

EU Environmental Law

Some reflections on major developments during the last 20 years

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The purpose of the present paper – in the line with the concept of the whole issue – is to examine some cross-cutting questions of a constitutional nature in EU environmental law (innovative use of sources of EU law, regulatory instruments and aspects of enforcement). Rather than giving an overview of the development of EU environmental law and policy the paper will focus on the mentioned constitutional aspects with the objective of analysing the contribution of EU environmental law and policy to certain constitutional aspects and the potential relevance of specific developments in EU environmental law and policy for other fields of EU law and policy and for the process of EU integration in general.

§1 Introduction

EU environmental policy has become not only an integral but also an important part of EU activities over the past 30-40 years.¹ This field of EU law is not only important from an ‘EU point of view’ but also from a ‘Member State’s point of view’: a large variety of EU legal acts have a determining impact on the law of Member States, their environmental law being largely influenced respectively determined by EU law.² Moreover and of particular interest in the context of the present contribution, some characteristics of environmental law have led to the development of principles of a constitutional nature and of an importance reaching far beyond environmental law. It is the purpose of the present paper to highlight some of these developments, relating to principles and sources of EU law (§2), regulatory instruments (§3) and aspects of enforcement (§4). We will conclude with some summarising remarks highlighting especially the relevance of at least some of the developments for other fields of EU law (§5).

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¹ Cf. concerning the development of EU environmental law e.g. Patrick Thieffry, *Droit de l’environnement de l’Union européenne*, 2nd ed., Paris 2011, p. 4 et seq.; Peter G.G. Davies, *European Union Environmental Law. An Introduction to Key Selected Issues*, Aldershot 2004, p. 1 et seq.; Jan H. Jans/Hans B. Vedder, *European Environmental Law*, 4. Aufl., Groningen 2012, p. 3 et seq.; Ludwig Krämer, *Droit de l’environnement de l’Union européenne*, Bâle 2011, p. 3 et seq.; Astrid Epiney, *Umweltrecht der Europäischen Union*, 3rd ed. (forthcoming, Baden-Baden 2013), chapter 2.

² For certain Member States, almost the totality of national environmental law is determined by EU law. But also in general, it is no longer possible to consider and apply national environmental law without having regard to EU environmental law. Even in Member States with a certain tradition of environmental law such as Germany or the Scandinavian States, far more than 50 % of national environmental law is more or less influenced by EU environmental law.

§2 Sources of EU law: environmental action programmes and environmental principles

In the field of environmental law, the sources of EU law are sensibly the same as in other fields of EU law. From a strictly legal point of view, no particularity can be noticed. However, two sources are particular to environmental law and policy: environmental action programmes (A.) and environmental principles (B.). In the following, they will be briefly discussed before we attempt a short interim conclusion (C.).

A. Environmental action programmes

Environmental action programmes have already been developed and adopted since the very beginning of EU environmental law and policy. Even if programmes exist also in other fields of EU policies, the environmental action programmes have, by contrast, a special role and function because of their legal character. This special character has been introduced by the Treaty of Maastricht, which foresaw a special procedure for the adoption of environmental action programmes; today, Article 192 para 3 TFUE provides that environmental action programmes – called ‘general action programmes’ – shall be adopted under the ordinary legislative procedure. As a consequence, these programmes necessarily have to be legally binding; otherwise, the application of the ordinary legislative procedure would make no sense.³ As a consequence, the environmental action programmes are not ‘soft law’ but hard law from a legal point of view.

This aspect seems to be rather unique in a context where EU policies, programmes or communications and other position papers have in general no binding effect, but are only supposed to expose the point of view of their author(s) e.g. on the direction a certain policy should – in his or their view – take in the future. Legally binding obligations have to be adopted in acts of secondary law, typically in the form of directives or regulations.

Article 192 para 3 TFUE has thus opted for a different approach: Parliament and Council shall in principle first adopt general action programmes setting out priority objectives to be attained; in a second step, measures which are necessary for the implementation of these programmes have to be adopted on the basis of Art. 192 para 1, 2 TFUE or a different pertinent legal basis in the TFEU. Consequently, the action programmes themselves may not give rise to direct legal obligations for Member States or for individuals; they are, however, legally binding upon EU institutions. Moreover, the concept contained in Article 192 TFUE implies also that the general action programmes may not cover all sorts of environmental action. Rather, already the wording of Article 192 par. 3 TFUE supports the view that these programmes may only contain general priority objectives, including general measures;

³ Cf. e.g. Ludwig Krämer, *EC Environmental Law*, London 2007, p. 61; Krämer, *Droit de l’environnement de l’UE* (note 1), p. 33; Epiney, *Umweltrecht* (note 1), chapter 3, A.III.; not very explicit, however, CJEU, C-142/95 P *Associazione agricoltori u.a./Commission* (1996) ECR I-6669, para. 32.

concrete measures have to be adopted on the basis of Article 192 par. 1, 2 TFEU or another legal basis.⁴ In other words, the action programmes have to leave some space for implementing measures, but do not have to be limited to general objectives.⁵ EU institutions, enjoy, however, a certain margin of appreciation as to the exact content of an environmental programme.

Because of the legally binding character of the action programmes, EU institutions are under a legal duty to adopt the measures necessary to implement the programmes. In doing so, the institutions have to respect the content of the environmental programmes. This legally binding effect covers both the question *if* the institutions have to adopt implementing measures and the question *which content* such measures should have; implementing measures have to be adequate in order to realise the objectives expressed in the programmes.

