EU Environmental Governance

Ludwig Krämer

The European Union (EU) is not a State. It is a regional international organisation with, at present, 27 Member States. Therefore, its institutions, actors and activities, its successes and failures cannot be compared to those of a nation-State. The EU may only act within the limits which the Treaty on the European Union (TEU) determined[1].

The evolution of EU environmental policy and law

The original EEC Treaty of 1957 did not contain any provision on the environment, environmental policy or environmental protection. It was at the end of the 1960, in the aftermath of the echo of Rachel Carsons book "the Silent Spring", the students' revolt of 1968, and several requests from the European Parliament, that the European Commission first set up an administrative unit to deal with environmental matters. In 1971, it sent a first communication on an EU environmental policy to the Council which was followed, in 1972, by an EU environmental action programme. Both documents raised intensive discussions at European level.

At the first EU summit of the heads of States and Governments in Paris in October 1972, the EU institutions were invited to launch an EU environmental policy and action programme. The Commission took the matter up and set up, in the beginning of 1973, an "Environment and Consumer protection Service" which it placed under the responsibility of a Commission Vice-President, in order to underline its horizontal character and the relevance of environmental and consumer protection questions for all policies pursued by the EEC. Internal differences of view prevented this plan from becoming operational; the Service quickly developed into a "normal" Directorate General of the Commission.

The first environmental action programme was adopted in 1973. It established objectives, principles and priorities for action at EU level. As most of the then nine Member States did not have an autonomous national environmental policy, the programme served at fixing the framework for the elaboration of common rules for the EU territory. Measures in the area of water protection and waste management were tackled first, also, because the other Commission departments – agriculture, internal market, competition – did not see any reason to become active in these areas. As the EEC Treaty did not provide for a legal basis for environmental measures, the provisions on the establishment and functioning of the internal market, as well as the present Article 352 TFEU were mainly used as a legal basis of environmental measures.

The strategy of working with EU-wide environmental action programmes was considered successful and thus continued until the presence, where the sixth environmental action programme (2002-2012) is running. The Service grew continuously. In 1982, it became a full-fledged Directorate General. In 1990, a European environment Agency was created, with the task to collect, process and distribute information on the environment.

In 1987, a chapter on an EU environmental policy was inserted into the EC Treaty, the actual articles 191 to 193 TFEU. It contained a number of original features, such as a quality requirement ("high level of protection"), the obligation to integrate environmental requirements into the other EU

[1] See Article 5 TEU.

policies and the possibilities for Member States to maintain or introduce stricter environmental measures than those that were adopted at EU level. Environmental measures were to be adopted unanimously. Majority voting only became the normal rules as of 1999 (Amsterdam treaty), though in some particularly sensitive areas – taxes, town and country planning, land use and important energy matters - unanimous decisions continued to be required.

In 2009, the fight against climate change was mentioned in the Lisbon Treaties as one of the tasks of the European Union. At the same time, a new Directorate General for climate change was created within the Commission. Moreover, energy policy became a (shared) EU competence which is important in particular for climate change related energy questions (renewable energy, energy efficiency and energy savings).

The European Parliament set up, already in 1973, an environmental committee which continues to exist at present. It soon became very influential in the law-making procedure and continuously urged the EU legislature to improve environmental protection within the EU by appropriate legislation. The Council set up six regular meetings on environmental matters per year, two of them informal meetings. Media support and growing public awareness of environmental problems contributed to making environmental policy a mainstream policy at EU level.

Environmental legislation progressively extended to all areas of environmental law: Next to the traditional areas of water protection, air pollution, waste management, nature conservation, noise, and products, such legislation also covers, at least partly, biotechnology, criminal environmental law, soil protection and access to courts in environmental matters. Overall, some 300 environmental directives, regulations and international conventions that had been ratified by the EU, were adopted. The European courts issued some 750 judgments in environmental matters, frequently strengthening the environmental concerns against polluters or passive administrations.

Since the beginning of the 21st century, EU environmental policy is slowly diminishing in importance. This is due, amongst other factors, to the accession of new Member States with a limited active environmental policy; the promotion of liberal economic thinking by the EU institutions, in particular by the Commission, and the political will not to ensure the full application of the provisions on environmental protection that had been agreed at EU level. The integrative capacity of the EU is reduced and limited efforts are being made at present to stop this gradual reduction of environmental policy.

