workshop Implementation of the ELD in the EU Report 8 November 2011

2.7.4 Judgement on Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage

Case: Court of Justice of the EU, Grand Chamber 9 march 2010, in case C-378/08

Period of the dispute: 2008-2010

Plaintiff: Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA, Syndial SpA

Counterpart: Ministero dello Sviluppo economico, Ministero della Salute, Ministero Ambiente e Tutela del Territorio e del Mare, Ministero delle Infrastrutture, Ministero dei Trasporti, Presidenza del Consiglio dei Ministri, Ministero dell'Interno, Regione siciliana, Assessorato regionale Territorio ed Ambiente (Sicilia), Assessorato regionale Industria (Sicilia), Prefettura di Siracusa, Istituto superiore di Sanità, Commissario Delegato per Emergenza Rifiuti e Tutela Acque (Sicilia), Vice Commissario Delegato per Emergenza Rifiuti e Tutela Acque (Sicilia), Agenzia Protezione Ambiente e Servizi tecnici (APAT), Agenzia regionale Protezione Ambiente (ARPA Sicilia), Istituto centrale Ricerca scientifica e tecnologica applicata al Mare, Subcommissario per

la Bonifica dei Siti contaminati, Provincia regionale di Siracusa, Consorzio ASI Sicilia orientale Zona Sud, Comune di Siracusa, Comune di Augusta, Comune di Melilli, Comune di Priolo Gargallo, Azienda Unità sanitaria locale n. 8, Sviluppo Italia Aree Produttive SpA, Invitalia (Agenzia nazionale per l'attrazione degli investimenti e lo sviluppo d'impresa) SpA, già Sviluppo Italia SpA, interventig parties: ENI Divisione Exploration and Production SpA, ENI SpA, Edison SpA,

Normative references: Reference for a preliminary ruling on the interpretation of the 'polluter pays' principle in the Directive of the European Parliament and of the Council of 21 April 2004 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage and in the Directive of the European Parliament and of the Council of 31 March 2004 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The reference was made in several proceedings between the companies Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA, on one hand, and various national, regional and municipal Italian authorities, on the other. The reference was about measures for remedying environmental damage adopted by those authorities regarding the Augusta harbour, around which there are facilities and / or land of those companies.

Facts and aim of the action: The main causes concern the Priolo Gargallo (Sicily) territory, declared «site of national interest for decontamination purposes», in particular, the Augusta Roadstead, affected by recurring incidents of environmental pollution dating back to the early 60s, when the Augusta-Priolo-Melilli petrochemical site was realized. Since that time, numerous businesses, operating in the field of hydrocarbons and petrochemicals, have been installed and / or succeeded one another in this territory.

The area was the subject of a «characterization» designed to assess the soil, ground water, coastal waters and seabed conditions. According to Italian law, the firms located in the petrochemical site, as the owners of the industrial areas including the site of national interest, have submitted projects for emergency safety measures and measures for groundwater decontamination, approved by inter-ministerial decree.

Following delays on the remediation implementation, public authorities ordered these companies to proceed with the reclamation of the Augusta Roadstead's seabed and warned that in case of companies' non-fulfilment, the works would be carried out by the authorities of their own initiative at the expense of those firms. In addition, it was decided to complete the previously approved measures by the realization of a physical confinement of the layer.

The companies concerned have appealed to the administrative decisions claiming the impossibility of the task and the disproportion of costs. The national court has upheld the appeals declaring unlawful the decontamination obligations since, when those obligations were imposed, the 'polluter pays' principle or of the national rules governing decontamination procedures nor the adversarial principle had not been taken into account. Moreover, there had been no discussion with the undertakings in question concerning the conditions under which such a decontamination operation was to be implemented.

That judgement was appealed by the administrative authorities before the Council of Administrative Justice for the Region of Sicily which has recognised the conditions for the suspension of the previous judgment, taking into account the harmful consequences related to

the induced delay in the execution of the measures ordered by the government.

Subsequently, the administrative authorities have found that the measures previously approved were inadequate to remedy existing pollution and, with continued refusal of the applicant companies to comply with the requirements, have been prescribed to these other measures, the implementation of which, would be entrusted to the Sviluppo Italia Aree Produttive SpA. Lastly, Decree No. 4378 of 21 February 2008 was adopted concerning «a final order of adoption (...) of the determinations of the decision conference of services on the site of national interest of Priolo of 20 December 2007».

Against this decree and other administrative acts related to it, the plaintiffs have proposed again appeal to the referring court. In that action they denounce, in particular, the fact that the project chosen, which was developed by Sviluppo Italia Aree Produttive SpA which was entrusted with the execution of the project without a public tendering procedure, did not pursue an environmental objective but, instead, had as its purpose the construction of a public infrastructure, namely the creation of an artificial island within the Augusta Roadstead, using contaminated sediment.

At the referral, was pointed out that the competent public authority had leaned on undertakings operating in the Augusta Roadstead shoulder responsibility for the existing environmental pollution, without distinction between the previous and current pollution and with no finding of direct responsibility in the origin of damage to each of the companies involved.

It has been also highlighted the specific situation of Augusta Roadstead pollution where there have been a whole succession of petrochemical firms, so it would be useless as well as impossible to determine their own share of responsibility, while the fact of pursuing hazardous activities in the contaminated site would be enough to declare their responsibility.

Given this set of circumstances, the Regional Administrative Court of Sicily decided to suspend the proceedings and to transfer to the Court the following questions:

1) “Do the “polluter pays” principle (Article 174 EC) and the provisions of Directive [2004/35] preclude national legislation which allows the public authorities to require private undertakings – merely owing to the fact that they currently carry on their activities in an area which has been contaminated for a long time or borders on an area which is historically contaminated – to implement rehabilitation measures, irrespective of whether or not any preliminary investigation has been carried out to identify the party responsible for the pollution?

(2) Do the “polluter pays’ principle (Article 174 EC) and the provisions of Directive [2004/35] preclude national legislation which allows the public authorities to impute liability to make good the environmental damage in a particular form to the person who owns the property rights and/or carries on commercial activities on the contaminated site without first having to assess whether there is a causal link between the conduct of that person and the occurrence of the contamination, by virtue merely of that person’s “situation” (namely, that of being an operator whose activities are carried on inside the site)?

(3) Do the provisions of Community law in Article 174 EC and Directive [2004/35] preclude national legislation which, overriding the “polluter pays” principle, allows the public authorities to impute liability to make good the environmental damage in a particular form to the person who

owns the property rights and/or operates an undertaking on the contaminated site, without first having to assess whether there is a causal link between the conduct of that person and the occurrence of the contamination or the subjective requirement of intent or negligence?

(4) Do the Community competition principles laid down in the Treaty establishing the European Community and Directive 2004/18/EC, [Council] Directive 93/97/EEC [of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54)] and [Council] Directive 89/665/EEC [of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p.33)] preclude national legislation which allows the public authorities to award to private persons (Sviluppo SpA and [Sviluppo]) the activities of characterisation and of planning and performing decontamination operations – or more correctly, the carrying out of public works – in areas owned by the State directly, without first carrying out the necessary public tendering procedures?"

Results: The judgement requires the application of the Member State's national law in cases of environmental pollution in which are not satisfied the conditions of application of *ratione temporis and/or ratione materiae* of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.

It also establishes that Directive 2004/35, in the case of diffuse pollution, does not preclude national legislation which allows the competent authority, in the implementation of the Directive itself, to assume the existence of a causal link between operators and the pollution, and that based on the proximity of their facilities to the polluted area. However, according to the "polluter pays principle", in order to presume the existence of such a causal link, the authority must be based on plausible evidence such as the proximity of the plant to the polluted area and the correspondence between pollutants found and components used by the operator in the exercise of its activity.

Lastly, the judgment provides that Article. 3, n. 1, 4, n. 5, and 11, n. 2 of Directive 2004/35 must be interpreted as meaning that, when deciding to impose measures for remedying of environmental damage on operators whose activities fall within Annex III to the Directive, the competent authority is not required to demonstrate neither a fault or negligence, nor a malicious intent by the operators whose activities are held to be responsible for environmental damage. It is up to this authority, on the one hand, to run prior investigation on the origin of the pollution, and on the other hand, to demonstrate, according to national rules of evidence, the existence of a causal link between the activities of the operators and pollution in question.