In theory, this approach which is rather original compared with other EU policy fields could assure that environmental policy is better designed since the adoption of secondary law is preceded by a sort of conceptual phase leading to a programme with legally binding effect. Moreover, one may – at first glance – assume that the discretion of EU institutions to adopt implementing measures in the field of environmental policy is reduced since they have to respect the framework of the general action programmes. However, in reality it does not seem that environmental action programmes have deployed – at least so far – effects going beyond those of pure ‘soft law’ communications. A certain influence of the programmes on the content of EU environmental policy and law is beyond doubt, but also legally non-binding instruments deploy very often such effects. Consequently, such an effect is not a particular characteristic of environmental action programmes. Furthermore, there is no indication that institutions are truly aware of the legally binding effects of the programmes and the legal necessity to adopt implementing measures. Hence, it comes as no surprise that many of the objectives set out in environmental programmes have not been implemented by effective implementing measures at the EU level. Even the Commission emphasises that the necessary implementing measures in a certain number of fields set out in the 6th environmental action programme have not been adopted.⁶

One may object that this comparatively reduced effect of the programmes is due to the fact that nobody has introduced an action for annulment or for inactivity (Articles 263, 265 TFEU) claiming that an objective contained in an environmental action programme has not been observed by legal activity or because of inactivity. Indeed, it would be interesting to observe

⁴ This approach is also necessary in view of the different legal bases in the TFEU: if one could deduce already from the action programmes “direct” obligations for EU Member States or individuals or if exclusively Article 192 par. 1, 2 TFEU could be used for the implementation of environmental action programmes, the system of different legal bases stipulated in the TFEU would not be respected; this would be the case since environmental law has a transversal character, with the consequence that measures referring to environmental policy may also be part of other policies.

⁵ As an example, the objective of combating risks caused by dangerous substances could be complemented with the principle that there must be an interdiction of (certain) substances. However, which substances exactly are concerned or at least the exact modalities of an interdiction would then have to be set out in detail in secondary legislation.

⁶ Cf. the evaluation of the programme by the Commission, COM (2011) 531 final.

the reaction of the Court to such a plea. However, very often the objectives are not formulated in a sufficiently precise way, with the consequence that an action for inactivity will most likely be found to be not suitable. An action for annulment is only possible in respect of a secondary act. Moreover, the Court leaves in general a large margin of discretion to the EU legislator whenever secondary law is concerned, so that one cannot reasonably expect that the Court would really contribute to an effective application of Article 192 par. 3 TFUE.

The preceding remarks should not lead to the conclusion that environmental action programmes are not useful; they are certainly very useful, but not so much because of their legally binding effect, even if perhaps their political effect is strengthened by the legally binding effect. In this sense, Parliament should insist on ‘good’ environmental action programmes with rather precise objectives in order to have a means of pressure vis-à-vis the other EU institutions, especially the Commission and the Council.

All in all, one can conclude that the special instrument of environmental action programmes has not truly deployed a legally binding effect in a strict sense, even if it is formulated as such in the Treaty; but the instrument may – because of the mentioned particularities – have a greater political impact than some other merely legally non-binding communications or other ‘soft law’ instruments.

B. Environmental principles

Article 191 (2) TFUE mentions environmental principles which have to be respected by EU institutions when pursuing EU environmental policy and adopting environmental law and by Member States when implementing EU law.⁷ Compared to other policy areas, the Treaty not only defines here the objectives to be pursued, but also to some extent the means to be used: According to Article 191 (2) TFUE, the principles of precaution and prevention⁸ and of rectification at source as well as the polluter pays principle have to be followed when adopting EU secondary law. Thus, the Treaty contains limitations respectively defines a ‘direction’ for the potential content of EU environmental law. In other policy fields, there are sometimes also articles which refer to the means and the contents of EU secondary law, especially as there are now a number of integration principles which have been formulated for quite some areas of EU policies; however, in general EU action and competences are defined

⁷ Cf. to this latter aspect which will not be considered in this contribution with further references Astrid Epiney, Zur Bindungswirkung der gemeinschaftsrechtlichen „Umweltprinzipien“ für die Mitgliedstaaten, in: FS Manfred Zuleeg, Baden-Baden 2005, p. 633 et seq.; see also CJEU, C-378/08 *Raffinerie Mediterranée* (2010) ECR I-1919.

⁸ Article 191 (2) TFUE mentions both principles, which bolsters the conclusion that they have to be distinguished. However, the CJEU does not seem to make a clear distinction. Cf. CJEU, C-175, 177/98 *Lirussi* (1999) ECR I-6881, para. 51 et seq.; CJEU, C-318/98 *Fornasar* (2000) ECR I-4485, para. 37; CJEU C-418/97, C-419/97 *ARCO* (2000) ECR I-4475, para. 99. Cf. to this issue with further references already Astrid Epiney/Andreas Furrer, Umweltschutz nach Maastricht. Ein Europa der drei Geschwindigkeiten?, EuR 1992, p. 369, 384 et seq.; see also Epiney, Umweltrecht (note 1), chapter 5, A.II.2.a).

by means of the objectives to be realised. Summing up, the environmental chapter of the Treaty and in particular Article 191 (2) TFUE make an innovative use of primary law formulating prerogatives for the EU institutions as to the content and the means of environmental policy.

The environmental principles are legally binding: already their introduction into the Treaty itself pleads in favour of their legally binding character. Moreover, the mere ‘vagueness’ of some principles is not sufficient to deny them legal effect. Principles are certainly very often open-ended in the sense that they do not allow or demand in each single case a precise solution or action to be undertaken, but require only the balancing of different interests. But this ‘balancing obligation’ also has a legally binding character. The CJEU admits as well the legally binding character of the environmental principles.⁹

The question remains, however, whether the fact that Article 191 (2) TFUE contains such principles binding EU institutions from a legal point of view has an observable effect on EU environmental policy, in particular on its content.¹⁰

The relevant case law of the CJEU is a useful point of departure to answer this question. The CJEU seems to distinguish between the following legal effects of environmental principles:¹¹

- First, environmental principles may widen the possibilities of the EU to act in environmental matters. As an example, in cases where the CJEU examines the compatibility of secondary law with primary law, the precautionary principle contributes to the widening of the margin of appreciation of the EU institutions exercising their legislative power in the sense that already a danger or a risk may be sufficient to act even if all elements of the relevant environmental problem and its causes are not or not yet surely established from a scientific point of view.¹²

However, there is still no case law where the Court of Justice has taken the view that the legislator was legally obliged to take protective measures. One could support the view that the environmental principles may also lead to an obligation to act, especially in situations where there may be considerable risks for the environment and / or human health.

