

## CONTENTS

<b>Articles</b>	<b>1</b>
Conserving the Environmental Acquis: An Assessment of the European Convention <i>Ioli Christopoulou and Tony Long</i>	1
Public Participation and Information in the Emissions Trading Directive <i>Jerzy Jendroska</i>	7
Access to Justice in Environmental Matters: The Portuguese Actio Popularis – Law and Practice <i>Isabel Carinhas de Andrade</i>	11
The Reform of the EU Common Fisheries Policy – A Step Towards Greater Precaution in the Conservation of Fishery Resources <i>Miriam Dross and Felix Bloch</i>	17
Legal Factors Driving Agrobiodiversity Loss <i>Franziska Wolff</i>	25
Coexistence of Transgenic Crops and GMO-Free Agriculture - Legal Aspects <i>Andreas Hermann</i>	37
The German Banking Act (KWG) – An Obstacle for German Emission Trading? <i>Georgios Stratigakis and Christopher Hasenkamp</i>	42
<b>Conferences</b>	<b>45</b>
<b>Imprint</b>	<b>47</b>
<b>elni Membership</b>	<b>48</b>



## ARTICLES

## Conserving the Environmental Acquis: An Assessment of the European Convention

*Ioli Christopoulou and Tony Long***Introduction**

A European Constitution<sup>1</sup> is born and Valéry Giscard d'Estaing, who presided over the European Convention on the Future of Europe<sup>2</sup>, is Europe's midwife - at least as popularly portrayed.<sup>3</sup> The draft Constitutional text formed the basis of the negotiations of the Intergovernmental Conference (IGC) which started almost immediately following the Convention.<sup>4</sup> The outcome of these negotiations is still unclear due to the failure of Heads of State and Government to agree the new Constitution at the Brussels European Council in December 2003. This means that the provisions of the Constitutional Treaty are still open to change. However, during these first months of the Intergovernmental Conference in autumn 2003, it became evident that the IGC would in all probability adopt the majority of the Convention's draft provisions, although with some doubt still lingering over the highly political institutional arrangements of the European Union. This is, therefore, still a preliminary evaluation of the environmental dimension of the Convention's draft Constitutional Treaty - and certainly not the last word.

A brief overview of the Convention's mandate which helped set the expectations that environmental organizations had of the Convention is pre-

sented first. In this article, environmental organizations refer to the Green G8, an informal coalition of the eight leading European environmental organizations which have offices in Brussels.<sup>5</sup> The G8 have a ten-year history of cooperating on revisions to the European treaties. Their joint positions have contributed to the shaping of the Maastricht, Amsterdam and Nice Treaty provisions on sustainable development and environmental policy integration.<sup>6</sup>

Second, we contrast the expectations of the G8 with the reality faced when the first drafts of the Constitution were presented by the Convention's Praesidium. It soon became clear that the environmental provisions of the treaties were under threat. Consequently, the G8 activities intensified trying to keep up with the rapid pace of the Convention process.

Third, drawing both from the past experience following IGC-type revisions of treaties and from having actively followed the Convention process, an evaluation is made of the Convention process as an effort to provide a forum for the debate on the Future of Europe. The G8 expectations of the next Treaty reform are presented in the conclusion.

**The Convention's Mandate - The Laeken Declaration**

When the Nice Treaty was adopted in December 2000, the next IGC, at the time scheduled for 2004 rather than 2003, was already on the horizon. Aiming at a transparent preparation of the IGC, the European Council launched a debate on the Future

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<sup>1</sup> Throughout the article we will use Constitution or Constitutional Treaty interchangeably. Our use of either term should not be understood as taking a position on whether the European Union requires a Constitution or not.

<sup>2</sup> Hereafter, the European Convention on the Future of Europe will be referred to as European Convention or Convention interchangeably.

<sup>3</sup> Johannes Voggenhuber, Green MEP, often criticized the President's method of presiding over the European Convention. However, during the last official session of the Convention, on Friday, 13 June 2003, he congratulated the President for having accomplished his task of preparing a draft European Constitution by saying: "In the end you were not the Jupiter of the Convention, who delivered his own baby. You served as Europe's midwife." Thomas Fuller. "Reflections of EU's New Rulebook" *International Herald Tribune Saturday* 14 June 2003.

<sup>4</sup> *Draft Treaty Establishing a Constitution for Europe*. Adopted by consensus by the European Convention on 13 June and 10 July 2003 Submitted to the President of the European Council in Rome (2003/C 169/01) 18 July 2003.

<sup>5</sup> The member organisations of the *Green Eight (G8)* are: BirdLife International, Climate Action Network Europe, European Environmental Bureau (EEB), Friends of Nature International, European Federation for Transport and Environment (T & E), Friends of the Earth Europe (FoEE), Greenpeace and WWF. To contact the G8: European Environmental Bureau, Blvd de Waterloo 34, B-1000 Brussels. During the Convention process the Green Eight were also part of a bigger coalition, the Civil Society Contact Group.

<sup>6</sup> See WWF, Friends of the Earth, (FOE) and European Environmental Bureau (EEB). *Greening the Treaty*, November 1990: BirdLife International, Climate Network Europe, EEB, Transport and Environment Federation, Friends of the Earth, Greenpeace and WWF. *Greening the Treaty II: Sustainable Development in a Democratic Union*, November 1995: BirdLife International, Climate Network Europe, EEB, Transport and Environment Federation, Friends of the Earth, Friends of Nature International, Greenpeace and WWF. *Greening the Treaty III: Institutional Reform, Citizens' Rights and Sustainable Development*, 1999.

of Europe. A year later at Laeken, the European Council formalized this debate by creating the European Convention on the Future of Europe, a forum that would prepare options, potentially even a draft Constitutional treaty, to be considered at the next IGC negotiations.<sup>7</sup> The Laeken Declaration on the Future of the European Union is considered the mandate of the Convention, and as such guided its proceedings.

The Declaration included a list of more than 50 questions, which focused primarily on institutional issues, on the role of the European Union in a globalised world, and on the need for further integration of specific policy areas such as foreign policy and defence, justice and economic cooperation. The list of specific questions can hardly be considered exhaustive given that the Council asked the Convention "... to consider the key issues arising from the Union's future development and try to identify the various possible responses". While the Convention's task was very detailed on some areas such as the European Union's competence, the mandate was broad with respect to "the rest" of the Treaties, providing the Convention with ample flexibility to propose an in depth revision of the Treaty.