2.8 Directive 2008/99/EC on the protection of the environment through criminal law

On November 19th 2008, after a ten year-long diatribe between the European Commission and the European Council – settled finally by the Court of Justice of the European Union in 2005 – the European Union has taken a big step forward in the sphere of environmental protection with the publication of Directive 2008/99/EC, setting a common framework for the identification of environmental offences to prosecute by enforcing criminal penalties in each Member State (Gouritin, 2009). By introducing criminal penalties – and by putting much hope in their potential deterrent effect – the Directive has the scope to increase the effectiveness of the so far weak European environmental legislation.

The Directive requires Member States to treat as criminal offences – and therefore prosecute with criminal penalties – a number of activities that breach EU environmental legislation with the provision that they are committed unlawfully and intentionally or with serious negligence. These offences include injuries or death of people or any significant damage to the environment caused by the illegal shipment of waste, trade in endangered species or in ozone-depleting substances, deterioration of wildlife habitats, unlawful emissions to the air, water or soil, the unlawful operation of dangerous activities or the unlawful treatment of waste.

Directive 2008/99/EC, sets a common framework for the identification of environmental crimes in each Member State so to prosecute with criminal penalties a number of activities that breach EU environmental legislation with the provision that they are committed unlawfully and intentionally or with serious negligence.

As in 2008 the quantum of criminal penalties did not fall under the EU legislator's competences and as its legal basis was to be found in the third pillar of the European Union (Police and Judicial Co-operation in Criminal Matters[14]), Directive 2008/99/EC gives Member States the crucial responsibility to address the above mentioned offences by introducing effective, dissuasive and proportionate criminal penalties and they will also have to ensure that companies can be held liable for offences carried out by individuals but from which they benefit.

2.8.1 Legislative History

Environment protection has long been at the centre of EU strategies and policies, as stated in the Charter of the Fundamental Rights of the European Union adopted in 2000 and modified in Lisbon in 2007, art. 37: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and assured in accordance with

[14] The division in 3 pillars was introduced with the Maastricht Treaty (TEU) in 1999 and abolished 10 years later with the Lisbon Treaty in 2009. The Treaty of Lisbon abolished this pillar structure in favour of creating the European Union (EU). Within the EU, decisions are taken in accordance with a procedure of common law, called the "ordinary legislative procedure". However, the intergovernmental method continues to apply to the Common Foreign and Security Policy. Furthermore, although questions relating to justice and internal affairs have been "communitised", some of them relating to police and judicial cooperation in criminal matters continue to be subject to those procedures where Member States retain significant powers.

the principle of sustainable development" and in the Treaty on the Functioning of the European Union (TFEU), Title XX Environment, Art. 191.

In the last few decades, over 200 Directives where issued in the field of environment protection, but up to 2008, statistics on the compliance of Member States and legal entities to these Directives was definitely not encouraging. This is due to the fact that most of these Directives were often not binding and in most – if not all – cases did not foresee adequate and sufficiently dissuasive measures to achieve proper implementation of environmental law. EU's environmental legislation reflected the historical weakness of the EU Commission, Parliament and courts in the criminal sphere, but among the little competences the EU has in terms of criminal law, the Treaty on the Functioning of the EU recognises the EU's "competence to adopt common minimum rules on the definition of criminal offences and sanctions if they are essential for ensuring the effectiveness of a harmonised EU policy" (TFEU, Art. 83(2)).

Several studies carried out by the Commission showed that there were huge differences between the Member States in developing a definition of environmental crime, meaning that the same offences were sanctioned with different penalties from one State to the other.

The process that led to the publication of the Directive has been fairly complicated. In 2000 Denmark proposed a draft Council Framework Decision on the protection of the environment through criminal law, a third pillar instrument that found the opposition of the EU Commission, arguing that the correct legal basis for such norm was instead to be found in the first pillar. Despite the Commission's opposition – and the proposal of a Directive on the protection of the environment through criminal law in 2001 – the Council Framework Decision 2003/80/JHA was adopted in 2003.

The Commission launched appealed against the Council before the Court of Justice of the European Union, which released its judgment in 2005 on the legality of the adopted Framework Decision, recalling that: "neither criminal law nor the rules of criminal procedure fall within the Community's competence", but also establishing an exception to this rule: "the Community legislator is competent when the application of effective, proportionate and dissuasive criminal penalties by the competent authorities is an essential measure for combating serious environmental offences". The Court annulled the Framework Decision based on third pillar law and, in 2007, the Commission proposed a second version of a Directive on the protection of the environment through criminal law.

After lengthy institutional discussions and two judgments of the European Court of Justice on the extent of the Community's competence in the area of criminal law, the Council and the European Parliament agreed on the text of the Directive on the protection of the environment through criminal law. Directive 2008/99/EC – finally adopted on November 19th 2009 – for the first time contains provisions concerning criminal law, putting an end to the tradition of using sole Council Framework Decisions and Council Decisions with regard to criminal law.

2.8.2 Main actors and stakeholders involved

The Directive addresses natural and legal persons, proven that they have committed infringements or had lack in their task of supervision or control. Public organisations do not fall within the scope of the Directive.

All Member States must have implemented Directive 2008/99/EC by the 26th of December 2010. The Directive sets a list of offences to be prosecuted at the National levels by Member States but it leaves the choice of the quantum of criminal penalties to the Member States. In case the Directive is not fully implemented in National legislations, or in case a Member State fails to implement it, citizens can open a case at their National level claiming the application of the Directive or they can address the European Commission through a complaint procedure and the European Parliament through petitions and parliamentary questions in order to push for investigations on a specific offence that could lead a case to the European Court of Justice. This kind of procedure can take up to 7-10 years.

The Directive directly addresses natural and legal persons, that is to say legal private entities (such as corporations), who could be prosecuted proven that individuals with leading position (representatives of the entity, decision makers or control authorities) have committed infringements or had lack in their task of supervision or control. The Directive addresses not only those directly responsible for a criminal offence but also of those who support or incite to such offence.

Art. 2d of the Directive defines 'legal person' as "any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations." Therefore, public organisations do not fall within the scope of the Directive.

The criminal liability of legal persons is foreseen in Art. 6 of the Directive. Art. 6 list three conditions that must take place in order for the legal person to be prosecutable:

1. an offence must have been committed;
2. the offence must have been committed "for the benefit" of the legal person;
3. the offence must have been committed "by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person", based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person.

The Directive sets a list of offences to be prosecuted at the National levels by Member States but it leaves the choice of the quantum of criminal penalties to the Member States.

Art. 6(2) covers the liability of legal persons on the grounds of a lack of supervision or control by the natural person having a leading position when this lack of supervision or control "has made possible the commission of an offence".

Art. 6(3) allows the possibility to engage in criminal proceedings against both legal persons and natural persons "who are perpetrators, inciters or accessories in the offences".

2.8.3 Overview of main provisions and mechanisms

To constitute a criminal offence, all the conducts covered by the Directive must be unlawful. They must also be committed intentionally or with "serious negligence" (Directive, Art. 3). Inciting, aiding and abetting of such conducts will also be considered a criminal offence (Directive, Art. 4).

Looking at the offences in Directive 2008/99 one should first of all establish that, according to the formulation in article 3, all of them require unlawfulness that is defined in article 2(a) as infringing:

The Directive does not target all environmental wrongs but only those considered as the most serious ones.

- the legislation adopted pursuant to the EC treaty and listed in annex A; or
- with regards to activities covered by the Euratom treaty, the legislation adopted pursuant to the Euratom treaty and listed in annex B; or
- a law, and administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the community legislation referred to in (i) or (ii).

Annex A lists environmental Community legislation adopted pursuant to the EC Treaty. Annex B lists community legislation adopted pursuant to the Euratom Treaty. To fulfil the "unlawfulness" condition and be qualified as an offence in the sense of the Directive, the conduct in question must infringe the Directive or the legislation listed in the annexes, or "a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to".