- Second, EU legislative measures must not be in contradiction with environmental principles¹³ but have, quite the contrary, to support their realisation.

⁹ CJEU, C-284/95 *Safety Hi-Tech* (1998) ECR I-4301; CJEU, C-341/95 *Bettati* (1998), ECR I-4355; CJEU, C-293/97 *Standley* (1999) ECR I-2603; CJEU, C-127/07 *Arcelor* (2008) ECR I-9895; CJEU, C-343/09 *Afton Chemical* (2010) ECR I-7027.

¹⁰ The following discussion is limited to structural questions concerning the legal effect of environmental principles without a closer look at their content. Cf. to this respect, with further references, e.g. Epiney, *Umweltrecht* (note 1), chapter 5, A.; Jans/Vedder, *European Environmental Law* (note 1), p. 32 et seq.

¹¹ Cf. to these issues also e.g. Gerd Winter, *Environmental Principles in Community Law*, in: Jan H. Jans (ed.), *The European Convention and the Future of European Environmental Law*, Europa Law Publishing, Groningen, 2003, p. 1 et seq.; Astrid Epiney, *Environmental Principles*, in: Richard Macrory (ed.), *Reflections on 30 Years of EU Environmental Law*, Europa Law Publishing, Groningen, 2006, p. 17 et seq.

¹² CJEU, C-331/88 *Fedesa* (1990) ECR I-4023; CJEU, C-157/96 *National Farmers' Union* (1998) ECR I-2211; CJEU, C-343/09 *Afton Chemical* (2010) ECR I-7027.

¹³ CJEU, C-284/95 *Safety Hi-Tech* (1998) ECR I-4301; CJEU, C-341/95 *Bettati* (1998), ECR I-4355; CJEU, C-127/07 *Arcelor* (2008) ECR I-9895; CJEU, C-343/09 *Afton Chemical* (2010) ECR I-7027.

The Court, however, takes the view that the legislator disposes of a very large margin of appreciation for this purpose. In its case law, the Court has thus pointed out that a secondary act is not to be considered as being in contradiction with environmental principles merely because of the fact that it does not or at least not fully realise itself the principle where Member States are free to transpose or implement the measure in accordance with the pertinent environmental principle.¹⁴ This approach appears hardly convincing, since it implies a possibility for the EU legislator to avoid the implementation of environmental principles in secondary law which does not seem to be in accordance with the legally binding character of the said principles. More importantly, the approach of the Court entails also the risk of a varying implementation in Member States with the possibility of insufficient implementation in some Member States.

Beyond the mentioned case, the Court also leaves more generally quite a wide range of discretion to the legislator. In one case, the mere fact that the EU legislator had only prohibited one substance and not another substance which was a similar danger for the environment was not sufficient to be regarded as a violation of the goal of a high level of protection; the EU legislator can according to the Court act step by step and is not obliged to enact a complete prohibition of all dangerous substances for the ozone layer.¹⁵ However, one could legitimately ask if the precautionary principle interpreted in conformity with the principle of equality would not support the view that in such situations there may be a legal obligation to act in a more comprehensive way.

- Third, secondary law has to be interpreted in a manner that takes into account the environmental principles.¹⁶ In practice, this aspect may be the most important, also due to the fact that the Court seems to pursue a rather strict line using as much as possible the environmental principles in its argumentation in favour of their effectiveness through secondary law. The prime example is the Court's recent case law on secondary law in the field of waste,¹⁷ where the Court interpreted the polluter pays principle in a rather strict way. In some of the cases, the secondary law was not much clearer than Article 191 (2) TFUE, e.g. when provisions of secondary law only referred to the principle that the polluter has to support the full costs; the question thus arose whether far more concrete obligations than the Court has admitted until to date can be deduced from the polluter pays principle as formulated in Article 191 (2) TFUE.

¹⁴ CJEU, C-293/97 *Standley* (1999) ECR I-2603, para. 29 et seq.

¹⁵ CJEU, C-284/95 *Safety Hi-Tech* (1998) ECR I-4301.

¹⁶ Cf. e.g. CJEU, C-127/02 *Waddenzee* (2004) ECR I-7405, para. 58; CJEU, C-14/06, C-295/06 *EP, Denmark/Commission* (2008) ECR I-1649; CJEU, C-418, 419/97 *ARCO* (2000) ECR I-4475.

¹⁷ CJEU, C-378/08 *Raffinerie Mediterranée* (2010) ECR I-1919. See also CJEU, C-379/08, C-380/08 *Raffinerie Mediterranée* (2010) ECR I-2007; CJEU, C-254/08 *Futura Immobiliare* (2009) ECR I-6995; CJEU, C-188/07 *Commune de Mesquer* (2008) ECR I-4501.

C. Interim conclusion

Summing up, there are some original aspects to the sources of EU environmental law, with environmental programmes and environmental principles being of particular interest and importance. They can guide in particular the activities of the EU legislator. However, the whole potential of these tools does not seem to have been used to date. The comprehensive approach and the binding character of environmental action programmes have not truly been exploited. As to the environmental principles, their legal effects may be recognised; however, the EU legislator is very hesitant in implementing these principles through its legislative activity and the Court has given a wide margin of discretion to the legislator so that the enabling and guiding function of said principles cannot deploy its possible effects. It does not come as a big surprise, therefore, that there are still a lot of fields where EU legislative activity remains necessary in order to implement environmental principles. However, on the basis of the case law of the CJEU, it is very improbable that the Court will respectively can contribute to a better implementation of the environmental principles: if the legislator has acted, the Court grants a wide margin of appreciation; if it has not acted, there will be – in general – no procedure to sue the legislator since omissions can only be sued under the rather restrictive conditions of Article 265 TFUE.