Environmental Actors and the Legislative Process

The EU actors reflect the status of a mixture between citizens' union and an international organisation: The European Council, composed of the heads of government of the Member States and the Commission President, defines the general political direction and the priorities of EU policy. The European Parliament (EP), directly elected, represents the citizens, the Council the 27 Member States. The Commission, composed of 27 members and a staff of some 25.000 officials, is charged to identify and act in the interest of the Union as a whole. Furthermore, there is a European Economic and Social Committee (EECOSOC) with advisory functions which represents civil society, employers and employees[2], and a Committee of the Regions (CoR), also with advisory functions, which

[2] One of the 350 EECOSOC members indicated his origin in an environmental organisation (2011).

represents regional and local authorities. The EU Court of Justice shall ensure that EU law is observed.

A European Environment Agency is charged to collect, process and distribute information on the environment[3]. Apart from that there are no specific advisory scientific, technical or other bodies with specific functions in the environmental sector, be it on global environmental issues, long-term effects, sustainability or other issues.

Environmental legislation is proposed by the European Commission which has the monopoly for making proposals. The European Parliament and the Member States may suggest EU legislation, but cannot normally[4] oblige the Commission to submit a proposal. EECOSOC and CoR give their opinions on any proposal, without having any significant impact on its final outcome. The legislative proposal is adopted by a joint decision of the European Parliament and the Council which both decide by majority; in certain areas of environmental policy which are expressly enumerated in the Treaty on the Functioning of the European Union (TFEU), the Council decides alone and at unanimity[5].

Objectives and priorities for the EU environmental policy are laid down in environmental action programmes which are again proposed by the Commission and adopted by co-decision of the EP and the Council. At present, the sixth environmental action programme applies (2002 till 2012)[6]. It is legally binding, though its drafting leaves considerable discretion to the EU institutions. Legislative and other measures which are foreseen in the programme, are sometimes not taken, whereas occasionally, EU legislation is adopted without having previously been announced in an action programme. The Commission regularly consults with Member States, in Council meetings or otherwise, on what legislation to propose. The EP tries to influence the Commission with regard to new proposals, though with a limited success.

Normally, the EP tries to adopt resolutions on legislative proposals or other communications from the Commission with a large majority, in order to increase its institutional influence; this means that the different political groups, conservatives, socialists, liberals and greens, try to find compromise solutions which are acceptable to all these groups.

In Council, Member States normally pursue their own national interests. The preservation and protection of the environment does not rank high in the great majority of Member States, a tendency which is strengthened in times of economic or financial difficulties[7]. Commission proposals which are, these last years, not very progressive in protecting the environment, are normally watered down in Council, until they satisfy the last specific wishes of Member States – or rather the national

---

[3] See Regulation 1210/90, OJ 1990, L 120 p.1.

[4] See, however, Articles 225 and 241 TFEU, where the European Parliament, with the majority of its component members, and the Council, by majority of its members, may ask the Commission to submit a proposal for legislation. Such a request is, in this author's opinion, legally binding on the Commission. In environmental matters, such requests hardly ever occurred.

[5] These areas concern measures primarily of a fiscal nature, or affecting town and country planning, land use (except waste management), the quantitative management of water sources and the availability of those resources, and measures significantly affecting the choice between different energy sources and the general structure of energy supply of a Member State (Article 192(2) TFEU).

[6] Decision 1600/2002, OJ 2002, L 242 p.1.

[7] It may fairly be submitted that national environmental legislation is practically at 100 per cent based on previous EU environmental legislation in Greece, Spain, Portugal, Ireland, and in the twelve Member States which joined the EU since 2004.

administrations in Member States[8]. It also occurs that legislative proposals by the Commission are not discussed and thus become obsolete in time. For example, a minority of five Member States opposed the adoption of a directive on the protection of soil[9]. The proposal for a directive on access to justice did not either obtain sufficient support by the Member States in Council and was never adopted[10].

Environmental Policies and Other Policies

Article 11 TFEU provides that environmental requirements must be integrated into the other policies and activities of the EU. This takes into consideration the fact that the environment may also adversely be affected by measures that are elaborated and adopted under other EU policies. Within the Commission, next to the environmental departments also other departments are charged to prepare environmental measures and legislation, in particular the departments on climate change issues (greenhouse gas emission trading, mitigating measures etc) , on energy (renewable energies, energy efficiency, energy infrastructure), industry (car emissions, eco-design of products), internal market (product standards, chemicals), transport (infrastructure, modal shift), regional policy (financial support), oceans and fisheries (marine pollution, fisheries), and agriculture (pesticides, land use, biofuels). These departments often disagree as to the kind and intensity of legislative or financial measures which the Commission should propose.