The Court of Justice of the European Union, in its findings in the Case C-308/06 regarding Maritime transport and Ship-source pollution (Directive 2005/35/EC) defines the term "serious negligence" as "an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation" is meant. The European Court of Justice, Sentence Case C-308/06

2.8.3.1 Offences to be prosecuted with criminal penalties:

The Directive does not target all environmental wrongs but only those considered as the most serious ones. In particular, Article 3 of Directive 2008/99 defines nine major offences and sets provisions and requirements for each offence to be prosecutable, proven they are unlawful and committed intentionally or with at least serious negligence:

- discharge into air, soil or water, of materials or ionising radiation that causes or is likely to cause serious injuries or death to people and generate a substantial damage to the environment;
- collection, transport, recovery or disposal of waste that causes or is likely to cause serious injuries or death to people and generate a substantial damage to the environment";

- shipment of waste in a non-negligible quantity";
- operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used, and which causes or is likely to cause death or serious injury to any person or substantial damage to the environment"
- production, processing, handling, use, holding, storage, use, transport, import or export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the environment;
- killing, destruction, possession or taking of, or trade in, protected animal and plant species;
- trading in specimens of protected wild fauna or flora species or parts or derivatives thereof
- any conduct which causes the significant deterioration of a habitat within a protected site
- production, importation, exportation, placing on the market or use of ozone-depleting substances.

It's worth pointing out how several offences include both phrases "likely to cause" and "causes" as the scope of the Directive is to punish not only concrete harm but also the risk of concrete harm. The Directive also differentiates abstract endangerment crime from concrete endangerment crime.

The meaning of "substantial damage" evoked in the Directive brings up the issue of the evaluation, measure and threshold of environmental damage, which is still very controversial. It could lead to difficulties for Member States in the implementation exercise.

The Directive provides that inciting, aiding and abetting the committing of a criminal act is also punishable by Member States.

2.8.3.2 Minimum requirements to be implemented in national criminal laws

The proposed Directive lays down a list of environmental offences that must be considered criminal offences by all Member States, if committed unlawfully, intentionally or with serious negligence. The proposed Directive does not create a list of new illegal acts. The existing law already provides for these prohibitions. The Member States, by transposing this Directive will only have to attach to these existing prohibitions specific criminal sanctions.

Member States must ensure that legal persons can be held liable for offences committed for their benefit. This responsibility can be of criminal or other nature. They also must ensure that the commission of the offences is subject to effective, proportionate and dissuasive criminal sanctions. For legal persons the sanctions can be of a non-criminal nature.

The Directive only sets a minimum standard of environmental protection through criminal law to be adopted by the Member States, who are free to maintain or

introduce more stringent protective measures. The Directive does not lay down measures concerning the procedural part of criminal law nor does it touch upon the powers of prosecutors and judges.

2.8.3.3 Penalties

As already mentioned, Member States are free to decide what penalty to apply in case of violations of Directive 2008/99/EC. Nevertheless, the European Court of Justice holds for these penalties necessarily to be effective, proportionate and dissuasive. Criminal penalties must be effective, proportionate and dissuasive.

As the definition appears to be quite broad, it is worth explaining the scope of these three adjectives.

Effectiveness: to be effective, a penalty must ensure – or contribute to – the achievement of the goals set by the violated Directive. When applicable, a penalty should also lead to the restoration of the environmental situation prior the violation, so it should foresee measures that the perpetrator must take in order to "undo" or restore te consequences of the crime. At the same time, the penalty should incapacitate any further and future impact or harm to be caused by the violation (Faure, 2011).

Proportionality: between the three, the requirement of proportionality is probably the least to be subject to misinterpretations. The penalty will be harsher in cases of concrete harm rather in cases of mere threat or endangerment. The penalty will also vary based on what is the object at stake: stronger penalties will be applied where human health is endangered or harmed, while the endangerment or harm of economic and administrative interests will be punished with a lighter sanction. In extreme synthesis, the proportionality of penalties is the result of a balance between two factors: the object of threat/harm and the manner of the violation (Faure, 2011).

Dissuasion: According to the economic formula: if B = benefits, p = probability of being detected, prosecuted and convicted, S = sanction actually imposed, then the decision of the violator depends on $B \geq p \times S$ (Faure, 2011), the penalty must function as a deterrent for any other potential perpetrators. This can be achieve if the costs due to the penalty are a higher burden for the perpetrator than the economic benefits produced by the violation (Faure, 2011).

Legislative References

- D Case C-176/03 of the European Court of Justice
- Case C-308/06 of the European Court o Justice regarding Maritime transport and Ship-source pollution
- Charter of Fundamental Rights of the European Union
- Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements
- Directive 2008/99/EC on the protection of the environment through criminal law
- Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements
- e-justice platform
- Eurocrim Database
- European Law database (Eur-Lex)
- The explanations of the EU Commission
- To Search for a court in EU Member States
- Treaty on the Functioning of the European Union
- Type and level of criminal sanction for natural and legal persons per country

3. Critical issues in EU Environmental Law and recommendation

In the last 10-15 years, significant progress has been made to guarantee a more effective enforcement of EU Environmental Law in Member States, but – also due to subsidiarity issues – the European Commission has still to tackle several critical issues jeopardizing the full transposition, implementation and application of Environmental Law in Europe. Rather than commenting the strengths and weaknesses of each Directive reported in the previous chapter, in the next pages we will briefly examine a few main critical issues, which are applicable to several environment-related Directives. Some problematic issues, in fact, seem to recur very often in the implementation of all EU Environmental Directives, from the ones setting overall targets for Member States (e.g. the Renewables Directive 2009/28/EC, the EU Emissions Trading Directive 2003/87/EC), to those setting principles and limitations to actions carried out by Member States and private actors (e.g. Seveso III Directive 2012/18/EU, Environmental Liability Directive 2004/35/EC, Environmental Impact Assessment Directive 2014/53/EU, Industrial Emissions Directive 2010/75/EU and Strategic Environmental Assessment Directive 2001/42/EC).

Therefore, this chapter will briefly explore the following issues:

- 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;
- partial 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 Law;

- limitation in participation and access to environmental information and to legal protection in environmental matters;
- subordination of the protection of health and the environment to economic interests;
- Excess of power of operators in self-certification.

3.1 Infringement procedures: too long and ineffective?

Enforcement of EU Environmental Law is a growing focus of attention in the European Union, both because of the problems due to uneven transposition and implementation in Member States and because compliance issues can arise even in national systems characterized by strict laws and procedures. In most cases, EU Environmental Directives have a very broad scope, as they usually set national targets to achieve (e.g. the case of Renewables Directive 2009/28/EC) or – given the integrating effect of common enforcement – objectives and general principles to which all Member States must comply (e.g. Environmental Liability Directive 2004/35/EC), while they are free to define the manner by which to achieve them. This leaves Member States with the huge responsibility to transpose these targets and principles in national Law and then to implement and enforce national Law in order to comply with the targets and principles set by European Environmental Law.

European Commission has the responsibility to ensure that the TEU and the TFEU as well as all related measures including Directives are correctly applied.

Article 17(1) of the Treaty on European Union[15] (TEU) gives the European Commission the role of "Guardian of the Treaties", which entails its responsibility to ensure that both the TEU and the Treaty on the Functioning of the European Union (TFEU) – as well as all measures adopted pursuant to them (including Directives) – are correctly applied. In particular, the European Commission must monitor Member States' legislation, verify its compliance with EU law and ensure that Member States respect their obligations – and mainly: transpose EU Directives; comply with EU Regulations and Norms in Treaties; implement and comply with the judgments of the Court of Justice of the European Union (CJEU).

Considering that the effectiveness of transposition, implementation and compliance of national laws with EU environmental laws finally depends on the will and capacity of each Member State, the EU Commission is left with very few means to fulfil its duty as "Guardian of the Treaties", the main of which is the infringement procedure, based on Article 258 of the TFEU. It states that "if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. […] If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union"

[15] Article 17(1) of TEU: "The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programs. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multi-annual programming with a view to achieving inter-institutional agreements".

As already mentioned in the previous chapter, whenever a Member State does not apply or comply with EU law, the Commission can start an infringement procedure. Several means can be used by the Commission to obtain the necessary information to start an infringement procedure: its own investigations, studies and assessments; investigations following complaints from EU citizens and organisations; petitions from the European Parliament and questions from Members of the European Parliament (MEPs); mandatory reports submitted by Member States in compliance with Environmental Directive provisions. In 2013, the Commission received 3.505 new complaints from citizens, businesses and organisations. The three Member States against which the most complaints were filed were Italy, with 472 complaints – mostly related to employment, internal market & services and environment –, Spain with 439 complaints – especially in connection with employment, justice and environment –, and Germany with 297 complaints, related to justice, internal market & services and environment. It is worth noting how 72% of new complaints were concentrated in the following five policy areas: justice (590), environment (520), internal market & services (494), employment (470) and taxation & customs union (452) (The European Commission, 2014b).