Once the legislator has acted, on the contrary, the effects of the environmental principles seem to be much more important. In several cases, the Court has made a rather original and ‘far reaching’ use of the principles when interpreting secondary law. At least in this respect, the Court clearly contributes to the implementation of the principles. But this effect of environmental principles depends on previous legislative action of EU institutions which is often lacking.

§3 Regulatory instruments: some tendencies

It is of course not possible to consider all aspects of the regulatory instruments and content of EU environmental law and policy for the purpose of the present contribution. This would require an analysis of the whole substantive law. Our present focus is rather on three special, but linked tendencies characterising a large range of EU secondary law in the field of the environment over the last about 20 years. These tendencies are highlighted with references to some examples in secondary law to illustrate them; these references are of course not exhaustive. The tendencies to be discussed are first the so-called ‘integrated approach’ (A.), second the focus of EU environmental law on procedures (B.) and third the frequent lack of precise environmental standards (C.). A short interim conclusion highlights some interdependencies and consequences of these tendencies (D.).

A. The ‘integrated approach’

Since about 20-25 years,¹⁸ EU secondary legislation very often adopts the so-called ‘integrated approach’. According to this approach, secondary environmental law should not only focus on one environmental medium such as water or air, but take into consideration the different environmental media ‘as a whole’. In other words, the integrated approach assumes a holistic point of view, the protection of the environment ‘as a whole’ being the objective of the different EU measures, taking into account also the interferences between different environmental media.

The advantages of this concept are very often highlighted. The approach is centrally supposed to avoid a shifting of pollution between the various environmental media. Indeed, rather isolated measures may be of only limited value in terms of environmental protection. Measures in the area of water protection may contribute to a better water quality, but at the same time cause pollution of soils.¹⁹ In principle, the necessity of such a holistic approach is not contested, and already the interdependencies between eco-systems illustrate the necessity to go beyond an isolated focus on each individual environmental medium.

However, the approach also raises some questions:

- Already from a factual point of view, it does not seem possible to evaluate the consequences of a certain activity on the ‘environment as a whole’. Especially when long term-effects are to be included, this is normally not possible; but also in general, all the consequences of an activity cannot be known and taken into account.
- From the point of view of the decision to take, it is not possible that such a decision truly takes into account all interdependencies and the whole context. A rationality which considers ‘everything’ is not possible.
- From a conceptual point of view, no criteria are available which would define how one has to evaluate the consequences of a decision on the environment as a whole and under which conditions the implications on the environment are not acceptable. Indeed, the situation of the environment as a whole may not be evaluated from a scientific perspective, and every statement on this subject remains necessarily simultaneously the statement of a subjective point of view. Moreover, the well-known shifting effects may not be subject to a rational, foreseeable and objective evaluation: Is it, e.g., better for the environment as a whole if one uses more energy but causes less emissions?

Hence, the integrated approach remains a rather abstract and in some aspects idealistic concept, and its complexity has to be reduced when using it in legal acts. However, even if

¹⁸ However, the integrated approach was developed earlier, which is why the different environmental action programmes mentioned it already in 1983, 1987 and 1993. Cf. to this issue Ludwig Krämer, *Der Richtlinienentwurf über die integrierte Vermeidung und Verminderung der Umweltverschmutzung*, in: Hans-Werner Rengeling (ed.), *Integrierter und betrieblicher Umweltschutz*, Köln, 1996, p. 51 (52-53).

¹⁹ Cf. to the notion and the development of the integrated approach with further references Astrid Epiney, *EG-rechtliche Impulse für einen integrierten Umweltschutz*, in: Umweltbundesamt (ed.), *Nationale und internationale Perspektiven der Umweltordnung*, Erich Schmidt Verlag, Berlin, 2000, 47 et seq.

one proceeds to such a reduction of complexity, it seems that legislative measures based mainly on this concept may usually not be able to define precise rules of behaviour such as general emission standards in a general and abstract way. Indeed, it is in general difficult if not impossible to define the implication of a certain activity on the environment as a whole in a general and abstract way since these implications depend on a multitude of factors, such as the geographic situation of the activity or the traffic infrastructure in the relevant region. Moreover, the integrated approach implies an optimisation of the requirements for a certain activity which is only possible under the condition of a certain degree of flexibility in decision-making; very often, only a case-by-case decision may thus be able to consider the consequences on the environment as a whole or individual aspects of it. Summing up, the integrated approach is therefore characterised by a certain conflict with general and abstract rules or standards.

A look at different secondary acts based explicitly or implicitly on the integrated approach bolsters this conclusion.²⁰

- The Industrial Emissions Directive²¹ (which has replaced the so-called IPPC Directive²²) refers in several articles to the environment taken as a whole.²³ It certainly requires a permit for the installation covered by the directive; however, the obligations upon the operator contained in Article 3 are formulated in a very general way. Furthermore, the permit has to include limiting values for emissions; however, no general-abstract values are required, and the aspects to be taken into account when determining these values are also formulated in a rather general way, even if reference is made to the best available technologies which will play a more important role under the new directive. Summing up, the directive contains no standards which are precisely formulated but refers to rather general criteria which should be decisive when formulating such standards in the permit. Even if the standard of the best available technologies has been upgraded, it can still be doubted whether this approach is really able to guarantee that in every single case the competent national authorities formulate sufficiently stringent standards.
- The Environmental Impact Assessment Directive²⁴ and the Strategic Environmental Assessment Directive²⁵ require that projects or plans likely to have significant effects on the environment have to be subject to an assessment with regard to these effects. The results of this assessment have to be taken into account when the decision for the project or plan is taken. Both directives do not contain any material standard – except of the

²⁰ However, it is of course not possible to scrutinise here in detail various secondary acts. Cf. to this respect Epiney, in: *Nationale und Internationale Perspektiven der Umweltordnung* (note 19), p. 47, 52 et seq., the analysis made there being in large parts – as far as the aspect of the integrated approach is concerned – still of actuality.