The G8 prepared an initial contribution as soon as the Convention began its deliberations, urging that a new Constitution treaty must:

- maintain the objectives and principles essential for environment and sustainable development, in particular as laid down in articles 2, 6, 174 and 228 of the EC Treaty;
- extend transparency requirements to all EU bodies and guarantee the right of access to information, public participation in decision-making and access to justice;
- eliminate unanimity from environmental decision-making and extend qualified majority voting (QMV) with co-decision for environmental decisions (in particular Article 175 (2) of the EC Treaty)
- revise old and outdated objectives of the sectoral policies of the EU. Initially, the call was for a review of the EU's 45 year old objectives on Agriculture Policy, however, this was later extended to additional policy areas;
- include environmental rights in the Charter of Fundamental Rights.<sup>8</sup>

<sup>7</sup> Laeken Declaration on the Future of the European Union. Annex I to the Presidency Conclusions, Laeken, 14 and 15 December 2001. SN 300/1/01/ REV 1

<sup>8</sup> Initial Contribution to the Convention on the Future of Europe, G8, April 18, 2002. All G8 contributions can be found at WWF European Policy Office: <http://www.panda.org/epo>.

Moreover, the G8 considered the European Convention an opportunity to achieve greater policy coherence between the internal and external affairs of the European Union, which should be rooted in the commitment, already enshrined in the Treaty, to the protection and improvement of the environment and the promotion of sustainable development.

### The Definition of Sustainable Development

When the Convention's Praesidium presented its preliminary draft of a Constitutional Treaty, referred to as the "skeleton treaty",<sup>9</sup> it became clear that the exercise underway would significantly change the Treaty giving it a form of a coherent continuous text, similar to a Constitution. The G8 were dismayed at the fact that the objectives of the Union had deleted references to both "sustainable development" and the "improvement of the quality of the environment". (Article 3) Having recognized that the Convention could potentially weaken the environmental Treaty provisions, the G8 awaited the first draft of articles with some trepidation. They were presented by the Praesidium in early February.<sup>10</sup>

In this first version of the proposed draft Article 3 "sustainable development" was included among the objectives of the Union. But to the G8's dismay, its definition, focusing only on economic and social elements, was clearly missing the environmental pillar. Article 2 of the existing EC Treaty already recognized the promotion of "a high level of protection and improvement of the quality of the environment" as a task of the European Union. The deletion of this provision and the reformulation of the comprehensive tri-pillar definition of sustainable development *excluding the environment* would in fact contradict the Laeken mandate, which advocated for the moving forward rather than the undermining of the *acquis communautaire*. Furthermore, omitting this requirement would jeopardize the legal basis of the progress achieved at the Gothenburg Council in June 2001, which added the principle of sustainable development into the process of achieving a knowledge-based European Union agreed upon in Lisbon in 2000. A mere reference to environmental protection or placing environmental provisions in a different sentence rather than on a par with the other two components of the definition was therefore completely unacceptable.

The absence of a clear commitment to environmental protection and improvement meant that a

<sup>9</sup> European Convention. *Preliminary draft of Constitutional Treaty* (CONV 369/02) Brussels, 28 October 2002.

<sup>10</sup> European Convention. *Draft of Articles 1 to 16 of the Constitutional Treaty* (CONV 528/03) Brussels, 6 February 2003.

distinct European value, the appreciation of and will to contribute to environmental issues, shared across EU citizens would not be reflected in the European Constitution.<sup>11</sup> As a result, the Convention would have failed in fulfilling its mandate of creating a European Union that would be responsive to the concerns of its citizens, a primary concern in the Laeken Declaration. Moreover, it would weaken the EU's self-perceived yet widely recognized global leadership in environmental issues, a role that was at least to some extent confirmed at the World Summit on Sustainable Development in Johannesburg in 2002. Reflecting this position, the G8 pointed out that Article 13.4 referred to sustainable development of the Earth in the context of the Union's external relations. For this reference to be meaningful, the need for coherence between the internal and external action of the Union had to be highlighted while the environmental pillar of sustainable development strengthened.

The definition of sustainable development remained in the balance until the closing stages of the Convention process. A final and intense lobbying effort was mounted by the G8 during these last two weeks of the Convention. It was only in the draft presented prior to the final (regular) session of the Convention that the definition of sustainable development was restored.

*"The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."* (Article I-3.3)<sup>12</sup>

### Environmental Integration and Policy Coherence

The G8 was also faced with the challenge of trying to secure the status of two fundamental principles in the new Constitutional Treaty, namely the principle of environmental policy integration and the principle of policy coherence.

The integration principle, which is an essential support to the Union's objective of sustainable development, is part of the existing Treaty (Article 6, EC Treaty) and is found in the same prominent place in the front of the treaty as other primary principles (subsidiarity, proportionality).

Similarly, the principle of policy coherence is also part of the existing Treaty provisions, being mentioned in Article 3 of the EU Treaty and in Article 178 of the EC Treaty. It arises from the need to consider the effect that the policies and actions of the Union have on developing countries. In other words, the principle of policy coherence seeks to ensure that all external actions, such as trade and development cooperation, and external aspects of the Union policies, such as agriculture and fishing, are consistent with the objectives of sustainable development, poverty eradication and environmental protection in developing countries. Hence, it seeks to reinforce coherence between internal and external priorities of the European Union.

When the first drafts of the Constitutional Treaty were presented, it was unclear whether the references to these two principles would remain in the Treaty. Indeed, there were good reasons to worry that they could be lost. While draft Article 8, which outlined the fundamental principles of the EU, grouped together other principles that are presently found in the same place of the Treaty, these two principles were absent.<sup>13</sup> The G8 argued that both principles were of fundamental significance to the objective of sustainable development – social, economic, environmental – for two central reasons. First, environmental considerations need to be examined when any policy is applied. Second, sustainable development must be promoted globally, and in particular in the poorest countries, where the resolution of environmental questions is inextricably linked with the fight against poverty. With such an understanding the G8 promoted an amendment to include the integration and coherence principles into Article 8.