In the 2013, the Commission received 3505 complaints: Italy was the Member State with more complaints (472) and among the 5 policy areas concerned by complaints, the environmental with 520 complaints. The same year, it launches 761 new infringement procedures.

The infringement procedure is an administrative procedure that can be started by the European Commission in reaction to cases of non-compliance or violation of provisions of EU law by Member States. This procedure comprises both pre-litigation and litigation stages, explicated in Articles 258, 260 and 279 of the TFEU. The first two steps in the infringement procedure – under Art. 258 of the TFEU – are pre-litigation tools, such as the "letter of formal notice" and the "reasoned opinion", while the third is a litigation tool, being the referral of a Member State to the CJEU.

In case a Member State still fails to comply with a judgment of the CJEU, the European Commission can take further action against it, based on Art. 260 of the TFEU, imposing a fine – in form of a lump sum or penalty fee or both – to the Member States. Finally, Article 279 of the TFEU allows the Commission to request the CJEU to order interim measures before judgment is given, bit this procedure was used so far only in few and particular cases.

Every year the European Commission publishes a report on the application of EU Law by Member States based on its own monitoring process. The 31st Annual Report on Monitoring the application of EU law published in 2013, according to which, in that year the Commission launched 761 new infringement procedures (Italy received the most letters of formal notice, followed by France and Spain) mainly in the policy fields of environment, transport and health. In addition, the Commission sent 217 reasoned opinions to Member States (Italy, Romania and Belgium received the most) especially on environment, energy and taxation & customs union. Italy was the Member State with the most infringements also in 2012, and 25% of these involved non-compliance with Environmental Law.

Unfortunately though, considering that the infringement procedure is characterized by a very long timing (it can take more than 5 years from the beginning of an infringement procedure to the decision of the EU Court of Justice to impose a

financial penalty to a Member State), the deterrent effect of penalties is not sufficiently high compared to the benefits of non-compliance with agreed targets.

Another critical issue is that, due that the time between a case being lodged with the Court under Art. 258 TFEU (considering that the previous pre-litigation steps already can take a very long time) and judgment is often over 2 years, irreversible damage to the environment can be done in the interim if there is no requirement for Member States to be held back from damaging activities. The order of the CJEU will usually last until final judgment is given in the main action instigated under Article 258 TFEU. The Commission has the power to appeal to Article 279 of the TFEU to address these situations, as it allows the Court to order interim measures, but in recent years, the Commission has invoked Article 279 of the TFEU three times in cases handled by the Environment Directorate General[16]. So, whilst this is a highly effective tool, it is one to which the Commission will only have recourse in exceptionally urgent and serious cases.

Recommendation:

1. Interim measures ordered by the ECJ under Art. 279 of TFEU are proven the only effective mean to stop hazardous and risky activities to cause irreversible environmental damage during the time necessary to conclude an infringement procedure. Therefore, **the EU Commission should adopt the practice of invoking Art. 279 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.
2. There are cases in Europe of systemic and pervasive violation of Environmental Law, but infringement proceedings, being case-specific, cannot deal with systemic violations of the rule of law (Andersen, 2012). The Commission infringement procedures would be therefore more effective if **the infringing actions carried out by a Member State in the same policy area (environment) were to be addressed together – consequently offering the ECJ a broader and more comprehensive context – in a systemic infringement procedure** (Scheppele, 2013).

On March 11 2014, the European Commission adopted a new framework to address systemic threats to the rule of law, establishing an “early warning tool” allowing the Commission to enter into a dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law. This tool is a three-stage process: a) Commission assessment (if as a result the Commission believes that there is a situation of systemic violation of the rule of law, it will initiate a dialogue with the Member State concerned and sending an official warning); b) Commission Recommendation (the Commission addresses a public "rule of law recommendation" to the Member State); c) Follow-up to the

[16] Cases C-503/06, *Commission v. Italy* and C-76/08, *Commission v. Malta*, where the Court ordered the Member States to stop illegal hunting activities, and case C-193/07, *Commission v. Poland*, where the Commission applied to halt the imminent construction of a road and compensatory tree planting both of which threatened important nature habitats.

Commission Recommendation (the Commission will monitor the follow-up given by the Member State to the recommendation). If there is no satisfactory follow-up within the time limit set, the Commission can resort to one of the mechanisms set out in Article 7 of the TEU to guarantee the EU core values. This framework was issued in response to systemic violations of Fundamental Rights (the case of Hungary threatening the independence of judges was cited). It is yet to understand if this article 7 could be applied also to systemic violation of Environmental Law. Article 7 of the Treaty on the European Union (TEU) sets up a mechanism to guarantee the protection of EU core values, with an early warning and sanction mechanism in case of systemic violations perpetrated by a Member State. Article 7 has never been activated due to the exclusively political character of this procedure and the fact that it does not envisage any legal or judicial intervention.

3.2 Slow and uneven transposition and implementation of EU Environmental Law in Member States

The EC can start 3 types of infringement procedures related to the transposition of directives: non-communication infringements, non-conformity infringements and bad application infringements.

In occasion of the 2013 Conference on Implementation & Enforcement of Environmental legislation "Working together to Improve & Innovate" organised by the EU Commission, Environment DG, Karl Falkenberg intervened on the "gap between the quality and ambition of EU environmental legislation and the reality in the Member States", stating how "[…] the process of adopting new legislation is already a strong challenge – it is a lengthy and complex process. Unfortunately in the transposition process, Member States have the tendency to lack simplification and transpose the relevant Directives in a piecemeal manner, integrating them into national legislation […]". This is consideration is particularly important, as the economic costs of not fully implementing environmental targets are extremely high.

While EU regulations are directly applicable in each Member State, EU Directives must be transposed in national legal systems in order to enter into force. If a Member State does not transpose a Community Directive in time, the Commission may initiate an infringement procedure for "late transposition". The EC monitors and inform about such transposition through the "EU Internal Market Scoreboard" which shows that the four sectors where the largest number of infringement proceedings for late transposition were launched in 2013 were: environment (168 procedures), health&consumers (58), internal market and services (47), transport (36).

Whereas the transposition of EU Directives is essential in order to standardize the legal system within the European Union, reducing such delays is inevitably a priority for the European Commission. The Commission can start three different types of infringement procedures connected to transposition of Directives in Member States: non-communication infringements are opened when a Member State fails to notify legislation which transposes a specific Directive before a given deadline; non-conformity infringements are started if the Commission identifies

shortcomings in the transposition of a given Directive; and, finally, bad application infringements address the incorrect application of the transposed provisions of a Directive by a Member State.

The most common **causes of delays and shortcomings** in the transposition, implementation and enforcement of EU Directives and, in particular, of those which are environment-related, are:

1. too much discretion given to Member States;
2. different national political priorities;
3. lack of judicial experience in most Member States in dealing with environmental crimes;
4. difficulty in translating Directives into the diverse languages of the Member States (this is also connected to problems due to vague notions and definitions in EU Directives);
5. incoherence and conflicts between EU Directives and Member States' systems of already existing legislation.

As an illustrative example, the following paragraph will provide a very brief overview of the difficulties encountered by Member States in transposing and implementing two of the environmental Directives described in part 1 of the report.

Environmental Crimes Directive - 2008/99/EC

The main aim of the Environmental Crimes Directive (ECD) is to harmonize environmental criminal laws of Member States, allowing them to define the type and level of criminal penalties to be applied. The nine environmental offences listed in the ECD constitute a crime and must be punished when committed unlawfully and intentionally or with serious negligence. Unfortunately there are still considerable disparities between the criminal justice systems of Member States in the area of environmental crime. Throughout Europe, the ECD has already proved to be quite difficult to transpose and implement at the national levels, due to a range of different problems.

Firstly, the enforcement of such Directives directly depends on political priorities and national judicial capacity. As underlined by The European Union's Judicial Cooperation Unit, these two factors can determine the number of prosecutions for environmental offences in Member States, but this number still appears to be very low in most Member States, at least in comparison with "ordinary" crimes.

Secondly, the Directive just provides broad guidelines on what kind of penalties and sanctions should be applied, resulting in a great disparity between the application of the Directive throughout the Union, as where in certain countries a maximum of two years imprisonment can be imposed for a certain offence, in other countries the same offence can lead to an eight years imprisonment. In addition to this, it is arguable that confiscation of profits of environmental crime should be foreseen as well as penalties and sanctions.