Such conflicts are mainly solved by four mechanisms: first, the Commission pursues a strategic staff policy which ensures that the environmental department does not promote too environmentally friendly proposals; this is paired with a considerable self-restraint by the Commission which neither tries to fully implement the environmental action programmes which had been agreed at EU level nor seriously tries to address the most relevant EU environmental problems[11] – with the exception of climate change issues.

Second, the Commission elaborates an impact assessment on any legislative proposal and strategic policy paper, before it decides on a proposal; this impact assessment is organised and steered at the Commission's General Secretariat which thus gains considerable influence on the drafts and their content that are submitted to the college of Commissioners for adoption. Third, the fact that the Commission decides as a college and tries to avoid majority decisions; this leads to the accommodation and polishing of documents, before they are submitted to the 27 members of the Commission for final adoption.

And fourth, the Commission did not establish any administrative or political structure to make Article 11 TFEU operational. The different departments largely work according to their own strategies and priorities and do not seriously consider to present integrated draft proposals to the Commission which also include legitimate environmental concerns. The sheer number of growth and economy-oriented departments makes it normally impossible for the relatively small environmental

[8] Recent examples are Directive 2000/60 setting a framework for water policy, OJ 2000, L 327 p.1, Regulation 1013/2006 on the shipment of waste, OJ 2006, L 190, p.1, and Directive 2010/75 on industrial emissions, OJ 2010, L 334, p.17.

[9] Commission proposal for a directive establishing a framework for the protection of soil, COM(2006)232.

[10] Commission proposal for a directive on access to justice in environmental matters, COM(2003) 624.

[11] In this author's opinion, these are, next to climate change issues, the loss of biodiversity, the omnipresence of chemicals and their impact, resource management and the EU's responsibility for actively contributing to poverty eradication.

department[12] to actively and constructively participate in the discussions of environmentally relevant policies and legislation of the other departments.

Distribution of competence between the EU and its Member States

The competence for environmental policy is shared between the EU and the Member States. Competences which are not conferred on the Union in the Treaties, shall remain with the Member States[13]. Thus, the general responsibility for the protection of the environment lies with the Member States. The EU may take action "*only in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or the effect of the proposed action, be better achieved at Union level"*[14]. What exactly "better" means is not clear: consequently, this subsidiarity principle is interpreted politically. It allows Member States to block measures at EU level, where they do not wish to see, for specific reasons of their national policy or administration, a change in the status quo. It is normally overseen that the alternative to an EU provision is not a measure taken within each of the 27 Member States; rather, experience shows that only a minority of Member States would adopt such environmental measures[15].

Open conflicts on competencies in environmental matters between the EU and the Member States are rare, because there are sufficient mechanisms to agree politically on EU activities: informal discussions between the Commission and Member States' administrations within the "Policy Review Group"[16]; the fixing of objectives and priority actions in environmental action programmes; and the possibility for Member States or for some of them, to block undesirable Commission proposals In Council, without having to give reasons[17]. In the last instance, the Court of Justice decides on competence conflicts, though the Court cannot decide, when the Council does not adopt a Commission proposal. An example of dispute settlement by the Court is the area of criminal law, where the Court decided, against the Council, that the EU was competent to regulate the protection of the environment by criminal law[18], but decided in a subsequent judgment that the EU had no competence regarding the kind and the level of criminal sanctions[19].

The Court of Justice

The EU Court of Justice has to ensure that EU environmental law is observed. In environmental matters, it has issued, between 1976 and 2011, more than 700 judgments, mainly on application of the Commission and against a Member State which had not or not correctly transposed EU environmental law into its national legal order or had not applied it correctly. In more than hundred cases, a national court had asked the Court of Justice for an interpretation of EU environmental law.

---

[12] The staff of the Directorate General for the Environment of the Commission includes some 400 officials (2011).

[13] Article 4(1) TEU.

[14] Article 5(3) TEU.

[15] See the examples in n.9 and 10, above.

[16] The Environmental Policy Review Group is composed of high officials from central environmental administration of Member States and the Environmental Directorate General of the Commission. Its agenda, its minutes and its findings are not published.

