EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement

by Ludwig Krämer*

The economic crisis, which is affecting the European Union (EU) at present, has also had an impact on the protection of the European environment. Already, for about 15 years, the proponents of a market economy who wanted to make the EU "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion",[1] have been tempted to reduce environmental protection to a marginal aspect of EU policy. Proponents of this line of thinking have increased during the economic crisis. They have succeeded in reducing environmental legislative activity almost to zero.[2] Perhaps the most obvious demonstration of this strategy was the European Commission's proposal for a seventh EU Environment Action Programme(EAP)[3] which does not contain one single concrete proposal for legislative action; this in itself is remarkable when compared to the first six EAPs, adopted by the EU between 1973 and 2002.

In view of this determination not to fill the gaps in European environmental protection by new legislative initiatives, the implementation and application of existing environmental legislation becomes all the more important; it comes as no surprise that the seventh action programme proposal mentions the implementation and/or application of existing provisions, not less than 14 times in various paragraphs discussing "required" measures.[4] At the same time, despite the words in Article 1 of the Treaty on European Union (TEU) that "(T)his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken *as openly as possible and as closely as possible to the citizen*",[5] the process of monitoring the application of EU environmental law remains an almost entirely closed business between the EU Commission and the EU Member States. EU environmental law would be much better applied, if citizens had the option of actively taking part in the monitoring process. The following paper will try to suggest a number of concrete measures to improve the present situation as regards the enforcement of EU environmental law at EU level,[6] after having described the actual structure and practice of monitoring implementation of EU environmental legislation.

The Present State of Monitoring Implementation of EU Environmental Legislation

The EU exercises its environmental legislative activity through regulations, directives and decisions.[7] Regulations are of general application, binding in their entirety and directly applicable in all Member States. Directives are addressed to Member States and ask them to achieve a specific result, leaving them the choice of form and methods to achieve this result. Decisions – which are in particular used to adhere to international environmental agreements – are binding for those States or others, to whom they are addressed. Article 192(4) stipulates that "(W)ithout prejudice to certain measures adopted by the Union, the Member States shall… implement the environment policy". The phrase "certain measures" obviously refers to EU regulations; and implementation means the transposition of EU directives and, where appropriate, decisions into the national legal order of each Member State, as well as their application to concrete situations. The European Commission "shall ensure the application of

* Director of environmental law consultancy *Derecho y Medio Ambiente* in Madrid; Director of ClientEarth's Aarhus Centre in Brussels; served in the European Commission Directorate General for the Environment, 1972–2004; has lectured on EU environmental law at some 60 European and North American universities, and published some 20 books and 230 articles on that subject; awarded the 2001 Elizabeth Haub Prize for Environmental Law.

the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice".[8]

Once an EU directive is adopted, the Member States are obliged to transpose its provisions into their national legal order; each directive determines the time-span within which this has to happen. The transposing legislation must be sent to the Commission. At regular intervals, Member States must normally report to the Commission about the transposition, the application and the enforcement of the directive (implementation reports). All these obligations are laid down in the individual directive and may vary from case to case. Environmental regulations and decisions do not normally contain obligations to transpose them into national legislation or to report.

The Commission registers the national transposing legislation and makes it publicly available on the internet. The national implementation reports are not systematically published. The Commission's staff examines whether the national legislation completely and correctly transposed the provisions of the EU directive into the national legal order. Due to linguistic problems – there are 23 official languages within the EU and the national legislation is normally sent in the original language – and lack of human resources, the Commission frequently contracts "conformity studies", where private contractors examine the transposition of a directive (conformity studies are not made for regulations and decisions) within the 27 Member States. These studies contain a disclaimer which indicates that the Commission is not responsible for the content of the study. Yet the studies are not published or made available to the public on request.

The Commission does not have inspectors who could check the application of a directive within a Member State, for example by taking samples of water or air, inspecting industrial or waste installations, or looking at the impairment of a natural habitat. The Member States' implementation reports, mentioned above, report on the measures taken, but not on problems encountered, deficiencies of application and other omissions to apply the EU directive. The Commission has also dismissed the use of media reports to discover any non-respect of EU law.[9]

Almost the only source of information on the concrete application of EU environmental law is thus the citizen's complaint. This procedure is not regulated or formalised. Every citizen may address a complaint to the Commission regarding the disregard of a piece of environmental legislation. The Commission then registers the complaint. In the 1980s and 1990s, it then addressed the Member State in question, confronted it with the arguments of the complainant, tried to find out the facts and even made fact-finding visits to the place in question. This practice, however, has been abandoned for a number of years. Today, the Commission discusses the issue with the Member State in question and tries to solve it in this way. The complainant is informed of the result of the negotiations and may remonstrate, but has no means of carrying his complaint further.[10]

When the Commission learns that a Member State has infringed EU (environmental) law, it may start a formal procedure against that Member State. The wording of Article 258 of the Treaty on the Functioning of the European Union (TFEU), where this procedure is laid down, would oblige the Commission to start procedures;[11] however, the EU Court of Justice declared that the Commission had unlimited discretion in this regard so that its discretion on this question could not even be assessed or controlled by the Court itself. The procedure under Article 258 TFEU consists of a pre-judicial and a judicial part. The objective of the pre-judicial part is to clarify the facts of the case and allow the Member State to defend itself, eventually to rectify the situation and, thereby, generally avoid litigation before the Court. The Commission first sends a letter of formal notice to the Member State, confronting it with the facts and asking for an answer within a specific time. If the answer is considered unsatisfactory, the Commission sends out a reasoned opinion, to which the Member State

again is asked to answer. Should the dispute not be solved through this exchange of arguments, the Commission may apply to the Court of Justice.