Although the G8 considered the two principles as interlinked especially with respect to their role in attaining sustainable development, the European Convention made a distinction between the two principles and treated them differently. The principle of integrating the environment into all Union policies, when eventually restored, was placed under Article III-4 of Title I "Clauses of general application" at the beginning of Part Three on "The

<sup>11</sup> On 5 June 2002, on the occasion of the World Day for the Environment, the Eurobarometer published the results of a survey that took the pulse of European public opinion with respect to environmental concerns. Results include: 86% of Europeans want to see the environment become an area of policy concern of equal significance as the social and economic policies. Moreover, 89% of those questioned are preoccupied with future trends in the field of health and the environment (pollution, chemicals, etc.); 86% are concerned with the use of natural resources and waste generation; 82% are concerned with nature, flora and fauna future trends, 72% on climate change. *Flash EB 123. "Perception du développement durable et préoccupations environnementales des européens"* (Avril 2002).

<sup>12</sup> European Convention. *Text of Part I and Part II of the Constitution*. (CONV 797/1/03 REV 1 VOLUME I) Brussels, 12 June 2003.

<sup>13</sup> European Convention. *Draft of Articles 1 to 16 of the Constitutional Treaty* (CONV 528/03) Brussels, 6 February 2003.

Policies and Functioning of the Union”.<sup>14</sup> Although the G8 was pleased that the Convention reinserted the provisions in a prominent position, it was nevertheless concerned that these articles of horizontal application are not referred to as principles.

Similarly, the principle of policy coherence was finally reinserted in the Constitutional text. Given its focus on the external activities of the European Union it was tackled however separately and within the context of the new Title V on “The Union’s External Action”, rather than as a part of the overarching principles of sustainable development, to which the principle of environmental policy integration fell under. Unlike the principle of environmental policy integration, the coherence principle was to some extent strengthened as it is now appears in both in the *chapeau* Article III-193.3, as well as under the specific provisions of the development cooperation chapter (Article 218.1).<sup>15</sup>

### Democratic Life of the Union

So far the G8 activities had been mainly on the defensive in the Convention process. The one area that it considered as a potential area for significant progress was the proposal of a title on the Democratic Life of the Union (Title IV).<sup>16</sup> Given the Laeken mandate to bring the Union closer to its citizens, the G8 had specific proposals on ways to make the Union more democratic. The G8 presented draft articles to be included in the new Constitutional articles on the basis of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is the most important international legal agreement to date on participatory democracy. As such it was considered a most appropriate basis for this new title of the Constitution, which undoubtedly would extend similar provisions that will soon apply to environmental issues, on all areas that are of interest to the European civil society.

Three principles: transparency, participatory democracy and access to justice constituted the main focus of the G8 contributions. Article I46 on the principle of participatory democracy which includes provisions for openness, consultation, and the citizens’ initiative, constituted significant progress

towards bridging the democratic deficit of Europe.<sup>17</sup> The G8 sought to strengthen the provision of Article I-46.3 by proposing an amendment that would specify the criteria of the general requirement of civil society consultations:

*“The Commission shall carry out broad consultations with parties concerned in an early, appropriate and adequate manner and provide the public with adequate opportunity to comment during each stage of the decision-making in order to ensure that the Union’s actions are coherent and transparent.”*

The proposal was not taken into account, resulting in a vague commitment to participation, whose application may be difficult to assess.

A major weakness of the Constitutional treaty has been its failure to include the right of access to the European Court of Justice for citizens and their organisations. Access to justice would lead to the European Institutions to be accountable to the Union’s citizens, an essential element of participatory democracy. The recognition of this right would render the European Union compliant with its obligations under the Aarhus Convention, which explicitly provides for access to justice. In order for the Union to address the right to access to justice, a specific recognition of the right to challenge decisions of the European Institution should be inserted in Article I-46, in order to form part of the provisions on the democratic life of the Union. The G8 was also supportive of an amendment to Article III-270.4, which provided clarity while being less restrictive than the existing Treaty and the changes made by the Convention’s Praesidium.

*“Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person which is of direct and individual concern to him, and against a regulatory act which is of direct concern to him without entailing implementing measures has, or is likely to have, a substantial adverse effect on his interests.”*<sup>18</sup>

The G8 also sought to enhance the democratic life of the Union by eliminating the unanimity requirements in Council decision-making process. The G8 have always been strong advocates of the need of an extension of qualified majority voting (QMV) in combination with co-decision with the Parliament to new policy areas. As a result, the environmental

<sup>14</sup> European Convention. *Draft Constitution Volume II – Draft Texts of Parts Two, Three and Four.* (CONV725/03 Volume II) Brussels, 27 May, 2003.

<sup>15</sup> The principle of policy coherence was reinserted in Article III- 188.3 and Article 213.1 of the draft of Part Three (CONV 725/03 Volume II) Brussels, 27 May 2003. It should be noted that the objectives of the Union’s external action Article 188.2 (d) and (f) were also amended to include the environmental pillar in this draft.

<sup>16</sup> The articles were first presented in European Convention. *The Democratic Life of the Union.* (CONV 650/03) Brussels, 2 April 2003.

<sup>17</sup> European Convention. *Text of Part I and Part II of the Constitution.* (CONV 797/1/03 REV 1 Volume I) Brussels, 12 June 2003.

<sup>18</sup> Amendment proposed by Mr. Andrew Duff and Lord MacLennan of Rogart, Member and Alternate Member of the Convention on 22 May 2003. (Contribution nr.335, CONV 758/03) In their proposal they referred to Article 230.4 of the EC Treaty.

groups welcomed the Convention's intention to strengthen the role of the Parliament in areas that have an impact on the environment, such as economic, social and territorial cohesion, agriculture and fisheries, research and technological development and industry. However, exceptions to the general rule of QMV and co-decision were perceived as undermining the potential for an effective performance of the EU. In particular, the unanimity requirement was maintained in the key area of fiscal decision. The Green Eight has proposed for the deletion of the requirement of unanimity on fiscal measures which have an environmental purpose as outlined in Article III-130.2 (Article 174.2 of the EC Treaty).