²¹ Directive 2010/75 on industrial emissions, OJ 2010 L 334/17.

²² Directive 2008/1 concerning integrated pollution prevention and control, OJ 2008 L 24/8.

²³ See e.g. already Article 1 D 2010/75.

²⁴ Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment, OJ 2012 L 26/1.

²⁵ Directive 2001/42, OJ 2001 L 197/30.

obligation that the results of the EIA have to be taken into account when deciding on the permit for the project, a rather general obligation which leaves a large margin of appreciation to the competent authorities. However, procedural questions are subject to quite precise obligations.²⁶

- Furthermore, one may mention some general secondary acts which contain mainly procedural rules such as the directive on access to environmental information²⁷, the EMAS Regulation²⁸ or the Ecolabel Regulation²⁹. All these measures mainly concern procedural questions and there are no or very few (for the Ecolabel Regulation) material standards, the latter being formulated also in a rather general way.
- Finally, secondary legislation in special fields like water or air protection also refers to an integrated approach when dealing with quality standards, without, however, always formulating precise standards. There is a notable tendency to prefer quality standards over precise emission standards.³⁰ One may refer as an example to the Water framework directive.³¹

B. The role of procedural standards

The integrated approach was accompanied by a substantive amount of secondary legislation focusing on procedural rather than material standards. A typical example would be the EIA directive which has already been mentioned. But also in other fields of EU environmental law and in particular sectors, procedures are commonly formulated in a very precise way. Considerable legislative energy is deployed e.g. to define the plans to be established by Member States in several articles in the waste framework directive.³² Similarly, the Directive 2009/28 on renewable energy sources³³ contains certainly quantitative objectives to be attained as regards the part of renewable energy of the whole energy consumed in the Member States; however, the means to be used in order to reach these objectives are not set out, while the directive contains quite precise articles concerning the establishment of action plans. In the Ecodesign Directive³⁴ the objective of the directive is to set eco-design requirements for energy-using products. However, the directive contains only very few material requirements which are, moreover, formulated in a very general way leaving a large margin of appreciation in respect of the implementing measures; by contrast, the procedural rules are again formulated in a quite precise way. Finally, the Aarhus Convention and its implementing acts

²⁶ Cf. to this aspect also chapter §3 B.

²⁷ Directive 2003/4 on Access to Environmental Information, OJ 2003 L 41/26.

²⁸ Regulation 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme, (EMAS), OJ 2009 L 342/1.

²⁹ Regulation 66/2010, OJ 2010 L 27/1.

³⁰ Cf. to these issues, as water and air protection are concerned, Epiney, Umweltrecht (note 1), chapter 7, A., B.

³¹ Directive 2000/60, OJ 2001 L 331/1.

³² Directive 2008/98, OJ 2008 L 312/3.

³³ Directive 2009/28, OJ 2009 L 140/16.

³⁴ Directive 2009/125, OJ 2009 L 285/10.

in EU law come to mind,³⁵ in particular as regards the participation of the public; these aspects are, however, in general integrated into the relevant secondary acts such as the Industrial Emissions Directive or the mentioned EIA Directive.

Interestingly, the CJEU's interpretation of such procedural requirements is quite strict. Typically, the CJEU highlights in general the objectives and the *effet utile* of such requirements before adopting a rather strict view as far as their scope is concerned but also as far as the respect of the procedure in itself is concerned. For example, the Court stated that the programmes to be established on the basis of Directive 76/464³⁶ must have a specific character so that the objectives of the directive may be attained. In particular, the programmes have to present a comprehensive and coherent concept which contains a coherent planning for the whole national territory, which should enable the reduction of pollution by the respective substances covered by the directive. The mere adoption of overtly general programmes or several punctual measures are insufficient in view of the requirements of the directive.³⁷ At the same time, the CJEU also insists on its view that in case of non-respect of such procedural requirements a particular decision or act is in principle illegal and therefore may not deploy legal effects if the procedural requirements are in a close relationship with that decision, in other words, if they have to be accomplished before the decision is taken; as a consequence of this view, in principle the concerned procedure has to be repeated and the project or plan at issue cannot deploy any legal effects. These principles are particularly important in relation to the various environmental impact assessments which have to be completed on the basis of EU secondary law. In one case, the Court stated thus that in case a plan or programme was not made subject to an environmental impact assessment in violation of the SEA Directive, the competent national authorities had to take all general and specific measures in order to 'repair' this violation of the directive; in particular, there was for the Court an obligation to withdraw the plan or programme or to take the necessary measures to ensure that it cannot deploy legal effects.³⁸

C. The lack of substantive law

The above-mentioned two developments are accompanied by a simultaneous decrease in the amount of substantive law. In particular in sectors which are less important for the

³⁵ Cf. to this issue Jans/Vedder, *European Environmental Law* (note 1), p. 368 et seq.; Epiney, *Umweltrecht* (note 1), chapter 6, B.

³⁶ Today, the Water Framework Directive (Directive 2000/60, OJ 2001 L 331/1) is applicable (cf. article 8 D 2000/60). The principles developed by the Court in respect of D 76/464 remain in our view also applicable to Directive 2000/60.

³⁷ CJEU, C-207/97 *Commission/Belgium* (1999) ECR I-275. See also CJEU, C-184/97 *Commission/Germany* (1999) ECR I-7837; CJEU C-152/98 *Commission/Netherlands* (2001) ECR I-3463; in CJEU, C-130/01 *Commission/France* (2003) ECR I-5829, para 57 et seq., the Court emphasised that such programmes also must contain quality objectives.