Where the application is well-founded, the Court declares that the Member State has infringed EU law. The Member State must then take the necessary measures to comply with the judgment. Should it fail to do so, the Commission may start a new (pre-judicial and judicial) procedure, according to Article 260 TFEU. This time, however, it may ask the Court to decide on the payment of a lump sum and/or a penalty against the Member State in question. Since the end of 2009, this ability of the Commission to seek a lump sum/penalty payment is also included in the procedure under Article 258 TFEU, where a Member State did not transpose a directive into its national legal order.[12]

Overall, this way of monitoring the application of environmental law at EU level shows all the characteristics of a diplomatic, public international-law type of procedure: the procedure takes place between the EU Commission and the Member States. To a very large extent, it is not public. Individual citizens and environmental organisations have practically no right to participate in the procedures. The public is incompletely informed on the state of affairs, before and during any eventual instruction of a possible breach of a Member State's obligations under EU environmental law. The information that is provided is scarce – in no way comprehensive. Secrecy determines the procedure of monitoring the application of EU environmental law.

The Commission justifies this secrecy with the argument that the objective of all monitoring proceedings, and in particular the different steps prior to and during a formal procedure under Article 258 TFEU, is to obtain the Member State's compliance with its EU-Treaty-derived obligations, and that, therefore, negotiations should be based on mutual trust and confidentiality. It argues that any public discussion of specific cases would undermine the objective of such negotiations. To a certain extent, the General Court and the Court of Justice have adopted a similar position;[13] although to date no judgment has gone into detail on the balancing of the diverging interests at stake.

The practice concerning the monitoring of EU law has developed progressively since 1958, when the EEC Treaty (predecessor of the Lisbon Treaties) entered into effect. It aligns with the monitoring of application of international agreements: diplomatic discussions between the EU Commission and the Member State in question take place; the general public remains excluded from these discussions, and information on them is only published when either side considers it appropriate to do so. The Commission does not hesitate, however, to publish press releases on specific cases when it considers this appropriate, in order to increase pressure on a Member State. This attitude is hardly compatible with the "confidence and mutual trust" which it invokes in other cases. As the Commission's handling of potential infringements, its investigation of complaints, petitions and other practices are not controlled, it has a quasi-monopoly – unlimited discretion on whether and with what intensity it looks into cases of non-compliance by a Member State.

This situation, which might have been justified in the 1950s when the EEC Treaty was set up and started to function, is no longer compatible with the letter and the spirit of EU environmental law, for a number of reasons. As early as 1963, the Court of Justice declared:

> *[T]his Treaty* [the EEC Treaty] *is more than an agreement which merely creates mutual obligations between the contracting states... the Community constitutes a new legal order of international law .. Community law therefore not only imposes obligations on individuals but is also intended to confer rights upon them which become part of their legal heritage.*[14]

This jurisprudence led to extensive considerations of the direct effect of EU Treaty and secondary law, to requirements of consistent interpretation and of liability of States and of the EU itself for damage. The Court of Justice's jurisprudence need not be described here in

detail. What matters is that EU law also creates rights and obligations for citizens that the EU and national courts have to consider.

Why should there be any difference with regard to monitoring the application of EU (environmental) law? Since 1985, it has been uncontested that the protection of the environment is, under EU law, in the *general* European interest. This has frequently been confirmed by the EU Court of Justice.[15] As a matter of general interest, the issue of environmental protection is not one that should be reserved for national and EU administrations or political instances. Rather, every citizen has an interest in appropriate protection of the environment, and in the respect of existing legislation on that topic. It follows that each must be able to make sure that the existing legal provisions for the protection of the environment are actually applied.

Whether an EU Member State applies a provision of EU environmental law or not is not just a matter between that State and the EU Commission. The Commission might, for political or other (financial or economic) considerations, avoid taking any steps against such a breach of EU law. Why should there not be public discussion, not only about such a breach of law by the Member State, but also about the EU's attitude? Such public discussion is likely to lead to greater compliance with EU law; and the EU, as an "ever closer union among the peoples of Europe",[16] can only profit from compliance with the law.

In the foreseeable future, there is no prospect for amending the EU Treaties to improve citizens' involvement and participation in the monitoring of EU law. There are, however, numerous small steps which could be taken now to improve the present situation, reduce the democratic deficit of the EU policies, increase citizens' involvement in matters at EU level and thus strengthen the EU as a whole. In particular, in more than half of the EU Member States (the 12 that joined the EU after 2004, as well as Greece, Spain, Portugal, Ireland, and probably Italy and Luxemburg), almost 100 percent of national environmental law is derived from EU legislation. Most of the other Member States admit that their national environmental law is 70–80 percent EU-derived. These figures mean in practical terms that it is of relevance to all EU Member States and to all EU citizens, if and how the common environmental rules which were adopted at EU level, are applied and complied with. Therefore, small steps to improve the present situation are in the interest of all. Such measures may be divided into three categories: measures to increase the role of the European Parliament in the monitoring process, in recognising the rights of citizens and environmental organisations in participating in this process, and in measures to promote an open and transparent European Union, where decisions are taken as openly as possible and as close as possible to the citizen. The following discussion presents suggestions for all three.