[17] For example, the proposal for a directive on the protection of soils (n.9, above) was blocked by five Member States in Council, whereas twenty-two favoured EU legislation on soils.

[18] Court of Justice, case C-176/03, Commission v. Council ECR 2005, p.7879.

[19] Court of Justice, case C-440/05 Commission v. European Parliament and Council, ECR 2007, p.I-9097.

Individual citizens and environmental organisations only have very limited possibilities to apply to the Court, as an EU decision, unless it is directed at them, must affect them directly and individually[20] in order to be capable of be attacked in court; and the provision of "*direct and individual concern"* is interpreted very restrictively by the Court of Justice. Environmental litigation between two Member States on EU environmental matters, theoretically possible, has not yet taken place.

The EU Court of Justice may, overall, be qualified as "integration-friendly" and "environment-friendly". Indeed, in the past, the Court of Justice favoured, overall, an EU-friendly interpretation of environmental law, against the interests of Member States. This manifested itself in the jurisdiction on the repartition of competencies[21], the rights of individual citizens in environmental matters[22], in obligations for Member States which flow from specific legislative acts of the EU[23], or in an EU-friendly interpretation of environmental directives[24]. Some examples may be given hereafter:

Even before a specific environmental chapter was inserted into the EU Treaty, the Court held that the protection of the environment was an important objective of EU policy[25]. When Member States where of the opinion that the EU had no competence to protect the environment by means of criminal law, the Court decided in favour of an EU competence[26]. The Court, though, was not blind in favouring EU measures: in the waste sector, it resisted attempts by the EU institutions to base the legislation on trade-related provisions and decided that Article 192 TFEU was the appropriate legal basis[27]; this jurisdiction allowed Member States, through the application of Article 193 TFEU, to maintain or introduce more stringent requirements at national level.

At numerous occasions, the Court assumed a role which went far beyond that of an interpreter of EU environmental law, and took, de facto, political decisions[28]. This function was not limited to the environmental sector, but covered all areas of EU law and was probably motivated by the imperfection of EU (environmental) law on the one hand, by the need to promote European integration in general on the other hand. It is true that the environmental sector profited from this approach at numerous occasions, in almost all sectors of environmental law (water, air, waste, nature protection). Only one aspect remained excluded: the question of standing in environmental matters: the Court interpreted the provision of Article 263 TFEU, according to which standing was possible, when a person or an environmental organisation was "directly and individually concerned" very restrictively and refused to accept that the environment was an issue of *general* interest, so that

---

[20] See Article 263 TFEU.

[21] Court of Justice, cases C-92/79 Commission v. Italy, ECR 1980, p.1115; C-240/83 Défense des Brûleurs, ECR 1985, p.531; C-278/85 Commission v. Denmark, ECR 1987, p.4069; C-155/91 Commission v. Council ECR 1993, p.I-939.

[22] Court of Justice, cases C-131/88 Commission v. Germany, ECR 1991, p.I-825; C-361/88 Commission v. Germany, ECR 1991, p.2567; C-237/07 Janecek, ECR 2008, p.I-6221.

[23] Court of Justice, cases C-186/91 Commission v. Belgium, ECR 1983, p.851; C-263/08 Djurgaarden, judgment of 15 October 2009; C-205/08 Kärnten, judgment of 10 December 2009.

[24] Court of Justice, cases C-302/86 Commission v. Denmark, ECR 1988, p.4607; C-57/89 Commission v. Germany, ECR 1991, p.I-983; C-494/01 Commission v. Ireland, ECR 2005, p.I-3331.

[25] Court of Justice, case C-240/83 (n.21 above).

[26] Court of Justice, case C-176/03 (n.18, above)

[27] Court of Justice, cases C- 155/91 Commission v. Council, ECR 1993, p.I-939; C-187/93 European Parliament v. Council, ECR 1994, p.I-2857; C-411/06 Commission v. European Parliament and Council, judgment of 8 September 2009.

[28] Court of Justice, cases T-183/07 Poland v. Commission, judgment of 23 September 2009; C-246/07 Commission v. Sweden, judgment of 20 April 2010; T-362/08 IFAW v. Commission, judgment of 13 January 2011.

persons would only very exceptionally have standing to promote or defend environmental interests. The Court maintained this interpretation against large criticism and argued that only a change of the EU Treaty itself could bring about a change in its understanding of Article 263 TFEU. It will have to be seen, to what extent a recent finding by the Aarhus Convention Compliance Committee that the Court practice is not in compliance with the EU's obligation under the Aarhus Convention, will lead to changes in legislation or in the Court's practice.