³⁸ CJEU, C-41/11 *Inter-Environnement Wallonie*, 28.2.2012. The CJEU only admits an exception to this rule where there is a necessity to maintain some legal effects of the plan or programme in order to satisfy the requirements of environmental protection.

development of the internal market, one can observe throughout the last 20-25 years the adoption of ever less legislative acts containing precise standards, such as interdictions concerning certain animals or plants or emission standards. If standards are formulated in a precise and quantitative way, they concern very often only quality standards or objectives to be attained without, however, describing at least approximately the means to be used in order to attain these standards. Several examples of acts or areas of secondary law come to mind:

- The Industrial Emissions Directive³⁹ contains an obligation for the Member States to require a permit for all installations covered by the Directive. However, the Directive uses very general terms such as the efficient use of energy to describe the conditions under which such a permit may be granted; furthermore, emissions standards may also be defined individually for each installation by the competent authorities of the Member States, while the directive does not contain such standards.
- In the area of waste law, especially the framework directive 2008/98 contains a substantive amount of principles and objectives regulating the transposition of the directive by the Member States and thereby waste law in the Member States. Examples include the principles of the prevention of waste production, of self-sufficiency or of proximity. These principles are certainly legally binding; however, they are formulated in a very general way, with the consequence that only in exceptional cases truly precise obligations for the Member States can be deduced; the Member States, therefore, enjoy a very wide margin of appreciation.
- As regards climate protection, the relevant secondary law contains rather few precise standards which are moreover essentially limited to objectives, the means to attain them being left to the discretion of Member States. As examples, the already mentioned Directive 2009/28 or Directive 2010/31 on energy efficiency of buildings⁴⁰ come to mind.⁴¹

D. Interim conclusion

The European Commission stated in 2007 that the environment in the EU is still degrading and that the environmental law of the EU is not sufficiently effective: 'the EU is not yet on the path of sustainable environmental development. There has only been limited progress with the fundamental issues of integrating environmental concerns into other policy areas and improving the enforcement of EU legislation. Many environmental pressures are actually increasing: global emissions of greenhouse gasses are rising, the loss of biodiversity is

³⁹ Directive 2010/75 on industrial emissions, OJ 2010 L 334/17.

⁴⁰ OJ 2010 L 153/13.

⁴¹ Cf. in detail as regards these aspects of climate protection law Ludwig Krämer, Klimaschutzrecht der Europäischen Union, SZIER 2010, p. 311 et seq.

accelerating, pollution still has a major effect on public health, the amount of waste produced inside the EU continues to increase, and our ecological footprint is steadily growing.⁴²

This blunt statement shows that EU environmental law has not deployed sufficient effects – even if the situation would probably be much worse if there was no EU environmental law at all. Certainly, the lack of implementation and enforcement of EU environmental law in some areas and in a lot of Member States plays a certain role in this context. However, aspects of substantive law arguably account at least to the same extent; furthermore, problems in implementation and enforcement sometimes merely reflect deficiencies in substantive law. The more a rule is formulated in general terms, the more difficult proves its effective implementation. In any event, if EU environmental law grants too wide of a margin of appreciation, there is a high risk that Member States do not choose the ‘best’ solution in terms of effective environmental protection. The consequences are not only doubts on the effectiveness of too general obligations, but also considerable differences in the implementation between the various Member States. Good reasons plead therefore in favour of precise standard-setting in EU secondary law.

The important role of procedures cannot fully compensate for the lack of precise substantive law. There is no doubt that by following certain procedures, there may be a contribution to the effectiveness of EU environmental law, an aspect which may be illustrated by the requirements of the environmental impact assessments or those concerning access to environmental information, participation of the public and access to justice. From this perspective, the strict approach of the CJEU towards the interpretation of such requirements appears indeed highly useful and in principle convincing. Still, plans and procedures arguably cannot replace precise standards; in our view, secondary law in particular fields of environmental law such as waste law or the protection of environmental media ought to contain more precise standards in order to render EU secondary law more effective. This point of view does not run counter as such to the integrated approach, since the latter can also be taken into account when defining precise standards. In any case, as set out previously,⁴³ there is a need to reduce the complexity of the integrated approach so that it may function as a concept underlying EU environmental law rather than as a standard to be realised by itself.

§4 Selected aspects of enforcement

The enforcement of EU environmental law follows the same principles as the other parts of EU law. In the treaties, no special instruments can be found in this area, and secondary law also only rarely contains specific instruments which are not present in other areas of EU law. However, some of the general procedures are particularly important in the field of EU environmental law. The procedure in Article 260 TFUE has been used in particular in the

⁴² COM (2007) 225 final, part 6.

⁴³ §3 A.

field of the non-application of EU environmental law and rulings of the CJEU under this article are therefore remarkably numerous.⁴⁴

However, and in spite of the existing instruments of enforcement in EU law, it is interesting to note in this context that the application and the enforcement of EU environmental law knows particular problems compared to other fields of EU law. This situation is probably mainly due to the fact that environmental protection does not correspond to a specific individual interest of economic nature, as it is the case for most of the other sectors of EU law such as competition law, agricultural law or the fundamental freedoms. The objective of environmental protection does not correspond to a particular group of 'egoistic' economic interests, the environment not having a real 'voice' in the elaboration and application of EU environmental law. Furthermore, the need for environmental protection and for the application of EU environmental law in the Member States is perceived differently in various Member States.⁴⁵ Finally, the existing 'centralised' mechanisms of enforcement, especially the procedure of Article 258 TFUE, often prove not highly effective. This is partly due to their duration, but even more so due to the impossibility for the Commission to become aware of all possible failures of the Member States to implement and apply EU environmental law correctly.⁴⁶