Measures to Improve the Present System of Application Monitoring

An Increased Role for the European Parliament

In the past, the Commission continuously objected to any increased role of the European Parliament in the monitoring of the application of (environmental) law. Its argument was that the EU Treaties had assigned this task to the Commission, not to the Parliament.

This argument is only partly correct. Monitoring the application of EU law is mentioned in Article 19 TEU as a task of the Commission. However, Article 14 TEU explicitly mentions that the European Parliament is tasked to "exercise functions of political control". And it would be strange to deny the European Parliament the right to check for itself whether the legislation it adopted together with the Council is effective and efficient; whether it is applied in full or in part; and whether the instruments, sanctions, planning and reporting obligations are sufficient to ensure the protection of the EU environment at a high level, as required by Article 191 TFEU. Such efficiency controls are necessary in order to allow Parliament to request, if need be, a review or an amendment of existing legislation. The

Parliament cannot be reduced to making legislative co-decisions with no right to look at the results of its legislation. It needs to identify good and bad consequences, possible shortcomings or omissions, provisions which are too interfering and provisions which do not work in practice for whatever reason.

The following sections discuss examples of ways in which the European Parliament can play a greater role in the monitoring of EU environmental law.

Regular Meetings of the Environmental Committee on Implementation of EU Environmental Law

At regular intervals, Parliament should organise meetings of its Environmental Committee, at which the implementation of one or several environmental directives is discussed in the presence of the Commission. The Commission would then report on the transposition of the directive(s) under discussion, and omissions in this regard. It could also report on cases of bad application (complaints it had received and follow-up it had undertaken); on good or bad practices in Member States; and on considerations of means to improve EU legislation. Once the dates are known, when a specific directive is to be discussed in this way, members of the public could address the members of the European Parliament, drawing their attention to breaches or omissions and thus contributing to an open exchange on the application of EU environmental legislation.

In this way, Parliament would, in effect, ask the Commission to give accounts of the application of EU legislation and of its own activity in this regard.

Direct Parliamentary Investigation of Environmental Petitions

The European Parliament could play a more active role in the handling of petitions. At present, every citizen has the right to send a petition to the European Parliament.[17] However, where the petition reproaches a Member State for not respecting EU environmental law, the European Parliament itself does not examine the petition. Rather, in almost all cases, it sends the petition to the European Commission which deals with it as if it were a complaint. In this regard, the European Parliament is probably the only Parliament in the world which does not use petitions in order to control the activity of the national or EU executive. This practice often leads to frustration by citizens, as they frequently had first addressed the European Commission, but not obtained any satisfactory answer.

The Parliament could and should use the opportunity of receiving such a petition as a justification for directly checking for itself whether EU environmental law has been fully respected in a concrete situation. It should request accounts from the European Commission, organise site visits in appropriate cases and demonstrate in all possible ways towards the petitioner(s) that the European Parliament is taking citizens' concerns seriously.

Formal Request for an EU Regulation on Handling Environmental Complaints

The European Parliament could formally ask the Commission, under Article 225 TFEU,[18] to elaborate a proposal for EU legislation on the complaint procedure. Such legislation exists in the area of competition law.[19] There is no reason whatsoever, why such a legislative regulation could not be adapted for other sectors. The argument that complaints in competition law concern private companies, whereas complaints in other areas concern Member States, is not valid. Indeed, the complaints procedure is, first of all, a procedure which determines the rights and obligations of a complainant. The interests of Member States (and of the Commission) can be well preserved through a careful drafting of such legislation. The objection of the Commission to drawing up such legislation can only be explained by the will to maintain its uncontrolled discretion on the handling of complaints. There is no legal ground which would oppose the elaboration of procedural provisions to apply to complaints.

On several occasions, the European Parliament had asked the Commission to draw up such a legislative proposal on complaint handling, without success.[20] It therefore appears that a more formal request would be appropriate. It would allow the European Parliament to start a political debate on the procedures for handling complaints regarding the application of EU law.

There is a wider problem with complaints, which is not at present addressed by the Commission. Specifically, the above-described mechanisms on the implementation of EU environmental law are designed to examine whether EU law was correctly and completely transposed into national law. There is no way in which the Commission is informed of the practical application of such law. And it is well known that (particularly in the environmental sector) legal provisions are all too often just put in the statute books and not applied in practice. The permitting of installations, the emission of pollutants, the measuring of the quality of air or water, the impairment of natural habitats, inspections, and numerous other aspects are all addressed only on paper. As the Commission has no inspectors, it normally is not informed of such problems. Complaints submitted by individuals could play a very important role in bringing to the attention of the Commission potential cases of non-compliance which otherwise would pass unnoticed.[21] The current limitation of Commission monitoring to the transposition of environmental legislation, without considering its practical application, directly contradicts Article 19 TEU, which requests the monitoring of *application,* as well as *transposition.*

Improved Rights of Citizens to Participate in the Monitoring Process

Citizens could and should obtain more and better information on the compliance of Member States with their obligations under EU environmental law. This can be achieved through a number of steps.