Enforcement

According to the EU Treaty the Member States shall, as a rule, implement the environmental measures which were taken at EU level; the Commission "*shall ensure the application of the Treaties and of measures adopted by the institutions pursuant to them,"* and shall oversee the application of Union law (Article 17 TEU). The EU did not build up any administrative structures for making these provisions operational. Considerations to involve the European Environment Agency in the enforcement procedure, failed in the early 1990s[29]. Environmental inspectors or auditors were not established[30]. The official reason given was the subsidiarity principle, though there are EU inspectors in the areas of competition, fisheries policy, regional policy, veterinary policy, marine policy etc. An attempt to bring together national environment enforcement bodies in an informal EU gathering (IMPEL) failed, also because a considerable number of Member States did not have environmental enforcement bodies. IMPEL therefore turned recently into a private EU association, with no link to the EU institutions.

The European Parliament could, in theory, examine petitions which it obtains from citizens, in order to check enforcement and compliance by the Commission and by Member States. In practice, however, it sends the petitions which it receives, to the Commission and asks it to deal with it. This practice is particularly annoying in cases, where the Commission itself had not taken action to enforce EU environmental legislation.

The European Ombudsman examines cases of maladministration which include in particular bad enforcement of EU environmental law by the Commission. However, his activities cover all aspects of EU law; its procedures take a very long time, and its conclusions are not binding, so that the Commission or the Council might easily ignore them.

Within the EU Commission, there is no organisational separation between enforcement and other administrative structures. This leads to frequent interferences from the policy level in the enforcement activities. The whole process of environmental enforcement became, over the last years, subject to policy considerations which were based on the concept that the Commission should not look into too much detail of practical application of EU environmental legislation.

The only instrument which is at the disposal of the Commission with regard to enforcement is the infringement procedure of Article 258 TFEU; if a first judgment by the Court is not complied with, the Commission may start a second procedure, where it then may ask the Court to condemn the

[29] See on the one hand Regulation 1210/90 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, OJ 1990, L 120 p.1, Article 20; on the other hand Regulation 933/1999, amending Regulation 1210/90, OJ 1999, L 117 p.1 which does not refer to Article 20 any more.

[30] The EU only adopted Recommendation 2001/331, OJ 2001, L 118 p.41 which recommended Member States to provide for environmental inspectors.

infringing Member State to the payment of a lump sum or a penalty (Article 260 TFEU). The procedure is long: in environmental matters, it takes on average 47 months between the formal start of the procedure and the judgment of the Court according to Article 258 TFEU. The procedure under Article 260 TFEU takes, on average, more than five years in environmental matters[31].

Both procedures require at least three formal Commission decisions –which leave ample room for Member States to bargain with the Commission on stopping the procedure. Moreover, the Commission is obliged, under Articles 258 and 260 TFEU, to prove non-compliance by a Member State; however, it has no means to present witnesses, seize documents, inspect sites or plants etc. Rather, it is limited to an exchange of letters with the Member State in question – which is time-consuming and binds human resources. These and other reasons led the Commission to concentrate more and more on the formal transposition of EU environmental law into the national legal order of Member States and not examine, whether the provisions are actually applied. For this reason and as the legal culture within the 27 Member States is quite different, the largely uniform EU environmental provisions lead in practice to a very different practical application in Member States. This is tolerated, because the environment has no voice and because economic considerations and interests prevail in most Member States and within the Commission.

Overall, the Member States *transpose* EU directives into their national legal order, though normally with delay which sometimes runs up to decades. The correct and complete transposition of EU environmental law is monitored by the Commission. Differences exist with regard to the different Member States and to the intensity of the monitoring, due to staff availability, translation needs – all correspondence with Member States takes place in the Member State's language -, knowledge of the national law and other circumstances. Until now, the whole monitoring procedure, including the procedure under Articles 258 and 260 TFEU, is highly confidential.

As regards *practical application*, the Commission learned, in the past, about bad application mainly through complaints from citizens and environmental organisations, which it then took up and examined itself. Since about ten years, the Commission more and more reduced the complaint handling and preferred to discuss issues with Member States bilaterally, without involvement of the public. As it has little or no factual information on the specific case of bad application, this practice leads to a situation, where bad application of existing provisions is less and less frequently sanctioned and, lastly, controlled.