### Part Two of the Constitution – Fundamental Rights

During the early stages of the Constitutional debate it was not clear whether the Charter of Fundamental Rights of the European Union would be imported into the draft Constitution, and, if so, whether changes in its provisions would be possible. In anticipation of its integration, the G8 advocated for the amendment of the environmental article (Article 37), which presently reads as an amalgam of Articles 2, 6 and other important Treaty Articles. The G8 proposed the article to be redrafted so that it would be phrased in terms of a right to a clean and safe environment – a right that has been crystallized in international environmental law and is explicitly recognized in the Aarhus Convention, as well as in several national constitutions of Member and Accession States.

However, when, at the final stages of the Convention's proceedings, it was decided that the Charter of Fundamental Rights would be included in the draft Constitution, it also became clear that changes in its content would not have been considered. As a result, the G8 recognized that pursuing this objective at that time would have rendered its efforts moot and decided against it.

### Part Three of the Convention – Union Policies

In addition to the provisions on democratic life, which, in one form or another, were expected in the Convention's outcome, the G8 called for the revision of the policy chapters of the Union. A review of the objectives and principles included in the sectoral chapters of the Treaty would allow the proposed Constitution to be internally coherent. New policy language would make Community action consistent with the overarching objective of attaining sustainable development. Furthermore, substantive revisions of the policy chapters were not

only within the scope of the Laeken mandate but indeed would be essential for its fulfilment.

The environmental organizations concentrated their efforts in updating the wording of those chapters of the treaty that have the greatest impact on the environment. These certainly included agriculture, transport, economic and social cohesion, internal market, and common commercial policy among others.<sup>19</sup> Although the amendments proposed were simple and specific, aimed at making the particular provisions of the Constitutional Treaty consistent with the overarching objectives of the Union, they found little support in the Convention's Praesidium as well as among many of the Convention members.

The main reason for the negative stance to reform of individual policies derived from a narrow interpretation of the Laeken mandate. More worrying was a second fear that a revision of the language in the policy chapters would constitute a Pandora's Box which, if opened, would risk the sensitive European balance. The G8 argued the opposite, namely that amendments to policy chapters would actually assist the Convention in meeting its objective of drafting a Constitutional Treaty that would respond to the needs of the Europeans, that would be internally coherent and that would deliver the Laeken expectations.

A third argument against opening Part Three was also advanced, namely the limitations of time. In other words, the European Convention was not prepared to undertake such an ambitious task. The time restriction argument is a legitimate one. Even the Convention's President was requesting an extension of the deadline for the completion of the deliberations of the Convention during the extraordinary April 16, 2003 European Council in Athens. The request was eventually denied by the European Council, making it indeed more difficult for the Convention to complete its task.<sup>20</sup> As a result, the Convention adopted for the most part only minor and mainly technical revisions to Part Three recommended by a small group of legal experts. There were some exceptions - the Convention now proposes some quite fundamental changes, for example introducing new language for the common commercial policy which now falls under the new title

<sup>19</sup> For an in-depth version of the G8 proposals on updating the policy chapters of the Treaty see: Birdlife International, Climate Action Network Europe, European Environmental Bureau (EEB), Friends of Nature International, European Federation for Transport and Environment (T & E), Friends of the Earth Europe (FoEE), Greenpeace and WWF. *Towards a Green EU Constitution: Greening the European Convention Proposal*. August 2003.

<sup>20</sup> See speech by Valéry Giscard d'Estaing. "Présentation du rapport oral sur l'état d'avancement des travaux de la Convention européenne au Conseil européen." Athens, 16 April, 2003.

on external action of the Union, as well as a new and controversial title on energy.<sup>21</sup>

Without doubt, the G8 considers the failure of the Convention to discuss the substance of policy areas particularly disappointing and a significant flaw in the Convention's outcome.

### The Convention Process – An Assessment

The Convention method was tried for the first time in a Treaty revision context, a marked contrast to the traditional negotiations undertaken behind the closed doors of Inter-Governmental Conference procedures. The European Convention instead was an open process in which all institutions as well national parliaments from members and accession countries took part. Documents were accessible through the Convention's internet site almost at the same time as the Convention members received them. All plenary meetings of the Convention were open to the public. In addition, Convention members were largely easily approachable, while contacts over e-mail were also significant.

Nonetheless, it was disappointing that the Convention's Praesidium organized only one civil society hearing on the Constitution in June 2002, at which time the Convention process was still in its preparatory phase. It should be remembered that although the Convention's deliberations were inaugurated in late February 2002, it was not until almost a year later that the Convention's Praesidium presented the first sixteen articles of the Constitution. Although in late autumn 2002 the skeleton treaty was presented it remained largely unclear what the articles would entail.

During the months of preparatory work, the Convention was divided in smaller groupings which discussed specific aspects of the European Union policies. Although this method was no doubt efficient for those topics under discussion, such as the Union's external action, it also meant that the topics falling outside the mandate of the specific groups were not given enough time to be tackled. The environmental dimension, for instance, was not discussed in any specific group. It only became evident later, in part due to the intensity of environmental lobbying, that its absence from the group discus-

sions had to be recognised. Indeed, had there been a stronger communication between the Convention and civil society and greater transparency, it is possible to assume that the threats that the early Constitution drafts posed could have been avoided. Instead, attention could have been focused on moving forward in such areas as participatory democracy, access to justice and the review of the outdated policy chapters.

The G8 had to focus most of its activities to its first objective, namely to maintain an unambiguous reference to sustainable development and the environmental priorities of the European Union. Although the environmental organizations have had a tradition of following closely the treaty revision process, the pace of the Convention process during its last few months of deliberations was unprecedented, placing particular pressure on Convention members as well as those observing the process to react rapidly. To be more specific, when the Convention's Praesidium presented new articles, the Convention members had a set time period, usually one week, to table amendments which would then be discussed at the following Convention session, which were occurring on a bimonthly basis.