Increase the Rights of Complainants

As mentioned above, environmental complaints constitute the main source of information to the Commission concerning the practical application of EU environmental law. Yet, the environmental complainants are treated as undesirable interferers by the Commission. During the last few years, the Commission has made their position even worse. In the 1980s and 1990s, the Commission examined environmental complaints, confronted a Member State with the complainant's arguments, cross-checked the Member State's answers and thereby tried to clarify the facts as much as possible. Citizens were encouraged to send complaints, as this would enable the Commission to get an impression how environmental law was applied within the Member States.[22]

In 2007, the Commission set up a so-called "Pilot" system,[23] consisting essentially of the exchange of correspondence with Member States via electronic mail, replacing the previous practice in which the exchange took place via administrative letters.[24] No other significant change with regard to the system prior to 2007 was introduced. However, the Commission used this system to put aside any participation of complainants: the exchange took place exclusively between the national and the EU administrations. Only at the end of the procedure is the complainant informed of the final result of this exchange.

The Commission sees a great advantage of the new system in the acceleration of the procedure. However, the streamlining – *i.e.*, replacing of letters to the Member State's Permanent Representation with electronic correspondence – does not justify the transition to a purely inter-administrative procedure. In the vast majority of cases, the bad application of EU environmental law that is complained of has occurred at the local or regional level and involved, in one way or the other, the public authorities of a Member State. A procedure in which only the national public authorities can argue about the facts and the legal implications operates essentially to enable these public authorities to act as judge and party at the same

time. When a local authority wants to construct a golf course within a protected area, when an authority does not take steps against a company that discharges waste water into a river, when an unauthorised landfill threatens to contaminate the ground water: what shall the public authority tell the Commission other than that the environmental risk is minimal and that the necessary steps are being taken?

By introducing the Pilot system, the Commission deliberately intended to deter complainants, reduce complaints and thereby avoid the obligation to start formal proceedings against a Member State under Article 258 TFEU. The uncontrolled handling of complaints under the Pilot system raises the suspicion that the Commission arbitrarily selects those cases which it wishes to discuss with Member States – the Commission itself reports that out of 604 environmental complaints received in 2011, only 149 led to discussions with Member States under the Pilot system.[25] Thus, it comes as no surprise that the number of environmental cases under Article 258 TFEU has decreased during the last few years.[26]

As explained above, in competition law, the Commission has demonstrated a workable method by which the serious participation of complainants in the enforcement of EU law can be obtained. In environmental law, a similar approach appears necessary.

Access to Conformity Studies

As noted, the Commission systematically orders studies, known as "conformity studies", which compare the transposition of an EU environmental directive into the national legislation of each of the 27 Member States. However, the Commission does not publish these studies or make them otherwise available, despite the fact that each study contains a disclaimer which states that the Commission is not responsible for the content of the study. The Commission justifies its attitude with the argument that it orders these studies, in order to discover potential breaches of EU law. According to the Commission, the studies are part of the procedure under Article 258 TFEU which must be pursued in a climate of mutual trust and confidence.

This practice appears untenable. Studies on the transposition of an EU environmental directive are "environmental information", to which, under EU law, there is a right of access.[27] Conformity studies do not bind the Commission. The Commission has unfettered discretion in deciding whether or not to accept the conclusions of a study, whether to make that choice immediately or after several years and whether to begin formal proceedings against a Member State under Article 258 TFEU. The conformity studies are not part of any procedure under Article 258 TFEU – such a procedure has not even begun when the study is made.

Neither is it correct to argue that the conformity studies are therefore part of the procedure under Article 258 TFEU, by virtue of the fact that they serve to detect possible infringements of EU law. The studies have first and foremost the objective of informing the Commission of the state of the law in each of the Member States. Remembering that Member States send their national legislation to the Commission in its original language, and that Commission officials do not know all 23 official languages of the EU nor their varied legal systems (which may even vary within the regions of a Member State), the conformity studies are essential to provide information on the state of the transposed law in the Member States. To illustrate the practical difficulties which are involved with the transposition of EU law, Directive 92/43 on natural habitats and the conservation of wild fauna and flora[28] produced 914 pieces of national transposing legislation, which were officially sent to the Commission by Member States.[29]

An environmental organisation brought the case before the EU General Court, challenging the Commission's continuing refusal to provide public access to the conformity studies (T-111/11). The General Court dismissed the application. The judgment is likely to be appealed.

Right to Participate in Meetings with Member States

At present, under the Pilot system, the Commission discusses with the national authorities of a Member State the factual and legal circumstances of a case. However, when this discussion is based on information which the Commission has received from an individual person or a non-governmental organisation (NGO), that citizen or NGO should have the right to participate. As there are no procedural rules on complaints, there is no such right at present; however, such a right would make sense. Indeed, the Commission normally does not know much about the specific circumstances of a case. As regards the facts of the case, it is entirely dependent on the Member State's authorities, who may, as noted above, have a specific interest in presenting the factual circumstances in a way that favours their point of view. The initiator of the case could clarify and rectify issues from his point of view and thus allow the Commission to obtain a more objective view of the problem.

Linked to this issue is the right of the initiator to be informed of the Member State's arguments. Indeed, given that the Commission largely depends on the Member State's presentation of the facts and the legal consequences, it could call on the initiator to clarify and rectify the facts, draw attention to side-issues not raised and generally give the Commission a more objective view, should it indeed inform the complainant of the Member State's arguments. As the protection of the environment is in the *general* interest and not only in the interest of the Commission and the Member States, the question of the initiator's participation or full information should not be left only to the Commission and the Member States.

Right to Participate in Fact-finding Missions of the Commission

The same reasoning applies when the Commission undertakes fact-finding missions to a Member State. This occurs seldom enough,[30] with the vast majority of cases being decided by the Commission after desk studies. Where a fact-finding mission does take place, the initiator of the action should have a right to participate, in order to explain his point of view, draw attention to neglected or omitted aspects, bring in local knowledge or contribute otherwise to a more complete picture of the specific case.