Another common obstacle is the judicial inexperience and the unfamiliarity of prosecutors with environmental crimes. So, among tendencies, we can note the focus on crimes that "associated" with environmental crime, but that can be dealt

with using traditional criminal law (i.e. fraud or corruption) and the imposition of relatively low financial penalties and the lack of imprisonment sentences.

Environmental Liability Directive – 2004/35/EC

As already mentioned for the ECD, the problems concerning the implementation of the Environmental Liability Directive (ELD) are of different types.

Firstly, one of the main reasons for the implementation difficulties of the ELD can be assumed to be the discretion left to the Member States. This discretion covers extremely important provisions that represent the very core of the Directive, such as: the scope of the liability regime or the compulsory financial security. So far, the large majority of Member States – given that they were free to decide between weaker or stronger forms of implementation of the ELD – has chosen the weakest form of implementation, therefore contributing to narrow the scope of the Directive at a European level and weakening its effectiveness. As an example, Member States had the opportunity to enlarge the narrow scope of this Directive, by determining more species and habitats to be protected under national law than under the Wild Birds and the Habitats Directives, but only very few have chosen this path, while the majority stuck to the narrowest scope possible. In addition to this, very few Member States have declared the intention to establish a compulsory insurance for operators in the future.

Secondly, the vague and unclear notions and key definitions listed in the Directive have further undermined harmonization and coherence in the transposition of the Directive in all Member States.

Moreover, the implementation process of the Environmental Crime and Environmental Liability Directives reflects general implementation problems of Directives into Member States' national laws, such as the problems caused by the translation into the different languages, or those due to the implementation of certain Directives into already existing laws.

The consequences of uneven, late or bad transposition and implementation of environmental Directives in Member States is likely to jeopardize one of the Union's main priorities, that is harmonization of Environmental Law.

Fortunately, in the last few years, the European Commission has made progress in addressing the issue of uneven and late transposition. In 2012, the Commission adopted a Communication "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness". The Communication – complementing the Commission's 2008 Communication on "Implementing European Community Environmental Law" – sets out suggestions and recommendations with the objective of providing Member States with means and tools to improve transposition and implementation of EU Directives. According to the Commission, in fact, "the costs of not implementing current (environmental) legislation are broadly estimated at around

€50 billion a year in health costs and direct costs to the environment". Great emphasis is put on the importance to provide an accessible and reliable knowledge base and up-to-date and comparable information in order to ensure a correct implementation in Member States. Citizen and civil society control on their national, regional and local authorities is as much important, therefore the Commission recommends to improve inspections and surveillance, to set criteria for how Member States should deal with citizen complaints, to ensure more access to justice in environmental matters and to support for European networks of environmental professionals.

Several formal and informal groups and organisations were born in the last 10-15 years to overcome the impacts on citizens' health and on the environment. The Committee of the Regions can count on the technical support offered by the EU Network for the Implementation and Enforcement of Environmental Law (IMPEL), while the European Union Forum of judges for the environment (created in 2004 as an association in Belgium and open to all EU and European Free Trade Association judges) was created with a view to raising the awareness of judges of the key role of the judicial function in the effectiveness of sustainable development. It aims to promote the implementation and enforcement of national, European and international environmental law from the sustainable development perspective by sharing experience and best practices on judicial training and on environmental case law in order to contribute to the better implementation and enforcement of international, European and national environmental law.

According to the Commission, in fact, "the costs of not implementing current (environmental) legislation are broadly estimated at around €50 billion a year in health costs and direct costs to the environment".

In addition to formal and institutional agencies and working groups, there are also informal implementation networks that count on the involvement of European regulators and inspectors concerned with the implementation and enforcement of environmental law. The main activities carried out by these networks include the exchange of information and experience on the implementation and enforcement of existing EU environmental legislation and the development of common views on the coherence and practicality of this legislation.

Recommendation:

3. Civil Society organisation are not always fully aware of the existence of the above mentioned informal and formal implementation networks or might be reluctant to engage and interact with such bodies, due to their proximity with institutions. Nevertheless, such organisations, agencies and networks possess qualified expertise and up-to date information on on-going transposition and enforcement of processes in Member States. A **positive interaction between activists, NGOs, environmental no profit organisation and such formal and informal bodies could help them in their lobbying activities,** providing them with not questionable data and information to be used to put pressure when addressing environmental injustices.
4. Introduce **new – and improve existing – training methods for regulators, inspectors, prosecutors, judges, etc.**
5. Improvement of **access to information and justice for the public and especially for Environmental Justice Organisations – EJOs**. Provided

with adequate tools, the public and civil society will be able to take action against failures of compliance, transposition and implementation of EU Environmental Law, as "formal complaints" have proved to be insufficient.

3.3 Vague notions and key definitions in environmental Directives

Way too often, notions and key definitions in EU environment related Directives seem to be purposefully vague. This may be due to different causes: it can be a result of compromises between the Commission and the Council and – consequently – with lobbies; it can be a strategy used by the EU legislator to allow Member States to apply a variety of already existing solutions foreseen in national law; or, it can be due to the necessity to translate in all EU languages the provisions contained in the Directive.

In all the above-mentioned cases, the consequences can be very serious. The vagueness of notions and standards may, in fact, result in an uneven and incoherent application of the Directives in different national contexts, thus jeopardizing the achievement of harmonization of environmental law in the EU. The effectiveness of these Directives is also threatened by the diverging application in Member States, justified by the use of too vague notions.

The ECD imposes Member States to enforce or introduce effective, proportionate and dissuasive penalties when one of the nine offences listed in the Directive is unlawfully and intentionally committed.

To exemplify the problems resulting from the use of vague and open definitions we will briefly examine the issue in relation to a selection of the Directives included in Chapter 1 of this Report.

Environmental Crime Directive – 2008/99/EC

Among the many implementation challenges of the Environmental Crime Directive (ECD), one of the most critical is the interpretation of the vague notions and definitions included in the Directive. The text presents in fact a large number of vague or very open notions, such as "substantial damage" (Preamble 5, article 3(a), (b), (d) and (e)), "(non) negligible quantity" and "(non) negligible impact" (article 3 (c), (f), (g)), "dangerous substances" (article 3 (d)), "leading position", etc.

It is arguable that the use of vague notions in criminal law constitutes a violation of the *lex certa* requirement, according to which the law should be very precise in order for the potential perpetrator to know for sure if his behaviour will fall or not under the scope of the law (Faure, 2011). Another open notion given in the ECD is "significant deterioration of a habitat within a protected site (Article 3(h)). While the definition of "habitat" is provided in the text, there is no definition of "significant deterioration" (Michael, 2010).

Most importantly, the ECD imposes Member States to enforce or introduce "effective, proportionate and dissuasive" penalties when one of the nine offences listed in the Directive is "unlawfully" and "intentionally" committed. The notions of effectiveness, dissuasiveness and proportionality are certainly not unequivocal or

precise (Faure, 2010). The same notions are also used in Directive 2009/123/EC on ship-source pollution and in the so-called Seveso III Directive. The reason for the use of this phrase is that at the time of the introduction the Directive, the EU did not have any competence for prescribing the level of sanction to Member States. However, according to Article 83 of the Treaty on the Functioning of the European Union (TFEU), the EU now has certain competences to set minimum provisions regarding the type and level of criminal penalties to be applied in certain areas under certain conditions. Art.83(2) TFEU states that "if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures, Directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned".

Environmental Liability Directive – 2004/35/EC

The definition of "environmental damage" has proved to be extremely difficult to interpret.

The vagueness of certain notions contained in the text of the Environmental Liability Directive (ELD) has most likely caused difficulties in its transposition and implementation. The Directive is in fact quite hazy concerning several aspects of the environmental liability regime. In particular, the definition of "environmental damage" has proved to be extremely difficult to interpret. The Directive defines "environmental damage" in Article 2, however all definitions listed in Article 2 of the ELD are quite subjective. Different circumstances provide exclusions and exemptions from what can fall under the notion of "environmental damage", making this definition more subjective or at any rate hard to promptly measure.

The ELD's definitions present other issues as well, e.g. cost recovery where the government incurs the response costs is also measured by "environmental damage", so the cost is measured and established according to the nature and entity of the "environmental damage", but an operator could argue that there was no environmental damage and that the cost is not recoverable or that the cost went beyond what was necessary to assess the "environmental damage." The use of "justified," "proper" and "effective" all open the door for an operator to claim that the costs incurred by a government agency were none of the above.