Understanding the constraints facing Convention members, the G8 prepared very specific amendments, which were received with considerable support. Amendments that would improve the definition of sustainable development and restore the principles of environmental policy integration and policy coherence were the ones that Convention members actively championed for, especially since they were linked to the threat of moving backward from the existing *acquis*. Other areas, including transparency and access to justice, though in principle agreed upon, were difficult to be accepted by Convention members, resulting in a much smaller number of amendments. Nevertheless, support for the G8 positions was generally broad and came from a wide cross section of political opinion including members of the national governments, European Parliament, national parliaments and frequently also by the European Commission.<sup>22</sup>

Towards the end of the process, and perhaps realising the threat posed by the loss of critical provisions of sustainable development, Environment Commissioner Margot Wallström presented a proposal for a Protocol on Sustainable Development.<sup>23</sup> The envi-

<sup>21</sup> The new chapter on energy is problematic as it stands and should integrate sustainable development as a primary goal. The article should include clear objectives for ambitious policies on energy efficiency and sustainable renewable energy that would contribute to the minimisation of health risks and prevent climate change. It does none of the above. Even more worrying in this area of European policy was the recommendation of the Convention's Praesidium to integrate the Euratom Treaty into the Constitution. Instead, the European Convention should have proposed a review period during which the future of the Euratom Treaty would be deliberated upon.

<sup>22</sup> For example, see Presidency Conclusions the Informal Meeting of Environment Ministers. "Sustainable Development as a core issue for the Future of Europe". Lagonissi, Attiki, Greece, May 2003.

<sup>23</sup> See Letter of Environment Commissioner Margot Wallström to Convention President Valéry Giscard d'Estaing. (AC/sle D(2003) – 5985) Brussels, 22 May 2003.

ronmental organizations supported this initiative. In agreement with the Commissioner, the G8 argued that the Protocol should be viewed as a complement rather than a replacement of an improved definition of sustainable development. The Protocol was not included into the draft Constitution's appendix but remains on the agenda of the Constitutional debate.

### Conclusion

The revision of the treaty by the European Convention achieved only very limited advances in the environmental field, for example with respect to the objectives of the external action of the Union. Rather a great amount of time and resources were

devoted to safeguarding existing provisions. In other words, and putting it kindly, the environmental organisations spent a great deal of time running to stand still. It is highly unlikely that European citizens will feel that the European Union has now acquired a stronger legal base to design policies that will address their fundamental concerns about the future of the environment and the social well-being of present and future generations. The G8 considers the revision of the policies in Part Three of the Treaty will be a priority for the next reforms, while also demanding a further discussion on citizen's access to justice.

## Public Participation and Information in the Emissions Trading Directive

*Jerzy Jendroska*

### Introduction

The EU scheme for emissions trading has raised numerous questions since its announcement in the 2000 Green Paper<sup>1</sup>. Of various aspects involved in the scheme, the issues of public participation and information have attracted somewhat less attention of the commentators. A mixed model of command-and-control and economic instruments, this scheme requires careful consideration also in relation to these issues.

The following article does not attempt to examine every single aspect of public participation and information that may, and no doubt will, arise around the entire scheme. Instead, it focuses on presenting the respective provisions of the Emissions Trading Directive (ET Directive)<sup>2</sup> against the requirements of other legal instruments relevant in this context. Thus, the most important instruments here are the Climate Change and Aarhus Conventions, which provide for the basic international legal background concerning public participation and information in

climate change policies. On top of this the relation of the ET Directive to some other relevant pieces of Community legislation needs to be presented.

### Climate Change Convention

The United Nations Framework Convention on Climate Change addresses the issues of public participation and information in a broader context of Education, Training and Public Awareness.

Its Article 6 states that:

- "the Parties shall... promote and facilitate ...*
- ii) Public access to information on climate change and its effects,*
  - iii) Public participation in addressing climate change and its effects and developing adequate responses..."*

This already rather 'soft' language becomes even softer by stipulating that these obligations shall be fulfilled by Parties *"in accordance with national laws and regulations, and within their respective capacities"*.

The language employed by the Convention makes its requirements in this respect rather vague and even prompts views that public participation and information do not amount to a "hard" obligation under the Convention<sup>3</sup>.

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<sup>1</sup> For a short summary of the questions raised see for example Birgit Dette, The Green Paper on Greenhouse Gas Emissions Trading within the European Union, ELNI Newsletter 2/2000 p11-12.

<sup>2</sup> Directive 2003/87 EC of 13 October 2003 establishing a scheme for greenhouse gas emission trading within the Community and amending Council Directive 96/61/EC (OJ L 275 25.10.2003)

<sup>3</sup> See D.J.E.Grimeaud, An Overview of the Policy and Legal Aspects of the International Climate Change Regime (Part 2), Environmental Liability, Vol. 9 Issue 3, June 2001, p 99

The Kyoto Protocol to the Convention, which serves as another legal basis for the ET Directive, is even more vague and ‘soft’ in this respect. In fact, specifically it only mentions public access to information, and requires in its Article 10 that “*suitable modalities should be developed...taking into account Article 6 of the Convention*”.

### Aarhus Convention

The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus in 1998 (Aarhus Convention) has been described by the UN Secretary General Kofi Annan as “the most ambitious venture in the area of ‘environmental democracy’ so far undertaken under the auspices of the United Nations”<sup>4</sup>.

Indeed, the Aarhus Convention represents the first binding international instrument attempting to comprehensively and exclusively address issues of citizens and environmental rights<sup>5</sup>. The Convention rests on three pillars, each of which has its precedent in the 1992 Rio Declaration and Principle 10 - access to information (Articles 4 and 5), public participation in decision-making (Articles 6-8), and access to justice (Article 9). The Preamble, Article 1 (Objective), Article 2 (Definitions), and Article 3 (General Provisions) provide the background to all three pillars. There is no need to describe here in any detail the provisions of the Convention<sup>6</sup>, but it may be useful to point out some of its particular features concerning access to information and public participation.

The Convention regulates the issue of access to environmental information in two separate articles: Article 4 regulates the so-called “passive” disclosure of information while Article 5 addresses the so-called “active” disclosure of information. The terms “active” and “passive” relate to the requirements of the public authorities. Thus, active information requirements impose a duty on public authorities to affirmatively act, whereas passive information provisions may require the establishment of systems and procedures, but do not require public authorities to act until triggered by a communication from the public.

Article 4 is designed in a way similar to the so-called Freedom of Information Laws, which regu-

late the rights to request information from public authorities, establish categories of information that might be exempted from disclosure, and set forth procedures for disclosing the information. In particular, the Convention takes into account the experience gained in the implementation of the EC Directive 313/90 on access to environmental information. Consecutively, Directive 2003/4<sup>7</sup> has been adopted with a view of implementing relevant provisions of the Aarhus Convention<sup>8</sup>.