Right of Access to EU Courts in Environmental Matters

Access for individual persons and NGOs to the EU courts is, at present, regulated by Article 263(4) TFEU.[31] As a consequence of the very restrictive interpretation which the Court of Justice gave, in the past, to the phrase "direct and individual concern", in the last forty years not one single application of an environmental organisation to the Court has been held admissible.[32] In 2009, the Lisbon Treaties amended Article 263(4) providing that also actions that relate to regulatory acts that do not entail implementation measures, are admissible, where a person was directly affected. The effects of this Treaty amendment remain to be seen.

The Aarhus Convention[33] goes much further. Its Article 9(3) provides that:

> *each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, if any, members of the public have access to administrative or judicial procedures to challenge acts or omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*

With regard to the EU, which has adhered to the Convention,[34] the words "national law" must be read as "EU law". According to Article 216(2) TFEU, international agreements to which the EU has adhered, are binding on the EU institutions and on the Member States. It follows from this that the EU Court of Justice is bound by Article 9(3) of the Aarhus Convention.

It is general opinion in EU law that an international agreement cannot modify the EU Treaties; thus, Article 263(4) TFEU remains in force, even after the entry into force, for the

EU, of the Aarhus Convention. However, it is up to the Court of Justice itself to amend its restrictive jurisdiction and grant enlarged access to the Court in environmental matters, for example by accepting that an environmental organisation is directly and individually concerned where an act complained of contradicts EU environmental law.[35] Therefore, the Aarhus Convention Compliance Committee rightly found that the EU is not in compliance with its obligations under the Aarhus Convention, if the Court of Justice maintains its restrictive interpretation of Article 263(4) TFEU.[36] The Court's argument that amendment of the Lisbon Treaties would be necessary before it can adopt another interpretation of Article 263 TFEU is not convincing, as the Court had itself, at earlier occasions, enlarged the application of this provision, without any support for that in the text of Article 263.[37]

The controversy at the EU level, over the extent of citizens' and NGOs' rights to information, to participation in decision making and to access to the courts raises the fundamental problem, whether the protection of the environment is to be ensured by public authorities alone, or whether civil society also has a role to play. In all EU Member States and at the EU level, the protection of the environment has very largely been laid into the hands of the administration. The administration grants permits for activities that pollute the environment; monitors emissions and discharges into the environment; inspects installations; plans and realises infrastructure projects; and ensures waste management and habitat protection. Yet, the administration is not the owner of the environment, it "belongs" to everybody. Administrative measures (acts or omissions) need to be controlled, as do those of any private person. In a simplified way, it may be asked, "Who watches the watchers?" – who protects the environment against administrative acts, omissions, failures and deficiencies, against wrong or superfluous planning that impairs or destroys the environment or against excessive indulgence of the actions of polluters? As the environment is everybody's, this task can only be assumed by civil society, and the way to do this is to appeal, in the case of disputes between the public authorities and the civil society, to the arbiters – the courts.

It is thus submitted that it is fundamentally wrong for public authorities to have a monopoly on the decision of whether to tackle environmental impairment in court. This task must also be assumed by civil society in cases where the public authorities, for one reason or the other, do not take action to protect the environment.

Sooner or later, the legitimacy of the Commission's administrative monopoly regarding environmental actions to the EU Court of Justice will have to be checked by the Court itself. The Aarhus Convention, which grants citizens and environmental NGOs a right of access to the courts in environmental matters, constitutes a first step in this regard but will have to be made fully operational within the EU. The above-mentioned decision by the Aarhus Convention Compliance Committee only constitutes the beginning of the procedure which makes this right operational.

The conclusion is that either the EU Court of Justice must change its view of this jurisdiction and grant greater standing to environmental organisations, or the EU will continue to be in breach of its obligations under public international law.

Measures to Promote an Open and Transparent European Union

Publication of Commission Measures under Articles 258 and 260 TFEU

It was mentioned that the Commission does not make public the letters of formal notice and reasoned opinions that it sends out to Member States. Its principal argument for refusing such transparency is the need to maintain a climate of mutual confidence between the Commission and the Member State in question, and thereby to facilitate the objective of the procedure – bringing the Member State's law into conformity with EU law and making an amicable settlement of the dispute possible.

A number of Member States make such letters of formal notice and reasoned opinions as they receive available to the public, either on their own initiative or upon request. These

States accord a higher value to transparency and the need for an open discussion than to the administration-to-administration confidentiality argument. It also should be noted that in matters of insurance law, financial law, industry law, *etc.*, such letters of formal notice and reasoned opinions appear regularly in the media. They are openly discussed and enable a democratic exchange of opinions, including about how far EU law reaches and whether the EU institutions rightly claim that national law infringes EU law. The difference between the environmental sector and those other, more economy-oriented sectors, is that the environment has neither a voice nor a big, powerful lobby behind it which can ensure, through its privileged contacts with national or EU administrations, that such documents become publicly available. Access to information at EU level is easier for big, vested interests than for citizens or environmental NGOs.

Also, surprisingly, the Commission itself sometimes publishes press releases, when it decides to dispatch a letter of formal notice or a reasoned opinion. The purpose of such press releases is obviously an attempt to increase pressure on a Member State to align to EU law. However, such publications contradict the argument about an "atmosphere of trust and mutual confidence" that the Commission so often uses in order to refuse the disclosure of these documents.