The same kind of problems were already noted for the Seveso II Directive, in fact the European Union Network for the Implementation and Enforcement of Environmental Law in 2003 had already noted that the operator's reporting requirements under the Seveso II Directive for "major accidents" were very subjective because of the use of vague notions and that they would probably create problems in the enforcement for this reason.

Recommendation:

6. Article 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 and in areas that were subject to harmonization measures. Seen that both the **ECD and the ELD Directives are facing several transposition and enforcement**

difficulties, we recommend the two Directives to be amended in order to include more precise indications of the nature and entity of financial and non-financial penalties. In some cases, even if there are no significant problems in transposing and implementing a Directive, the lack of precise definitions can narrow the scope of the Directive itself. This is, for example, the case of Directive 2009/28/EC on the use of Energy from Renewable Sources.

Renewable Energy Sources Directive – 2009/28/EC

Renewable energy sources are in fact very different one from the other, as are their impacts on the environment.

The Renewable Energy Sources (RES) Directive defines renewable energy as follows, in Article 2(a): "energy from renewable non-fossil sources, namely wind, solar, aero-thermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases". With the exception of biofuels, all the provision contained in the Directive refers generally to "renewable energy" as defined in Article 2.

It is arguable, though, that renewable energy sources are in fact very different one from the other, as are their impacts on the environment. The definition of renewables in Directive 2009/28/EC does not classify energy sources and management systems according to their impact, and therefore Member States are not required to give priority to one source rather than the other.

Throughout Europe, civil society engaged in energy issues claims that energy sources should be differentiated according to their different environmental impacts and to the different management system required for their production and distribution. This would allow national strategies, priority support schemes and local planning to give priority to less damaging technologies and to decentralized, community-led power generation.

Considering EU ambitious priorities in the field of energy and the commitment to the principles of the Aarhus Convention, the scope of the RES Directive could significantly be enlarged in order for it to contribute not only to the reduction of GHG emissions in the EU but also to foster "public participation in environmental decision-making".

Recommendation:

7. In relation to the definition of renewable energy included in EU Directive 2009/28/EC, we recommend that in Art. 2 «definitions», the definition of "renewable energy production and consumption" should be amended to take into account of the **modality of production and the modality of use, in terms of efficiency, energy economy and reduction of social and environmental impacts of power plant. Also, environmental impacts should be the basic criteria to differentiate the different non fossil fuel energy sources.** This criterion should help create a classification of renewable energy sources based on the degree of contribution of these sources to reduction of air, water and soil contamination.

8. In relation to “support schemes” and to “renewable energy obligation” referred to in Art.2 (k) and (l), we recommend the **introduction of a set of criteria for the allocation of incentives, based on the effective production of energy from renewable sources rather than on the acquisition of certificates**, in order to encourage energy producers to gradually but definitively abandon the production of energy from fossil sources therefore contributing to the achievement of Europe’s 2020 targets on carbon emissions.

3.4 The 3 pillars of Aarhus Convention in EU environmental Directives

The Aarhus Convention focuses on 3 pillars: information, participation and access to justice and it assumes public participation contributes positively to the creation and implementation of environmental policies.

The Aarhus Convention recognises that “in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns”. In that sense, the Convention focuses on 3 pillars: information, participation and access to justice and it assumes public participation contributes positively to the creation and implementation of environmental policies.

Information. The need of environmental information is largely and indiscriminately recognised as its access and knowledge is a fundamental condition for the realisation of the public interest lying in the protection of the environment and of public health.

Directive 2011/92/EC on Environmental Impact Assessment (EIA) acknowledges the Convention and establishes in Article 6 that pertinent national public authorities shall be informed regarding project subject to environmental impact assessment and “the public shall be informed [...] of the following matters early in the environmental decision-making procedures”. Similarly SEA Directive 2001/42/EC and industrial emission Directive 2010/75/EU acknowledge the right to participation and access to environmental information.

Participation. EIA Directive 2011/92/EC also established in Art. 6 provision 4, as indicated in the Aarhus Convention public involvement in environmental public decision making in early stage of authorities proceedings and before any authorisation is granted to a given project in order to guarantee effective public participation. In this case too, the SEA and the industrial emission Directive make similar provisions.

Access to justice in environmental matters. This pillar of the Aarhus Convention establishes in Article 9 provision 3 that every state party guarantees within their own national legislative frameworks citizens' access to administrative or judicial procedures to challenge private or public authorities' decisions or omissions contradicting national environmental law; and in Article 9, provision 5 that public shall be informed on its right to undergo administrative or judicial

proceeding and shall be assisted in order to remove any economic or other difficulties in accessing justice.

Notwithstanding the detailed prevision of the Aarhus Convention, we witness that, on one hand, public authorities fail to guarantee preventive information and adequate participation processes to the public. On the other hand, policies and national jurisdictions tend to use restrictive criteria to identified public representatives who can legitimately actuate in the legal system, as we can see in EIA Directive 2011/92/UE , SEA Directive 2001/42/CE and IPPC Directive 2010/75/UE.

Recommendation:

9. in order to guarantee a major circulation and comprehension of environmental information, in particular **in regard with environmental and health impact assessment of plans, programmes, projects and plants, texts of the EIA Directive 2011/92/UE, SEA Directive 2001/42/CE and IPPC Directive 2010/75/UE should be completed with more tight and binding measures.** By establishing evaluation criteria in EU policies in regards with Member States' actions towards preventive information for example, it would overcome the low impact of national communication strategies in this field and who not leave alone non governmental and environmental justice organisations in conveying environmental information to the public which is fundamental in giving citizens access to justice.

A basic difference is made between citizens as individuals or their organisations and those citizens and their organisations potentially impacted by a given project or having specific interests in regards with it.

3.5 Differences between “public” and “public concerned” in participation and access to environmental information

In EIA Directive 2011/92/EU, article 1, “public” and “public concerned” are distinguished and defined respectively as “one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups” and as “ the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures [...]. For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”. So a basic difference is made between citizens as individuals or their organisations and those citizens and their organisations potentially impacted by a given project or having specific interests in regards with it.

This distinction is made also in IPPC Directive 2010/75/EU and generally speaking rights regarding decision-making process participation or access to environmental information and justice differ for stakeholders if they are part of the “public” or the “public concerned”. Accordingly, there are differences in their protection from potential effects of projects, plans or plants on health and the environment.

Directive 2011/92/UE establishes access to information for the public and the public concerned while adequate form of consultation and participation to decision-making in environmental matters in due time are planned only for the latest. The quality and quantity of information provided to both stakeholder groups also differs. Article 9 guarantees that the public shall be informed by competent authorities when they grant or refuse development and provided with information regarding the content and conditions related to the decision, its reasons and outputs from eventual participation processes occurred and the description of measures planned to limit the development's effects. As provided by article 6, the public concerned shall have access to more information, in particular information gathered pursuant to Article 5 (project description with information on the site, design and size of the project; measures to address negative effects and data to identify and assess effects on the environment, projects main alternatives with the reason on the final choice, etc.) and those relevant for the release of a permit.

IPPC Directive 2010/75/EU recognises also the possibility to participate to decision-making process only to the public concerned, while the information regarding an adopted decision shall be accessible to the public. In Directive 2001/42/EC no distinction is made between “public” and “public concerned” in regards with participation. Though, Article 6, provision 4 establishes that Member States identify the sectors among the public to be consulted, including not only those “affected or likely to be affected by, or having an interest in the decision-making [...] including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned”. If on one hand, this could be interpreted as the possible inclusion in the consultation process other sectors of the public as for examples organisations interested in the conformity of the consultation process or in other potential impacts of the project or plan (like health), on the other hand it might be seen as leaving too much space to the Member States in the definition of who can and who cannot have access to consultations and related detailed information.

Recommendation:

10. In regards with the access to environmental information provided in the 3 Directives it appears necessary that the European Union impose **more specific criteria on the type of information that 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 around environmental issues, **environmental information should aim at the widest diffusion and accessibility**.
11. Similarly, **in regards with participation to decisional processes, the Directives should overcome the distinctions between “public” and “public concerned” in order to widen the range of potential public sectors participating** while avoiding Member States to limit participation of public sectors and the application of what is established in the Aarhus Convention and taking into consideration general interest principles such as transparency, health protection and democracy.

12. The Directives should establish mechanisms allowing **binding the results of participation processes to decisions** in order to provide participation with power in terms of its impact in decision-making processes.