It is in this context that one has to place the approach of individual rights conferred by EU law taken by the CJEU, an approach which could also be termed the concept of 'normative interest claim'.⁴⁷ According to this concept, EU law confers rights on individuals when the EU law provision in question pursues an objective which is also in the interest of individuals; as a consequence, the individuals concerned are entitled to go before national courts and to claim their rights conferred by EU law. Such rights may be part of EU law which has direct effect; but in many cases, especially where directives are concerned, EU law obliges Member States to transpose the directive in respect to the relevant articles in a manner that guarantees that individuals are able to claim their rights before national courts, the rights having become part of national law which again is a transposition of EU law.⁴⁸

This approach was developed by the CJEU in relationship to environmental law and it is precisely in this field that it has become particularly relevant up to this date. As its consequence, individual rights have also to be conferred where the relevant article pursues general interests such as effective environmental protection which are also of some interest to

⁴⁴ Cf. to this respect, with further references, Krämer, *Droit de l'environnement de l'UE* (note 1), p. 122-123.

⁴⁵ Cf. to these issues e.g. Krämer, *Droit de l'environnement de l'UE* (note 1), p. 117-118.

⁴⁶ Cf. to these issues e.g., with further references, Epiney, *Umweltrecht* (note 1), chapter 5, D.II.

⁴⁷ Cf. in detail to this issue Astrid Epiney, *Primär- und Sekundärrechtsschutz im Öffentlichen Recht*, VVDStRL 61 (2002), p. 362, 393 et seq.; Astrid Epiney/Kaspar Sollberger, *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht. Rechtsvergleich, völker- und europarechtliche Vorgaben und Perspektiven für das deutsche Recht*, Berlin 2002, p. 333 et seq.; see also, with further references to recent doctrine, Epiney, *Umweltrecht* (note), chapter 5, D.II.

⁴⁸ Cf. in the case law of the CJEU already CJEU, C-131/88 *Commission/Germany* (1991) ECR I-825; CJEU, C-361/88 *Commission/Germany* (1991) ECR I-2567; CJEU, C-298/95 *Commission/Germany* (1996) ECR I-6755; see furthermore CJEU, C-237/07 *Janecek* (2008) ECR I-6221.

the individual. In the case law of the CJEU, this has been admitted to date where human health is concerned: As an example, air quality standards pursue on the one hand the general interest of environmental protection and the health of the whole population, but they also have as an objective the protection of the health of each individual. As a consequence, the individuals that e.g. live in a region where the applicable quality standards are not respected are entitled to go before a court and claim the respect of air quality standards and the adoption of measures such as national action plans aimed at attaining such standards.⁴⁹ National law has to guarantee that such claims are possible and effective. It is worth noting that this approach goes far beyond the concept of judicial review in some Member States where especially administrative acts are only subject to judicial review if a person possesses a ‘subjective right’; often, such a right is only granted where the person is concerned in a particular way, more than all other persons. This concept would thereby exclude judicial review of provisions pursuing general interests.⁵⁰

Even if, as mentioned, the concept of a ‘normative interest claim’ has been developed by the CJEU and is now widely recognised, some questions remain. It remains in particular unclear which individual interests are necessary and sufficient in order to accept the existence of an individual right capable of being claimed in justice. Good reasons support a rather large approach so that a ‘direct’ interest is sufficient even if said interest is of an immaterial character and does not concern the person herself; the latter point would be exemplified best by the interest of nature protection under the condition that some individuals may have a personal interest in the protection of a site, e.g. where areas serving as zones for walks are concerned. These issues are, however, yet to be settled in detail.⁵¹

The concept of a ‘normative interest claim’ thus enables individuals to defend their interests but contributes also to the enforcement of EU law, an approach which the Court mentioned already in its well-known decision in *van Gend & Loos*.⁵²

Beyond the ‘normative interest claim’ mentioned above, access to justice has also been developed in the so-called Aarhus Convention.⁵³ This Convention provides that access to justice has to be guaranteed concerning permits of certain projects to individuals under specific conditions and to NGOs, for the latter independently of an interest.⁵⁴ The pertinent

⁴⁹ Cf. CJEU, C-237/07 *Janecek* (2008) ECR I-6221.

⁵⁰ This concept has mainly been adopted in Germany but also in Austria and to some extent in Italy. Cf. Epiney/Sollberger, *Zugang zu Gerichten* (note), p. 29 et seq.

⁵¹ Cf. to this issue Epiney, *VVDStRL* 61 (note), p. 361, 386 et seq.; Bernhard Wegener, *Rechtsschutz im europäischen (Umwelt-) Recht. Richterliche und sekundärrechtliche Bausteine und Fehlercodes unionaler Dogmatik*, UTR 2008, p. 319, 323 et seq.; Pavlos Eleftheriadis, *Environmental rights in the EC Legal order*, YEL 2007, p. 297 et seq.

⁵² CJEU, 26/62 *van Gend & Loos* (1963) ECR 1.

⁵³ OJ 2005 L 124/1.

⁵⁴ Cf. to the Aarhus Convention e.g. Katy Brady, *New Convention on Access to Information and Public Participation in Environmental Matters*, *Environmental Policy and Law* 28 (1998), 69 et seq.; Thomas von Danwitz, *Aarhus-Konvention: Umweltinformation, Öffentlichkeitsbeteiligung, Zugang zu Gerichten*, NVwZ 2004, 272 et seq.; Petra Jeder, *Neue Entwicklungen im Umweltrecht vor dem Hintergrund der Aarhus-Konvention*, *Jahrbuch des Umwelt- und Technikrechts (UTR)* 2002, 145 et seq.; Veit Koester, *The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental*

articles of the Aarhus Convention as well as the implementing EU law have already been interpreted by the CJEU in its case law.⁵⁵ The Convention is, however, explicitly limited to environmental matters.