Although it might be understandable that all correspondence between the Commission and a Member State is not disclosed, letters of formal notice and reasoned opinions are unilateral documents, drawn up by the Commission alone and dispatched only after a detailed, word-by-word examination of the document regarding its environmental, technical, economical, legal and political aspects. The decision to dispatch it, is taken by the college of Commissioners. In view of all this, it is more than reasonable to question where the "trust and mutual confidence" that prevents the disclosure of these documents should lie. The documents reflect nothing less than the formal legal opinion of the Commission regarding whether a Member State's national law is in compliance with EU law. It is difficult or impossible to see why a Member State should be entitled to expect that such an opinion be kept confidential.

Neither does Regulation 1367/2006 allow the refusal to disclose such documents. According to that Regulation, the Commission may refuse disclosure of a document, where the disclosure would "undermine the purpose of inspections, investigations and audits".[38] As noted above, however, the procedure under Article 258 TFEU is not an investigation nor an inspection procedure, nor does the history of that provision allow the Commission to come to such a conclusion.[39] There is, at the end of the day, no argument visible, why the letters of formal notice and reasoned opinions should not be made public.

Concordance Tables

As noted above, when an EU directive is adopted, it has to be transposed into national law. As the legal systems of all 27 Member States are quite complex and elaborate, quite often the transposition of a directive does not involve the simple adoption of one or two pieces of legislation, but requires the amendment of a number of national legislative or regulatory acts. Some provisions of a directive might already exist in the national legal order, so that a transposition is not necessary. The relative competence of regions in environmental matters might further complicate the transparency of transposition measures.[40]

In order to remedy this, the Commission, supported by the European Parliament, suggested that Member States transmit concordance tables, listing for each provision of the EU directive the exact corresponding provisions of national law. The Council (Member States), however, intensely opposed such a requirement, and would only accept the concept that Member States were *invited* to voluntarily submit concordance tables. In practice, only a few Member States do so, and even they do not do so systematically for all environmental directives.

There is no way of obliging Member States to produce concordance tables. However, the Commission could produce such tables itself, send them to the Member States for agreement, and publish them afterwards. Concordance tables would help considerably in making the transposition and application of EU environmental law more transparent. They would also stimulate public discussion and thereby, in the medium term, improve compliance and contribute to the discussion on environmental law which, in turn, will contribute to the protection of the environment.

No such efforts have so far been undertaken.

Active Dissemination of Documents Relating to Implementation

The internet has greatly increased the possibility of disseminating information on the environment and thereby overcoming the problem that the environment has no voice; that there are no strong, wealthy and powerful lobby groups behind it; and that future generations, plants and animals cannot defend their interests.

In order to facilitate access to information, the EU institutions are required to set up registers, listing the documents which they hold, so that persons may ask for them.[41] While the European Parliament and the Council set up such registers, the Commission instituted a register only of those documents that are subject to decisions by the College of Commissioners. This register does not include all the correspondence, studies, minutes of meetings, analyses and other documents which are dealt with by the different Directorates General (*e.g.*, Energy, Trade, Environment, Agriculture, Transport, Climate, Competition, Fisheries).

An active dissemination policy of the Commission should set up registers for each Directorate General, where documents are listed, so that every citizen could know what documents are available and can ask for their disclosure. At present, the citizen's right of access to environmental information is hampered by the fact that citizens normally do not know what kind of environmental information is available. Given that "[p]ublic authorities hold environmental information in the public interest"[42] and not in their own interest, there follows an obligation to actively disseminate information. It is encouraging to see that the EU General Court recently recognised that the individual right of access to information included a right to have registers set up and that there was an individual "right of access to a register".[43] It is up to the Commission to draw the conclusions of this case.

Monitoring the Application of International Environmental Law

International environmental agreements to which the EU has adhered, become part of EU law, to the extent of the EU's competence to deal with the subject matter.[44] There is no qualitative difference between other parts of EU environmental law, such as regulations or directives, and international agreements. When an international environmental agreement is concluded and ratified or acceded to by the EU, the EU makes a commitment to the other contracting parties of that agreement, that the agreement will be fully complied with throughout the territory of the EU. This means that the statement of Article 17 TEU according to which the Commission "shall ensure the application of measures adopted by the institutions" pursuant to the Lisbon Treaties, also applies in full to international environmental agreements.

In practice, however, the Commission does not monitor the application of international environmental agreements. It leaves to each Member State the decisions whether to individually ratify the agreement or not and whether it will be necessary to adopt national legislation in order to transpose the provisions of the agreement into its national legal order. The Commission itself does not normally[45] propose EU legislation to transpose the international agreement into the EU legal order, arguing that this is not necessary. Neither

does it take action against a Member State whose national legislation or practice is not in compliance with the international agreement.[46]

To give two examples: the EU adhered to the Convention on Biological Diversity.[47] However, it did not adopt any EU legislation to transpose the requirements of that Convention into a directive or regulation. Towards the Secretariat of the Convention, the EU declared that its existing legislation, in particular that on the protection of birds, of natural habitats and wild fauna and flora, and legislation in the agricultural and fisheries area were sufficient to comply with the requirements of the Convention – which they clearly do not.

The EU adhered to the Paris Convention combating desertification[48] without adopting any legislation to make this Convention operational within the EU, though the EU also has soil erosion and desertification problems.