The Aarhus Convention covers public participation in environmental decision-making in three separate articles. The most detailed of these is Article 6, which is concerned with public participation in decision-making on specific activities. Article 7 covers public participation concerning plans, programmes and policies relating to the environment. Article 8 deals with public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments.

As far as specific decision-making is concerned, in Article 6 the Convention establishes quite an elaborate set of procedural rules to be followed by environmental authorities while taking decisions to authorize certain activities. Most of the activities covered by Article 6 fall into the categories listed in an Annex to the Convention. The Annex is generally based on a list of activities subjected to EIA requirements under the Espoo Convention, combined with lists of activities subject to the EC EIA and Integrated Pollution Prevention and Control Directives. Additionally, according to Article 6.1 b), parties should also provide a “catch-all” provision to extend the scope of Article 6 to other decisions with potentially significant effects on the environment.

With respect to public participation in planning, policy and lawmaking, and legislative drafting, the extent of relevant obligations resulting from the Convention is more limited. This is particularly true in leaving it up to the Parties to the Convention to determine the scope of the public to be consulted.

Within all the public participation provisions, however, there are certain fundamental requirements, such as those that may be found in due process norms. These include timeliness, notification, publication, access to relevant information, possibility to submit comments in writing or at a hearing, tak-

<sup>4</sup> Kofi Annan, Foreword (in) *The Aarhus Convention: An Implementation Guide*, S. Stec, S. Casey Lefkowitz (with J. Jendroska), UNECE, 2000.

<sup>5</sup> See J. Jendroska and S. Stec, *The Aarhus Convention: Towards a New Era in Environmental Democracy*, *Environmental Liability*, Vol 9 Issue 3, June 2001, p 148.

<sup>6</sup> It has been also reported extensively in the ELNI Newsletter, beginning with articles of J. Wates reporting on the progress in negotiations.

<sup>7</sup> Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41 14.2.2003)

<sup>8</sup> See for example H. Maschke, *Access to Environmental Information in the EU: The Revision of Directive 90/313/EEC*, ELNI Newsletter No 2/2000.

ing due account of comments, and a reasoned publicly available decision.

The Aarhus Convention currently provides a benchmark for access to information and public participation in environmental matters. For its Parties it is a binding standard<sup>9</sup>. The European Community signed the Convention in 1998 and is planning to ratify it soon<sup>10</sup>. One can reasonably expect that the ET Directive will be compatible with the requirements of the Aarhus Convention concerning access to information and public participation<sup>11</sup>. The Explanatory Memorandum to the proposal for the ET Directive expressly says that: “*the proposed provisions are consistent with the Aarhus Convention that the European Community is committed to ratify soon*”<sup>12</sup>. It is worth examining to what extent this is indeed the case.

### Access to Information in the ET Directive

The ET Directive addresses the issue of public access to information in a rather ambiguous manner. Several provisions deal with various aspects of public access to information and the relation between them is not clear.

The most general reference is in Article 17 entitled “Access to Information” and reads as follows:

*“Decisions relating to the allocation of allowances and the reports of emissions required under the greenhouse gas emissions permit and held by the competent authority shall be made available to the public by that authority subject to the restrictions laid down in Article 4 of Directive 2003/4/EC”.*

The wording of this provision raises a number of questions. The very fact that there is a separate Article dealing with access to information seems to suggest that it shall handle the issue comprehensively for the entire Directive. However, this Article relates only to some of the documents to be prepared under the Directive, namely to decisions relating to the allocation of allowances and the reports of emissions required under the greenhouse gas emissions permit. According to the recent proposal for a directive amending the ET Directive following the Marrakesh accords, Article 17 shall be supplemented with *information on project ac-*

*tivities in which a member State participates or authorizes private or public entities to participate*”<sup>13</sup>. The supplement, although much welcome, does not clarify the basic question related to this Article.

The basic question is what about other documents, for example, permits themselves or national allocation plans. Are they considered environmental information and thus subject to Directive 2003/4 or not? If not, is it in line with the Aarhus Convention?

Another question concerns allocation decisions, information on projects, and reports from emissions covered by Article 17, namely does the wording of this Article suggest that they are subject only to article 3(30 and article 4 of Directive 2003/4 and that other provisions of this Directive do not apply? In that case, what is the extent of regulation on other requirements stemming from the Aarhus Convention, for example, what about the deadlines for supplying information? What is the procedure for access to such documents?

As far as allocation decisions (as well as information on projects) one can suspect that they would be only available through the registries under Article 19. It seems that registries are exempted from Article 7 of Directive 2003/4 concerning dissemination of environmental information and the Regulation to be adopted by the Commission under Article 19.3 to design the registries shall be guided by Article 17 regarding confidentiality. Still unclear in this respect is the situation with the requirement of Article 16 (2) to ensure publication of the names of operators who are in breach of Article 12 (3). Is it meant to be included into the registries under Article 19?

Another question concerns reports of emissions. They are mentioned in Article 17 but do not seem to be covered by Article 19. One can suspect that the idea is that they should be accessible through the European Pollutant Emission Register (EPER). The fact is that EPER, in its current form as envisaged in the Commission Decision of 17 July 2000<sup>14</sup>, does not meet the criteria. It will only meet them when transformed to fulfil obligations under the UNECE Protocol on Pollutant Release and Transfer Register, which was signed in Kiev in May 2003. The European Community signed the Protocol in Kiev and is planning to transform EPER into PRTR in order to meet the criteria required by the Protocol. According to the Protocol, the PRTR covers all the greenhouse gases covered by the ET Directive and provides for detailed requirements concerning its design in order to make it publicly accessible in line

<sup>9</sup> However, as it is often said the Aarhus Convention is only a “floor” not a “ceiling” in this respect.

<sup>10</sup> The proposal for the conclusion of the Aarhus Convention by the Community was tabled by the Commission at the Council meeting on 27 October 2003.

<sup>11</sup> This article does not cover the 3rd pillar of the Convention access to justice, since in this respect there is neither any obligation in the Climate Change Convention nor a clear situation in Community law (respective draft directive is still being hotly debated).

<sup>12</sup> COM (2001)581 final, 2002/0245 (COD)

<sup>13</sup> COM (2003)403 final 2003/0173 (COD)

<sup>14</sup> OJ L 192 28.7.2000

with the Aarhus Convention. The problem remains, however, that it is far from entering into force and its requirements have not yet been implemented into Community law.