Enforcement of EU environmental law by Member States could outweigh these difficulties. However, Member States are frequently not interested in effectively ensuring the application of (EU) environmental law provisions, because local, regional and national administrations regularly let economic interests prevail over environmental concerns. More generally, environmental enforcement authorities within the Member States are badly equipped in human and financial resources and have difficulties in imposing themselves on agricultural, transport, industry and other administrations.

The result is that the effective and complete application of (EU) environmental legislation remains the greatest challenge for lawyers and policy-makers within the European Union, at all levels of

[31] See L.Krämer, *Environmental judgments by the Court of Justice and their duration.* Journal for European Environmental & Planning Law 2008, p.263-280.

administration. No serious intention or initiative exists to change the present unsatisfactory situation.

The citizens and the EU

Public involvement in environmental decision-making at EU level is not considerable. This is due to a number of reasons. First, there is no EU public opinion. Media, radio and TV are nationally structured and journalists report from Bruxelles, what is interesting for the national audience, not what is of general EU interest. Second, the definition of what constitutes a "general EU interest" is difficult and all too often influenced by economic or financial considerations. Therefore, negotiations on environmental issues frequently have a touch of horse-trading. Third, the language problem: while there are 23 official languages, English dominates as a language, being used in about three quarters of all discussions and documents, the remaining part being taken by the French language. This eliminates large parts of the 500 million EU citizens from getting involved in environmental decision-making. And fourth, the often highly technical content of environmental decisions requires a continuous participation in the negotiation process at EU level which often goes beyond the capacity of citizens or environmental organisations.

The Commission regularly organises internet consultations on legislative and other proposals. Again, English is almost the only language which may be used. Hearings are very exceptional and hardly assemble a representative participation. The Commission does not lay detailed accounts on the question, why it did or did not follow specific suggestions made during the consultation procedure. And no case is known, where the public consultation led to significant amendments of an environmental draft proposal.

The European Parliament has no right of legislative initiative, but has to react to specific Commission proposals. Here and there, it organises public hearings. However, these mostly take place within a Parliamentary Committee and are again not representative. Also, it is rather the rule that a Member of Parliament learns about a specific environmental problem, when he(she) is confronted with a specific Commission proposal. This constellation facilitates involvement of environmental NGOs, but also of vested interest groups, in the Parliamentary discussions. The overall involvement, though, is not significant, because of the weakness of NGOs as regards resources and as also the European Parliament's influence on EU environmental decision-making is limited.

The Council does not let the public get involved in its decisions. Member States' position in legislative matters are elaborated in the capitals of the 27 Member States, and it is there, where public involvement may take place – provided the discussions at EU level are followed closely enough, in order to allow constructive contributions.

Generally, involvement in the environmental decision-making process at EU level is easier for large vested-interest groups and their representatives than for the general public and environmental organisations.

Environmental organisations – with the exception of Greenpeace – receive financial support from the Commission which also influences their positions. Their financial and human resources are grossly insufficient to cover all aspects of EU environmental policy. In consultations, hearings or public discussions, their numeric inferiority to vested interest groups is appalling, though it remains remarkable, how much they are capable of contributing, with their limited resources, to the day to

day work of the institutions. Their most remarkable achievement appears to be that they manage to stop the institutions from completely following business (industry, traders, farmers etc.) suggestions and interests.

In that regard, the participation of environmental organisations in the elaboration and implementation of EU environmental policy – in particular the numerous executive and implementing decisions – is effective. EU environmental policy would look differently without the participation of environmental organisations. To this contributes the fact that journalists from a good number of Member States – in particular United Kingdom, Germany, Netherlands, the Scandinavian countries, Belgium – are ready to listen to NGOs and spread their arguments. NGOs are less effective in persuading the EU institutions to take new action: their involvement is more re-active than pro-active.

As mentioned above, individual persons and environmental organisations have practically no standing before EU courts. Until mid-2011, all applications to the Court by an environmental NGO were held inadmissible, with the argument that citizens or NGOs were not directly and individually concerned by environmental measures which concerned the *general* interest. It is too early to assess, whether the Aarhus Convention will lead to some changes in the Courts' case-law.

Good Governance Principles

In 2001, the Commission declared that the principles of openness, participation, accountability, coherence and efficiency should be the principles of European governance[32]. An assessment of ten years later leads to the conclusion that some modest progress has been made as regards openness, but with regard to participation, accountability and coherence, no significant changes are visible and that efficiency in environmental matters would need strong improvements.