In cases submitted to the Court of Justice in the form of requests for preliminary rulings, the Court will examine the content of an international (environmental) agreement only to the extent that its provisions are of direct effect. This is consequent of the absence of transposing EU legislation. However, as there is nobody to bring the EU before the Court of Justice, for failure to adopt EU legislation and thereby to fully apply the international agreement within the EU, the EU's practice of not ensuring the application of international environmental agreements that have not been transposed into EU legislation remains without sanction.

This is not the place to discuss the problem of monitoring the application of international environmental agreements in general. It is obvious to everybody that the environment, globally and regionally, would be in a much better shape, if the 2200 multilateral and bilateral agreements [49] were complied with. However, requiring the application of existing rules is never popular, for environmental organisations, for academics, for the administrations themselves, nor for scientists, and the legal literature on practical application and enforcement of EU law, of international environmental agreements and of national environmental law is remarkably scarce. At EU level, the Commission has a rather unique mandate to monitor the application of environmental law. It must be deplored, therefore, that it does not make use of this mandate.

Concluding Remarks

As can be seen, the EU institutions have a broad range of possibilities to improve transparency, openness and citizen participation in the monitoring of application of EU environmental law. What it lacks is the political will to do so.

In environmental matters, transparency and openness of administrative practice are vital, because the environment itself has no voice. The EU Lisbon Treaties mention, not less than eight times, the words "open", "openness" and "transparency". One could have hoped that the entry into force of these Treaties, at the end of 2009, would have ushered in a new stage of administrative openness, as was so solemnly proclaimed in Article 1 of the Treaty on European Union. Four years later, it has become clear that the EU institutions did not see the Lisbon Treaties as a new opportunity to move towards an open-society model, but have acted as before, anxiously keeping as much environmental information as close to their chest as possible and only reluctantly opening up towards civil society. This has become particularly evident in the area of monitoring the application of EU environmental law in Member States, where the Commission has considerably reduced its openness and its monitoring intensity in comparison with previous years. Each step undertaken by citizens and environmental organisations to reach greater openness and more transparency must fight against a reluctant administration which continues to practice a diplomatic, inter-governmental style which might have been appropriate in the 1950s, but is hopelessly outdated today.

The European Union praises itself on being much more than an international organisation. It has a directly elected Parliament, a Court of Justice which ensures that the law

is applied, a Commission which has the task of protecting the general *European* interest (not the same as the Member States' interest); an internal market; a common currency for the majority of its Member States; and harmonised policies in numerous sectors. It claims citizens' rights and fundamental freedoms in a Charter of its own.

And yet, when it comes to the point of letting citizens know about the state of compliance of Member States with EU environmental law and enabling them to participate in the monitoring process, the old inter-governmental patterns reappear: secrecy, confidentiality, and a we-know-best attitude characterise the EU administration. Citizens are considered as useful third persons, who might bring useful information on the application to the attention of the EU institutions, but who had better stay out of it when questions of compliance are discussed. Only every five years, at European elections, are citizens suddenly taken seriously. It is no wonder that the number of participants in such European elections has continuously decreased since 1979, when the first elections took place.

Asking for transparency and openness has nothing to do with those requests that are formulated by WikiLeaks and its adherents. There is no question of systematically asking for internal documents with the goal of bringing an end to a responsible administration. In the same way as a private company is entitled to keep its internal procedures and production methods for itself, it must be possible for a public authority to keep its internal decision-making procedures and deliberations confidential. Rather, regarding the environment, what is requested is that the result of the administration's deliberations, the decisions, acts and omissions which affect the environment, be subject to public discussion. This is the 21st century, and the request is based as much on the basic democratic considerations of an open society, as on the need to preserve and protect the environment.

---

[1] European Council, Lisbon 2000.

[2] This evolution is obscured by the EU's activity in the area of climate change and energy. The attempt to depart from fossil-fuel-sourced energy and to promote renewable sources of energy has led to considerable legislative activity.

[3] Commission, Proposal for a Decision on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet", COM(2012) 710 of 29 November 2012.

[4] *Ibid*., paragraphs 26, 41, 52, 63 and 82.

[5] Emphasis added.

[6] This approach leaves out the problems of enforcement of EU environmental law at national level by the Member States themselves and by private persons. See on this Hedemann-Robinson, M. 2007. *Enforcement of European Union Environmental Law*, at§§ 207 and 443. London and New York: Routledge-Cavendish.

[7] Article 288, Treaty on the Functioning of the European Union (TFEU).

[8] Article 17(1) TEU.

[9] This is different in competition law, where the Commission extensively uses media information in order to discover infringements of EU law.

[10] The possibility of addressing the European Ombudsman with the argument that the handling of the complaint constitutes a case of "maladministration" (see Article 228 TFEU) is not considered here, as the Commission's practice is laid down in administrative documents. And the Ombudsman does not appear to have the political courage to declare that the procedure – which in fact makes the Member State judge and party at the same time – constitutes a case of maladministration *per se*.

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

[12] See Article 260(3) TFEU.

[13] See in particular General Court, case T-191/99 Petrie a.o. *v.* Commission, ECR 2001, p.II-3677, paragraph 68: "The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned" justified the non-disclosure of letters of formal notice and reasoned opinions.

[14] Court of Justice, case 26/62, Van Gend & Loos, ECR 1963, p.1.

[15] Court of Justice, case 240/83 Procureur de la République *v.* ADBHU, ECR 1985, p.531.