3.6 Contrast in regards to public access to environmental information between Directives 2011/92/EU and 2003/4/EC

In regards with information to be provided to the "public concerned", EIA Directive refers in its Article 6, provision 3. c) to Directive 2003/4/EC on public access to environmental information. The Directive establishes in Article 1 its objective to set up the "terms and conditions of, and practical arrangements [...] to ensure that [...] environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information". In this Directive, no distinction is made between "public" and "public concerned", and no differences are made in the type of access to information rather you are directly interested by a given project or not. On the contrary, it provides that Member States "ensure that public authorities are required [...] to make available environmental information held by or for them to any applicant at his request and without his having to state an interest".

Directive 2011/92/UE, while it guarantees rights to information and participation, also limits their wideness.

The definition given in Directive's Article 2, provision 1 to environmental information is intended as "any information in written, visual, aural, electronic or any other material form on: (a) the state of the elements of the environment […] (b) factors [...] affecting or likely to affect the elements of the environment […]; (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors […] measures or activities designed to protect those elements; (d) reports on the implementation of environmental legislation; (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities […]; and (f) the state of human health and safety, including the contamination of the food chain".

When confronted with Directive 2003/4/EC, it appears that Directive 2011/92/UE, while it guarantees rights to information and participation, also limits their wideness. Such limits regards the quantity and quality of information the two Directives guarantee access to differs:

- Directive 2003/4/EC recognises all citizens independently of a given interest in environmental information, the right to access all data available to public authorities regarding for example, the state of the environment, air, atmosphere, water and soil; contaminating factors like energy, radiation, waste, emissions, etc. that can impact on environmental elements and on human health and security.

This kind of data becomes central in the evaluation and monitoring the impacts of a given project;

- In Directive 2003/4/EC everyone is granted the right to access environmental information held by or for public authorities whereas EIA Directive limits access to specific environmental information (i.e. data more relevant to technical and procedural aspects of the project rather than to the state of contamination or risk for health like in Directive 2003/4/EC) only to the "public concerned" (art. 6. 3. c)) ;

In Directive 2003/4/EC connections can be made between health, environment and access to environmental information to all citizens whereas EIA Directive seems to limit the subjects who can access information on possible health risks and participate to consultation in regards with EIA. In other words, it appears that Directive 2011/92/EU intents to exclude citizens non recognised as "concerned" from the evaluation of a given project, while Directive 2003/4/EC tends to build the recognition of an overall general interest in environmental protection.

Recommendation:

13. **It is necessary to guarantee in EIA Directive a wider access for all citizens** to environmental information similar from a quantitative and qualitative point of view to the one established in Directive 2003/4/EC **with no distinction between "public" and "public concerned"**.
14. **EIA, SEA and IPPC Directives could be integrated with criteria providing Member States to guarantee a general right to participation and access to environmental information not restricted to stakeholders recognised as "public concerned"**, allowing to take into account public sectors moved by general interests like health protection and citizens from wide geographical areas given that it is impossible for some plants, plans, programmes or project to distinguished between "public" and "public concerned" as they have no clear geographical limits also in terms of impacts.

3.7 Limits in the access to legal protection and application of normative tools in environmental matters

There are numerous limits in the access to a legal pursuit to contest the substantive or procedural legality of decision, acts or omissions in regards with public participation or information norms.

There are numerous limits in the access to a legal pursuit to contest the substantive or procedural legality of decision, acts or omissions in regards with public participation or information norms.

In its preamble, the EIA Directive recalls Articles 6 and 9 (2)(4) of the Aarhus Convention. Looking closely, it appears that Directive 2011/92/EC found inspiration in Article 6 of the Convention on "public participation to decisions on specific activities" for the division it makes between projects on which to apply the obligation of EIA and those projects which evaluation remains at the discretion of Member States, i.e. those not included in annex I of the Convention.

It also inspires itself from Article 9 from the Convention in regards to “judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions”. The article establishes that “members of the public concerned […] having a sufficient interest or, alternatively, maintaining impairment of a right” “[whose] request for information [...] has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law”.

Consequently, Directive 2011/92/EU limits this right to members of the “public concerned” “having a sufficient interest, or alternatively [...] maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition”, leaving to Member State the freedom of interpretation regarding the meaning of “sufficient interest” and “impairment of a right”. The only actor clearly identified by the Directive as being part the “public concerned” and for which sufficient interest is recognised to be “deemed to have rights capable of being impaired” (Article 11 (3)) are “non-governmental organisations promoting environmental protection and meeting any requirements under national law” (Article 1(2)).

Directive 2010/75/EU also limits access to justice in Member States to challenge the substantive or procedural legality of decision, acts or omissions in regards with public access to information and participation in permit procedures to the “public concerned” provided that they have a “sufficient interest” and they “maintain the impairment of a right” (Article 24 and 25). Once again, the interpretation of the notion of interest and impairment are left to the Member States with the indication of consistency with the objective of “wide access to justice”.

The EIA Directive intend by environmental impact a “significant effect” related to a development project on the human and natural environment. The Directive though has for objective to impose IEA to projects likely to provoke “significant” changes to the state of the environment to be assessed. It distinguishes between project having “significant effects on the environment” to be systematically assessed and those which might “not have significant effects on the environment in every case” for which Member States are to decide if they are likely to “have significant effects on the environment” (preamble (8) (9)). For this category of projects, Member States can, taking into account general criteria established by the Directive, decide on thresholds and criteria for the identification of projects subject or not to systematical EIA.

Article 2 of IEA Directive establishes, that before a permit is granted for “projects likely to have a significant impact on the environment by virtue, inter alia, of their nature, size or location (according to article 4 and listed in annex I) are made subject to a requirement for development consent and an assessment. Annex II of the Directive lists the types of projects for which Member States are to decide on the eventual evaluation. They can proceed to case-by-case decision or establish thresholds and criteria or both. Going through annex II list, it appears many projects have undeniable “significant effects”.

Recommendation:

15. In regards to participation and access to justice and information, it appears necessary the abolition of distinction made between the category of plants, projects, plans and programmes covered by Directives 2011/92/EU, 2001/42/EC and 2010/75/UE and 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**.
16. **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 "sufficient concerned" and "impairment of rights" with the objective to widen subjects able to access or situations eligible for legal proceedings.

3.8 Subordination of health and environment protection to economic interests

The SEA Directive 2001/42/EC actuates on the basis of the precautionary principle as from Article 191 (ex 174 TEC) of the Treaty on the Functioning of the European Union (TFEU)[17]. The latest establishes that environmental European Union policies "contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change." Following those objectives, Art. 191 refers explicitly to the balance between environmental protection and economic requirement, which recall to sustainable development as it is evoked in Article 11 of the same Treaty: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". In Article 191, even if aiming at a high level of environmental protection, the TFUE establishes that "the Union shall take account of: available scientific and technical data, environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action, the economic and social development of the Union as a whole and the balanced development of its regions". It can be intended that areas less developed where people suffers from economic disadvantage are more likely to host contaminating activities and see a more flexible application of the precautionary principle so a higher health risk. That would imply that, only if

[17] As no definition of the precautionary principle is included in Treaty or other documents from the Council, the European Commission has developed Communication 2000(1) defining that: "The precautionary principle is not defined in the Treaty, which prescribes it only once - to protect the environment. But in practice, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community". The precautionary principle is though ascribed within risk analysis (including risk assessment, risk management, risk communication) and management.

the economic requirements allow it, “environmental damage should as a priority be rectified at source and the polluter should pay” on the basis of the precautionary principle.

In IPPC Directive, economic requirements are related the identification of “best available techniques” for a given activity. In article 3 (10), this concept is defined as “the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole”. It is then specified that “a) ‘techniques’ includes both the technology used and the way in which the installation is designed, built, maintained, operated and decommissioned; (b) ‘available techniques’ means those developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages [...] as long as they are reasonably accessible to the operator”.

Areas less developed where people suffers from economic disadvantage are more likely to host contaminating activities and see a more flexible application of the precautionary principle so a higher health risk.

Further on, article 15 (4) establishes that “the competent authority may, in specific cases, set less strict emission limit values. Such a derogation may apply only where an assessment shows that the achievement of emission levels associated with the best available techniques as described in BAT conclusions would lead to disproportionately higher costs compared to the environmental benefits due to: (a) the geographical location or the local environmental conditions of the installation concerned; or (b) the technical characteristics of the installation concerned, the competent authority”.