Altogether, the issue of access to information under the ET Directive is regulated in a cumbersome way. In particular, the relation between Article 16, Article 17 and Article 19 1), 2) and 3) is not very clear and may cause some problems in practice. The wording of the Directive may be interpreted in a way that could result in contravening the Aarhus Convention.

### Public Participation in the ET Directive

The ET Directive provides for both individual decisions to be taken and a plan to be adopted, i.e. a national allocation plan. The respective provisions of the Directive thus need to be seen respectively in light of Articles 6 and 7 of the Convention.

There are basically 2 kinds of individual decisions envisaged in the ET Directive: greenhouse gas emissions permits and decisions relating to the allocation of allowances. Both are related to installations undertaking activities listed in annex I to the Aarhus Convention. The case of decisions on the allocation of allowances seems to be relatively clear: they do not seem to be covered by the ambit of article 6.1 of the Convention since a decision on allocation allowances can not be treated under the Directive as a decision "whether to permit proposed activity listed in annex I".

Another decision revolves around the situation with the permits. According to Article 4 of the ET Directive, holding such a permit is a *condition sine qua non* for undertaking the activity listed in Annex I to the Directive. These activities may also be found in Annex I to the Aarhus Convention, thus one can claim Article 6 of the Aarhus Convention does apply. The ET Directive does not, however, require public participation to be integrated into the permit. On the other hand, these activities are also subject to IPPC permit, since the IPPC Directive requires a public participation procedure that meets the requirements of Article 6 of the Aarhus Convention, according to the recent amendment introduced by the 2003/35 Public Participation Directive<sup>15</sup>.

The relation between ET permits and IPPC permits still remains ambiguous, however, although much has been clarified in the Commission's Non-Paper on Synergies between the EC Emissions Trading

Proposal and the IPPC Directive<sup>16</sup>. Although it requires coordination of both permitting procedures, wording in the ET Directive seems to be leaving a margin of discretion to member States whether to combine the permit types by integrating ET permitting into IPPC permitting<sup>17</sup>. In case they choose to establish a separate procedure and do not integrate a public participation procedure, one can speculate about the possibility of an installation carrying out only activities under the ET Directive and not being subjected to public participation. This in itself would not necessarily be considered to be in breach of the Aarhus Convention, as long it would be subject to such a procedure under any other scheme, for example, under the EIA Directive.

Quite another problem surrounds the national allocation plan. The ET Directive provides for requirements for public participation before its adoption in Article 9 and Annex III. The question, however, is whether these requirements are sufficiently detailed to implement obligations under Article 7 of the Aarhus Convention.

Article 7 of the Aarhus Convention is drafted in a somewhat convoluted form. Its binding part related to plans and programs heavily refers to provisions of Article 6. Nevertheless, the obligations are quite clear. Parties to the Convention are obliged to make appropriate provisions for the public to participate during the preparations of plans and programs relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Such a framework has to meet the following criteria:

1. identify the public, which may participate,
2. provide reasonable time-frames for different phases,
3. provide for early public participation
  - a. when all options are open, and
  - b. effective public participation can take place
4. take due account of the outcome of public participation.

The way the above obligations should be interpreted and implemented in Community law has been clearly set by the already mentioned Public Participation Directive 2003/35. This Directive provides a detailed set of procedural requirements to be met while preparing plans and programs considered as "relating to the environment" and thus to be covered by Article 7 of the Aarhus Convention. Since there is no doubt that national allocation plans un-

<sup>15</sup> Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156 25.6.2003)

<sup>16</sup> Non-paper of 22.01.02

<sup>17</sup> See M. Fernandez Armenteros, Synergies between the Emissions Trading Proposal and the IPPC Directive, ELNI Review, 2/2002, p.16-17.

der the ET Directive “relate to the environment”, one would expect that the procedure for their adoption should follow the public participation requirements as envisaged in the Public Participation Directive. However, this is not the case.

The ET Directive falls short in providing all necessary details. Indeed, the Directive does meet the requirements of the Aarhus Convention in relation to the definition of the public and providing the opportunity to participate to such a general public without attempts to limit these broad concepts. It also requires that the public have the opportunity to provide comments and that due account be taken of the comments. However, it requires neither the reasonable time frames to be provided and early and effective opportunities to participate to be guaranteed, nor does it specify the way the public should be informed.

The above shortcomings seem to have been noticed since the mentioned proposal for a directive amending the ET Directive provides for a new article (17bis). This new article requires that all national strategies and programs for the implementation of projects be subject to strategic impact assessment

and public consultation in accordance with the SEA Directive 2001/42 EC, and in particular with its Article 6 dealing with consultation.

Such an amendment is a step forward, since the SEA Directive meets the requirements of Article 7 of the Aarhus Convention.<sup>18</sup> The problem, however, is that the wording of the proposed Article 17bis does not seem to cover national allocation plans. In this case, the public participation requirement will be much less detailed for the latter and still not meet the requirements of the Aarhus Convention.

## Conclusions

The ET Directive takes into account the need for public participation and information in climate change decision-making and thus meets the requirements of the Climate Change Convention. Nonetheless, the provisions of the ET Directives are not sufficiently clear and detailed enough to ensure that Community law fully complies with the respective requirements of the Aarhus Convention.

<sup>18</sup> Although it is slightly less detailed than Public Participation Directive.

## Access to Justice in Environmental Matters: The Portuguese *Actio Popularis* – Law and Practice

*Isabel Carinhas de Andrade*

### 1 Introduction

Access to law and effective judicial protection is a basic guarantee of any democratic state in order to enforce individual rights and legitimate interests. The right to a healthy environment has, however, a particular feature. It belongs to the category of the so-called “diffuse or general interests” assigned to a collective of individuals and referring to a trans-individual and indivisible object. Identifying under which conditions and who can go to court to protect the environment is an issue that has seen different solutions in different legal systems.