[16] Article 1 TEU.

[17] See Article 227 TFEU.

[18] Article 225 TFEU: *The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of its reasons.*
[19] See Commission Regulation 773/2204 relating to conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004, L 123 p.8. The different chapters of the Regulation deal with the initiation of proceedings, investigations by the Commission, handling of complaints, exercise of the right to be heard, access to the file and treatment of confidential information,, and general and final provisions.
[20] See last European Parliament, Resolution of 16 May 2006, paragraph 26, document P6_TA(2006) 0202.
[21] See also Regulation 773/2004 (n.19), Recital 3: "Complaints are an important source of information for detecting infringements of competition rules. It is important to define clear and effective procedures for handling complaints lodged with the Commission". Why should complaints not likewise be important to detect infringements of environmental rules?
[22] See Krämer, L. 2009. "The environmental complaint in EU law". *Journal of European Environmental & Planning Law* 6(1): 13–35.
[23] Commission, COM (2007) 502: See also the evaluation reports of the Commission, COM (2010)70 and COM(2011) 930.
[24] These administrative letters preceded the opening of a formal procedure under Article 258 TFEU; their common name was thus "pre-infringement letters".
[25] Commission, 29th annual report on monitoring the application of EU law (2011), COM(2012) 714, p.6.
[26] *Ibid.*, at 8.
[27] Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on access to information, participation in decision-making and access to justice in environmental matters to Community institutions and bodies, OJ 2006, L 264 p.13.
[28] Directive 92/43, OJ 1992, L 206 p.7.
[29] National measures implementing the directive are available online at eur-lex (http://eur-lex.europa.eu/en/index.htm). URLs for eur-lex sites do not always provide a direct link for the user; however, two such are as follows: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:719921.0043:EN:NOT; and http://eur-lex.europa.eu/Notice.do?val=414976:cs&lang=en&list=414976:cs,415391:cs,&pos=1&page=1&nbl=2&pgs=10&hwords=directive~conformity~&checktext
[30] See for a case, where a fact-finding mission took place, Court of Justice, case C-103/00, Commission *v.* Greece, ECR 2002, p.I-1147 (paragraphs 8 and 32). The case was started following complaints by Greek NGOs.
[31] Article 263(4) TFEU: A*ny natural or legal person may.. institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*.
[32] The leading case is C-321/95P Stichting Greenpeace *v.* Commission ECR 1998, p.I-1651.
[33] Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, Aarhus (Denmark), June 1998.
[34] Decision 2005/370, OJ 2005, L 124 p.1.
[35] This argument was rejected by the Court of Justice in case C-321/95P, *supra*, note 33.
[36] Aarhus Convention Compliance Committee, Findings and recommendations of 14 April 2011 concerning the communication with regard to the European Union, ACCC/C/2008/32. This report will still have to be approved by the Meeting of the Parties of the Aarhus Convention.
[37] See Court of Justice, case 294/83, Les Verts *v.* European Parliament, ECR 1986, p.1339; case 34/86 Council *v.* European Parliament, ECR 1986, p. 2155; case C-70/88 European Parliament *v.* Council, ECR 1990, p.I-2041.
[38] Regulation 1367/2006, *supra*, note 27, which refers to Regulation 1049/2001 on access to documents, OJ 2001, L 145 p.43, Article 4.
[39] See in detail Krämer, L. 2003. "Access to letters of formal notice and reasoned opinions in environmental law matters". *European Environmental Law Review* 12: 197–203.
[40] The 914 transposition measures for Directive 92/43, *supra*, note 29, are a good example to demonstrate the usefulness of concordance tables.
[41] *Supra*, note 27, Article 4.
[42] *Supra*, note 34, Recital 17.
[43] General Court, case T-392/07, Strack *v.* Commission, judgment of 15 January 2013.
[44] See for example Court of Justice, case C-459/03, Commission *v.* Ireland, ECR 2006, p.I-4636, paragraph 82; case C-240/09 Lesoochranárske, ECR 2011, p.I-1255, paragraph 30.
[45] In specific cases, though, the EU does take measures to comply with international agreements. For example, in order to comply with the Montreal Protocol to protect the ozone layer to which it adhered by Decision 88/540, OJ 1988, L 297 p.8, the EU adopted Regulation 1005/2009 on substances that delete the ozone layer, OJ 2009, L

86 p.1; the EU adhered to the Basel Convention on the transboundary movements of hazardous wastes and their disposal (Decision 93/98, OJ 1993, L 39 p.1) and adopted Regulation 1013/2006 on shipments of waste, OJ 2006, L 190 p.1.

[46] The case Court of Justice, C-239/03 Commission v. France, ECR 2004, p.I-9325 constitutes an exception to this rule; this case was probably brought by the Commission, because a French court had submitted a request for a preliminary ruling where it enquired about the application of an international agreement – which France had not ratified, but the EU had – to a specific case, see case C-213/03, Pêcheurs de l'Etang de Berre, ECR 2004, p.I-7357. In environmental law, this is so far the only case brought by the Commission against a Member State with the argument that the Member State had not complied with an international agreement.

[47] Decision 93/626, OJ 1993, L 309 p.1.

[48] Decision 98/216, OJ 1998, L 83 p.1.

[49] Figures from Mitchell, R. 2007. "Compliance Theory. Compliance, effectiveness, and behaviour change in international environmental law", at 894. In: Bodansky, D., Brunnée, J. and Hey, E. *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press.