With regards to the weight given to economic requirements in relation to combustion plants, waste incineration plants and waste co-incineration, it is interesting to review Article 8 establishing the suspension of such plants or their installation “where the breach of the permit conditions poses an immediate danger to human health or threatens to cause an immediate significant adverse effect upon the environment”.

On one hand, the suspension is only guaranteed when compliance with the permit is restored proven that “the operator immediately takes the measures necessary to ensure that compliance is restored within the shortest possible time” or “the competent authority requires the operator to take any appropriate complementary measures”. This implies that their is no guarantee that permits are suspended until the complete elimination of health and environmental threats even when there has been a lack of respect of emissions limits during long periods provoking dangerous accumulation of contaminating substances in the environment.

On the other hand, the connotation of “immediate” to characterize the danger to human health and the environment related to activities regulated by the Directive is baffling as such danger are by nature the result of a long exposition of both environment and health to contaminating substances.

With particular regards to carbon dioxide emissions, a derogation is made in the IPPC Directive in favour of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community. Article 9 (1) (2) establishes that “where emissions of a greenhouse gas from an installation are specified in Annex I to Directive 2003/87/EC in relation to an activity carried out in that installation, the permit shall not include an emission limit value for direct emissions of that gas, unless necessary to ensure that no significant local pollution is caused” and “for activities listed in Annex I to Directive 2003/87/EC, Member States may choose not to impose requirements relating to energy efficiency in respect of combustion units or other units emitting carbon dioxide on the site”. Activities listed in annex I include energy activities such as combustion of minimum 50 MW, oil and gas refinery, coke production and gasification and liquefaction plants. Such derogation applies opposite principles to those pursued by IPPC Directive: Directive 2003/87/EC does not aim to prevent and decrease contamination but to establish an exchange scheme for emissions trade, for which costs and economic efficiency criteria prevail on thresholds based on the balance between environmental advantage and economic costs.

Both Directives 2011/92/UE (IEA) and 2003/4/E on public access to environmental information establish that competent authorities in Member States are limited in the diffusion of information in respect with “the limitations imposed by national laws, regulations and administrative provisions and accepted legal practices with regard to commercial and industrial confidentiality”. The protection of commercial and industrial confidentiality could appears disproportionate when confronted to the need to allow public access to important information for environmental and human health protection.

Recommendation:

17. **The European Union should provide Directives 2011/92/EU, 2001/42/EC and 2010/75/EC more biding tools in regard with human health protection**. Health protection should prevail on economic requirements, providing the strict application the precautionary principle, with for example the suspension of plants when health risks are identified until those risks are not eliminated or reduce to a minimum level. Those Directives could also include economic evaluation tool for the assessment of damage to health related to environmental impact so to include health (for example in occupational terms) in cost benefit analysis of a given project, plant, plan or programme. Finally, “the limitations imposed by national laws, regulations and administrative provisions and accepted legal practices with regard to commercial and industrial confidentiality” should be derogated when risk to human health are at stake.

3.9 Excess of power of operators in self-certification

Among the amendments made to EIA Directive 2011/92/EC by Directive 2014/52/EU, there is the inclusion of the "determination" procedure disciplined Article 4, paragraphs 5 and 6. It is a procedure used to determine whether the

project should or should not be subjected to Environmental Impact Assessment. The applicant provides information on the project's characteristics and its potential significant effects on the environment according to the detailed list in Annex IIA. The competent authority issues a determination based on the information provided by the applicant. This determination shall be made public and, according to the "relevant" criteria listed in Annex III, determines whether the Environmental Impact Assessment is needed or not for the project subject to determine specifying in both cases the reasons.

Among the new features included in Annex III by Directive 2014/52/EU, we find, among the projects' characteristics, the new letters f) and g). The first concerns the risk of serious injury and / or natural disasters related to "project in question" and not just "substances and technologies used". Among the risks to be taken into account are then introduced also those relating "to climate change, according to scientific knowledge". In letter g), introduced *ex novo*, we find the risks to human health.

In IPPC Directive 2010/75/EU, the operator is required to avoid any pollution risk once the activities are ceased, as well as to restore the site to a "satisfactory" state. To understand what is meant "satisfactory" we should take as a reference Article 22, in which were introduced provisions to protect the state of the site on which the plant operates. If the activity involves the use, production or release of hazardous substances, taking into account the possibility of contamination of soil and groundwater at the site of the installation, it is required that the operator elaborate and transmit to the competent authority a baseline report on the state of contamination of soil and groundwater, which will be used to make a quantitative comparison with the state upon definitive cessation of the activities.

Article 22 describes also the minimum information that must be contained in the baseline report and the fulfilment by the operator at the time of termination of the activity. The «necessary information to determine the state of soil and groundwater contamination» (Article 22, paragraph 2, second comma) shall include at least the following two elements:
- Information on the present use and, if available, on past uses of the site: within this requirement, the specification "if available" means information accessible to the operator of the installation, taking into account the reliability of the information on past uses;
- Information on the concentrations in soil and groundwater of relevant hazardous substances that will be used, produced or released by the installation.

If the development project of a site, already known at the time of the report, may involve the use, production or release of other hazardous substances, it is advised to include in the report also information on the concentrations of these substances in soil and groundwater. If such information is not yet available, new measurements have to be made where there is the possibility of contamination of soil and groundwater by hazardous substances that will be used, produced or released by the installation.

It has to be remembered that, according to the Directive, the requirement of the presentation of the baseline report covers activities involving the use, production

or release of hazardous substances in vision of the possibility of contamination of soil and groundwater in the site of the installation. Also it has to be taken into account that the first evaluation on subjection or not of this obligation, as well as the development of the relevant documentation, is in the hand of the operator based on its knowledge of the plant, the substances used, and the site of the installation. The report will serve as a basis for making a comparison with the state of contamination at the time of final cessation of activities.

Upon termination of the activity, the "satisfactory state" that the operator is required to restore can be determined in two ways:

- If it was expected a "baseline report", the operator will be required to restore the conditions of soil and groundwater contamination at levels set out in the report. It is the operator itself who must notice that the installation has caused significant pollution of soil or groundwater compared to the state shown in the baseline report. This is carried out through its own assessment of the state of contamination of soil and groundwater by relevant hazardous substances used, produced or released by the installation. The operator shall take the necessary measures to address pollution so as to return the site to that state, taking into account the technical feasibility of the measures.
- In the event that contamination involves a significant risk to human or environment health, even in the absence of the "baseline report", the operator will be required to carry out the necessary actions aimed at the removal, control, containment or reduction of relevant hazardous substances so that the site ceases to pose such a risk. In doing this, the operator will have to take into account as a reference the state of the site of the installation established in accordance with Article 12, paragraph 1, letter d) and will have to take into consideration the current or future approved use of the site. In the case the baseline report is not required, the operator will still proceed with the execution of the necessary actions aimed at the removal, control, containment or reduction of relevant hazardous substances so that the site, also in virtue of its current or future conditions approved, ceases to pose a significant risk to human health or the environment.

The first evaluation on the eventual subjection to the IPPC directive as well as the development of the relevant documentation is in the hand of the operator based on its knowledge of the plant, the substances used and the site of the installation.

Even in the EIA procedure the evaluation of the environmental compatibility of a given project is carried out by the public administration, which is based on information provided by the proponent of the project as well as on the advice given by other public administration structures, on the participation of individuals and social groups.

In regard to the projects listed in Annex I of Directive 2011/92/EC, under Article 5, the applicant is obliged to provide the information specified in Annex IV when the Member States consider that it is reasonable to expect him to compile this information taking into account the available knowledge and methods of assessment, and that such information is relevant to a given stage of the permit procedure, to the specific characteristics of a project or type of project and compared to environmental factors that may be affected.

Essentially, it is the Member States that can take away the "self-certification" power from operators. Indeed, it is expected that the competent authorities give their opinion on the information gathered by the applicant if the latter or the Member State requests.

Member States can take away the "self-certification" power from operators.

Recommendation:

18. To ensure impartial protection of the interests of the citizens related to environmental and health protection, it is necessary that the **data gathering relating to the condition** of the premises before, during and after the cessation of an activity, or in the planning stage, as well as **the identification of the measures** necessary to restore the condition of the premises and for the elimination of any risk to human health shall **not be left to the operator or to the applicant but should be carried out by the public administration**.

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