The Lisbon Treaties declared openness and transparency as leading principles of EU administration. Despite legislation which was adopted to increase access to information[33], much remains to be done. The most obvious examples in the environmental sector are the lack of systematic publication of studies on the environment, in particular implementation and conformity studies[34], the confidentiality surrounding the whole process of monitoring the application of EU environmental law, and information on contacts of the institutions with vested interest groups. The legislative process in Council, in particular in the Council working groups, where the essential legislative work is performed, remains non-public; minutes are not made available. Access to the institutions is easier for large vested interest groups than for an ordinary citizen or an NGO. An exception to this is the European Parliament which acts in an almost complete open and transparent manner; however, it has to be borne in mind that the weight of the Commission and the Council in legislative procedures is overwhelming.

Public participation in decision-making during the Council negotiations does not take place. The Commission considers participation equivalent to consultation – which it is not. It mainly proceeds to

[32] Commission, *European governance – a White Paper,* COM(2001) 428, OJ 2001*,* C287, p.1.

[33] Regulation 1049/2001 regarding public access to Council and Commission documents, OJ 2001, L 145, p.43; directive 2003/4 on public access to environmental information, OJ 2003, L 41 p.26; Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies, OJ 2006, L 264 p.13.

[34] See on this General Court, case T-111/11, ClientEarth v. Commission (pending).

internet consultations which take place in English and limit the access of citizens and, often enough also of NGOs.

The absence of transparency and of effective participation structures lead to the result that accountability is not well developed. It is still relatively easy for a Member State to argue at home that this or that decision was taken at EU level, without citizens knowing what the Member State itself had suggested or defended as a solution. The Council's explanatory memorandum which accompanies a Council position adopted during a legislative process is much too succinct to give accounts on the attitudes of the different member States. The Commission does not either lay account, for example by explaining why it does not follow request which had been formulated in environmental action programmes. EU agencies and offices do not systematically explain and justify the reasons which led them to adopt this or that position.

Coherence - in the sense of integrating environmental requirements into other EU policies – is not taken serious by the EU institutions: Since more than fifteen years, EU publications regularly state that EU transport policy is not sustainable – yet the orientation has not really changed. Coal and nuclear industry continue to receive more financial support from the EU than renewable energies. No serious steps have been undertaken to promote sustainable production and consumption, sustainable development policy or sustainable tourism.

As regards efficiency, the EU has not successfully tackled the most relevant environmental problems, such as the loss of biodiversity, the omnipresence of chemicals in the environment, and the fight against poverty. In climate change issues it appears to assume its responsibility within the EU, but completely fails to assume a leading role in the global discussion on structures and measures. Other problems, such as air pollution in urban agglomerations, soil erosion - including, in some Member States, desertification – noise, waste and resource management, environmental refugees problems did not significantly improve over the last thirty years. It is therefore not possible to call the EU environmental policy a success story.

Overall, the principles of good governance at European level still need to be made operational in environmental matters.

Possible Institutional Improvements

Overall, the frame for the preservation, protection and improvement of the quality of the environment within the European Union which is established by the EU Treaties, is adequate: the objective of protecting the environment is placed among the core objectives of the EU. The EU has made a commitment to strive for a sustainable development and, at the same time, for economic growth. The protection of the environment is to be achieved at a high level. Policies and legislation to fill this frame exist and can be further developed and completed at any time. Environmental requirements must be integrated into the elaboration and implementation of all other EU policies. There is a possibility to enforce environmental legislation and appeal to the EU Court of Justice, where Member States fail to comply with their environmental obligations. The European Court of Justice is independent, neutral and, overall, cautiously favourable to making the environmental objectives and principles of the EU Treaties operational in day-to-day practice.

The strength of the elaboration and implementation of environmental policy at EU level therefore depends more on the political will of the EU institutions and of the Member States to put the

environmental objectives and principles into practice, rather than on major deficiencies in the institutional and legal set-up.