§5 Conclusion

In EU environmental law, some particularities can be observed as highlighted in the present contribution.⁵⁶ Even if these particularities concern different aspects (sources of law, substantive law, enforcement), it seems that they can mainly be explained by the specificities of the concern of environmental protection, in particular the fact that it is merely a general, not an individual (economic) interest and the fact that scientific evidence is not always established as far as the causes of an environmental problem or environmental deterioration and the means able to remediate the situation are concerned. Furthermore, differing interests between Member States may play a certain role, especially as far as the substantive law is concerned.

Some of the particularities highlighted in this contribution may have more potential than admitted until now, especially by the CJEU; this is arguably the case for environmental principles, but also the environmental programmes. It seems, however, that the Court is willing to give an 'environmental friendly' interpretation of EU law. This can be seen e.g. when the Court takes into account the environmental principles when interpreting the relevant secondary legislation, when procedural requirements are subject to a relatively strict

Matters (Aarhus Convention), in: G. Ulfstein et al. (ed.), *Making Treaties Work: Human Rights, Environment and Arms Control*, Cambridge 2007, 179 et seq.; Christine Larssen, *L'accès aux informations sur l'environnement en droit international: la convention d'Aarhus*, in: C. Larssen (ed.), *Dix ans d'accès à l'information en matière d'environnement en droit international, européen et interne: Bilan et perspectives*, Bruxelles 2003, 25 et seq.; Elisa Morgera, *An Update on the Aarhus Convention and its Continued Global Relevance*, *RECIEL* 2005, 138 et seq.; Vera Rodenhoff, *The Aarhus-Convention and its Implications for the "Institutions" of the European Community*, *RECIEL* 2002, 343 et seq.; Martin Scheyli, *Aarhus-Konvention über Informationszugang, Öffentlichkeitsbeteiligung und Rechtsschutz in Umweltbelangen*, *ArchVR* 2000, 217 et seq.; Alexander Schink, *Die Aarhus-Konvention und das deutsche Umweltrecht*, *EurUP* 2003, 27 et seq.; Sabine Schlacke/Christian Schrader/Thomas Bunge, *Informationsrechte, Öffentlichkeitsbeteiligung und Rechtsschutz im Umweltrecht. Aarhus-Handbuch*, Berlin 2010; Stephen Stec/Susan Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide*, 2000; Christian Walter, *Beteiligungsrechte im Verwaltungsverfahren und Zugang zu Gerichten. Die Vorgaben des Völker- und Europarechts*, in: W. Durner/C. Walter (ed.), *Rechtspolitische Spielräume bei der Umsetzung der Aarhus-Konvention*, Berlin 2005, 7 et seq.; James Wates, *The Aarhus Convention: a Driving Force for Environmental Democracy*, *JEEPL* 2005, 2 et seq.; Michael Zschiesche, *Die Aarhus-Konvention – mehr Bürgerbeteiligung durch umweltrechtliche Standards?*, *ZUR* 2001, 177 et seq.; Astrid Epiney, *UN/ECE-Konvention über den Zugang zu Informationen, die Öffentlichkeitsbeteiligung an Entscheidungsverfahren und den Zugang zu Gerichten in Umweltangelegenheiten („Aarhus-Konvention“), Kommentar*, in: J. Fluck/A. Theuer (ed.), *Informationsfreiheitsrecht mit Umweltinformations- und Verbraucherinformationsrecht IF-R/UiG, Kommentar*, F II.1, 41 p., Heidelberg et al., 2003; Astrid Epiney/Martin Scheyli, *Die Aarhus-Konvention. Rechtliche Tragweite und Implikationen für das schweizerische Recht*, Freiburg (CH) 2000.

⁵⁵ CJEU, C-115/09 *Bund für Umwelt und Naturschutz Deutschland*, 12.5.2011 (Trianel); CJEU, C-240/09 *Lesoochranárske*, 8.3.2011; CJEU, C-263/08 *Djurgården-Lilla* (2009) I-9967.

⁵⁶ Which, as should be re-emphasised at this point, is not meant to treat exhaustively the manifold particularities of EU environmental law.

interpretation or when the Court develops the concept of a ‘normative interest claim’. This underlines the great importance of secondary law, whose adoption is, however, dependent upon the existence of a political will.

Even if the characteristics of EU environmental law dealt with in this contribution may be as mentioned in large parts explained by specificities of the area of environmental law and policy, some aspects simultaneously seem to be of at least potential relevance for other fields of EU law:

- First, the interpretation of EU secondary law in the light of objectives and principles laid down in primary law is of course a general principle of interpretation, especially in EU law, and is therefore also relevant in other areas such as migration law (e.g. interpretation of secondary law in the field of free movement of persons in the light of the objective of article 45 TFUE). However, it seems that this approach of the CJEU is particularly significant in the field of environmental law since the TFUE does not only contain objectives but also environmental principles which are of considerable importance for fleshing out the pertinent policy instruments and / or the content of secondary law.
- The predominant role of procedural rules exists also in other policy areas; however, this role depends from secondary law which has to make use of this instrument. As one aspect of this role which is also relevant in other policy areas one can cite the principle that non-respect of compulsory procedural rules must not be ignored because of the mere fact that the non-respect does not deploy effects on the final result and that such non-respect leads generally to the annulment of the pertinent decision. However, it seems that procedural rules play a particularly important role in the field of environmental law. One may explain this fact by the possibility to avoid drafting precise substantive standards using instead such procedural rules, but also by the importance of transparency for effective environmental protection.
- Finally, the conditions for rights of individuals under EU law are of course of general application. However, in the field of environmental protection they are of particular importance since environmental protection is as already mentioned a general interest, while ‘egoistic’ interests are rare in this field. By contrast, the possibility of associations respectively NGOs to get their claim heard before a court of law may also play a role in other fields of EU law, especially in areas where there are significant power imbalances between the relevant actors, as it is the case e.g. in the field of consumer protection or the law of equality. Such judicial remedies must, however, be introduced in secondary law.