Despite these general observations, the general institutional setting for environmental policy at EU level is capable of being improved, in the following areas:

1. There is a need of a public advisory body to inform and advise the Commission on long-term environmental trends, tendencies and problems. The environmental Commissioner within the Commission has almost never, during the last thirty years, dealt with environmental issues before his joining the Commission. Yet he is to take decision which may have long-terms effects on 500 million people, such as on the future of (cars and bicycles in) agglomerations, on soil protection, agriculture, or energy issues. Advice on strategic questions could only be of use.
2. The present close link between general administrative work and the monitoring of the application of environmental law is unhealthy. In competition matters, there is a strict separation of tasks within the Commission. The absence of such separation leads all too often to policy interference - to the detriment of the environment.
3. The monopoly of the European Commission to monitor application of EU environmental law is unjustified. Citizens and environmental groups should have access to the EU courts in order to challenge the infringement of EU environmental provisions by polluters, and to take action before national or EU courts against administrations which do not comply with their legal obligations to preserve, protect and improve environmental quality. The Commission is a political institution. In its daily work, it is heavily influenced by national governments and administrations on the one hand, by vested interest groups on the other hand. This frequently leads to the situation that it subordinates concerns for the protection of the environment through legislation or through proper enforcement of existing provisions to appeasement, arrangements and passivity.
4. Openness and transparency are environment's only allies. They need another quality at EU level. The present structures favour lobbying by vested interest groups.
5. As the environment has no voice in EU society, one might think of allowing the European Ombudsman to sit, as the representative of the environment and of future generations, in all Commission, Council and Parliament meetings – including working groups – and intervene in the name of the environment.

It is clear that these proposals do not stand any chance of being accepted, as the environment is too weak an interest at EU and at Member State level.

Trends for Centralisation or Decentralisation

There is no clear tendency as to whether centralisation or decentralisation of environmental issues will prevail in future. On the one hand, economic operators need rules for the bigger EU market: it is not possible to establish an internal market for goods and services, capital and labour, and leave the protection of the environment to the Member States. All legislation that is product-related will therefore in future more and more be centralised. Examples are the energy consumption of goods, their water-consumption, their noise level and their content of dangerous substances such as heavy metals.

This tendency for centralisation will also apply to industrial installations. It is true that these installations are not mobile; however, the goods which they produce, are mobile, and the production costs and methods will have an increasing influence on the composition and the price of products. Recent examples include provisions for the emission of greenhouse gases or best practices for installations.

Energy, transport, agriculture and fisheries are other examples, where the trend towards centralised environmental rules is likely to increase, mainly for reasons of increased competition among economic operators and the need to create a level playing field among them.

On the other hand, more traditional areas of environmental policy are likely to be more decentralised in future, because the integration capacity and the political will of the EU institutions decreased during the last decade. Among the reasons for this decrease are the deliberate placing of weak politicians and high officials at the top of the institutions, including the environmental sector; the enlargement of the European Union which brought new persons to the institutions who are more committed to promote economic growth than environmental (or social or consumer) protection; the reflection that inter-governmental cooperation is, after all, preferable and easier to achieve than policy and legislative integration; and the consideration that it is sufficient for the EU to set a general legislative framework for environmental legislation, and leave the local, regional or national level within Member States the task to fill this framework out.

This trend for decentralisation concerns water and waste management, air pollution, noise and nature protection (biodiversity). Where the EU institutions consider the difficulties to reach integrated solutions to be too great, they may even decentralise issues such as nuclear safety or biotechnology.

EU environmental policy and law mirrors the present uncertainties of the evolution of the European Union as such: whether the Union will further develop and better integrate national policies in economic, financial, monetary, social and structural questions or whether it will move more towards an intergovernmental organisation, will depend on the political will and the determination of European policy makers. And the environment will follow this general trend.

Concluding remarks

Overall, the administrative and political structure of EU environmental policy appears to be adequate, though a strategic environmental think-tank would be desirable. EU environmental legislation is broad and comprehensive. A considerable number of deficits exist in this regard, such as provisions on citizens' participation in environmental decision-making, transparency, access to (EU) courts, soil protection, the elimination of heavy metals and hazardous substances of the environment, nuclear safety provisions, air pollution rules, resource management etc. The biggest problem remains the enforcement and full application of EU environmental rules in and by Member States; the obvious deficit in this sector sometimes gives the impression that EU environmental legislation is not more than a paper tiger. This is all the more surprising, as the example of those EU member States which pursue an active environmental policy – such as the Scandinavian States, Netherlands, Austria, Germany – demonstrates that a strong environmental policy does not lead to loss of economic competitivity, rather to the contrary. Adequate or even good environmental governance structures at EU level cannot make up for the lack of political will to comply with the

Lisbon Treaties' requirements to preserve, protect and improve the quality of the European environment.