According to the Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental matters, done at Aarhus on June 25, 1998, all “members of the public concerned having a sufficient interest or, alternatively, maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition” should “have access to a review procedure before a court of law and/or an-

other independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission”.<sup>1</sup>

Portugal ratified the Aarhus Convention in February 2003<sup>2</sup> and deposited its instrument of ratification on June 9, 2003<sup>3</sup>. According to its article 20, the Convention entered into force in Portugal on September 7, 2003. Access to judicial procedures (in civil, administrative and penal jurisdiction) had, however,

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<sup>1</sup> Article 9 (2) of the Aarhus Convention

<sup>2</sup> Decree of the President of the Republic n.º 9/2003 of 25<sup>th</sup> February, published on the Portuguese Official Journal of 25-02-2003

<sup>3</sup> Announcement n.º 182/2003 published on the Portuguese Official Journal of 24-07-2003

already been broadly recognized by the Constitution of the Portuguese Republic through the *actio popularis* since 1976.

## 2 General Legal Framework of the Country

The main source of Portuguese law is statutory law, which includes the Constitution, international and Community Law and legislation enacted by the national legislative bodies. Case law and academic opinions function as tools to help interpret statutory law, but there is no such rule as the judicial precedent.

The courts are the organs with supreme authority that have the power to administer justice in the name of the people. In addition to the Constitutional Court, the main categories of courts correspond to the common courts (with a general jurisdiction in civil and criminal matters) and the administrative courts. As a rule, there are two instances of appeal within the common courts or courts of law. The possibility of appeal exists whenever the issue of the lawsuit is given a value that exceeds the value of the court to which one is appealing.

The administrative judiciary organization is a bit more complex: there are three kinds of administrative courts, and all three make decisions as courts of first instance, depending on the kind of administrative organ being challenged. There is generally only one instance of appeal. A matter is under the administrative jurisdiction whenever the issue of the lawsuit involves the State's (and its administrative organs and bodies) exercise of its powers of authority, which can take the form of an administrative act, an administrative regulation or an administrative contract. The State can also be prosecuted before the civil courts if acting as any other private person. The distinction between the two jurisdictions is not, however, always completely clear as will be shown below.

## 3 Portuguese Environmental Law and Enforcement Procedures

According to the Portuguese Constitution of 1976, protection of the environment is both a task of the State (**article 9 (e)**) and a fundamental right granted to everyone. Inserted in the chapter on Social Rights and Duties, the right to a healthy and ecologically balanced human environment, as set by **article 66**, also implicates the obligation of citizens not to harm the environment and the duty to prevent others from harming it.

A great part of Portuguese environmental law derives from EC law (nature conservation, environmental impact assessment, waste management, etc.) and falls within the scope of administrative law, since, in most cases, it establishes environmental protection as a special task of the State.

Almost all environmental regulations sanction the violations of its provisions with fines to be imposed by administrative authorities. If the administrative infringement procedure ends with the imposition of a fine, then the offender may appeal to the courts to overturn the decision of the administration. These appeals constitute a large number of the judicial procedures on environmental matters. However, citizens and NGOs cannot be a party in this process.

There is a specific administrative procedure to enforce the right of access to information regarding the access to all public administrative documents containing environmental or other kinds of information. Complaints against a refusal of access to these documents can be presented to the Commission on Access to Administrative Documents (CAAD), an independent administrative body. However, the opinion issued by this Commission is not binding for the administration. If the administrative organ holding the requested document does not comply, then it would be necessary to make use of a specific judicial procedure before the administrative courts to obtain access to the information.

Violations of environmental law can also be brought before the courts of any of the three jurisdictions (civil, penal or administrative) depending on the kind of regulation being disrespected.

## 4 Access to Justice by Citizens and NGOs – the *actio popularis*

**Article 52 (3)** of the Portuguese Constitution states:

*“Everyone, personally or through associations that purport to defend the interests in issue, enjoys the right of actio popularis in the cases and under the conditions provided by law, including the right to claim compensation, on behalf of the aggrieved party or parties, namely to:*

*a) promote the prevention, the suppression and the prosecution of offences against public health, consumer rights, the quality of life, the preservation of the environment and the cultural heritage”.*

This provision establishes the following main traits of the *actio popularis*:

- a) **Locus standi**: citizens and associations
- b) **Protected interests**: public health, consumer rights, the quality of life, the preservation of the environment and cultural heritage, and the property of the State, autonomous regions and local authorities.
- c) **Scope of the proceedings**: prevention, suppression or prosecution of offences against the protected diffuse interests and/or claiming of compensation for damages

The right of *actio popularis* is included in the chapter of rights, freedoms and guarantees of political participation, which means that its provisions shall be directly applicable and binding for both public and private bodies, as established by **article 18**.

However, article 52 (3) (a) is still a very general provision, expressly requiring a law to further detail the conditions of exercise of the right of *actio popularis*.

**Law 83/95 of 31 August** (Popular Action Law) responded to this need but it is still only half way to creating conditions for an effective exercise of the right of access to justice. It merely lays down fragmentary regulation and leaves many questions unsolved, as shown below.

In order to guarantee the protection of general or diffuse interest identified in article 52 of the Constitution, Law 83/95 regulates not only the *actio popularis* (Chapter III) but also public participation in administrative proceedings (Chapter IV). Chapter V contains some provisions on civil and penal liability for damages to diffuse interests.

#### 4.1 Legal standing

**Article 2 of the Popular Action Law (PAL)** grants the right to participate in administrative proceedings and to initiate a judicial proceeding to:

- a) Any **citizen** in full enjoyment of his/her civil and political rights either having or not having a direct interest in the claim (acting individually or collectively);
- b) **Associations and foundations** for the protection of the interests at stake, either having or not having a direct interest in the claim, as long as they fulfil the following requirements (as stated in Article 3 of Popular Action Law):
  1. having legal personality (being a legal person),
  2. expressly mentioning in their internal regulations the defense of the interests at stake as a goal or competence of the association or foundation,
  3. having no other professional activity that comes into competition with companies or independent workers;
- c) **Municipal authorities**, whenever the popular action is filed to protect the general interests of the residents of the respective area of competence.

Since 1995 the **Code of Civil Procedure** has had a very similar provision (**article 26-A**) recognizing a *locus standi* to all of the above and also to the **Public Prosecutor**. Acting in accordance with the provision, the Public Prosecutor has initiated a signifi-

cant number of lawsuits concerning the protection of environment, either on its own initiative or following a complaint presented by NGOs.

Though **Environmental NGOs Law** (Law 35/98) classifies these organizations as national, regional or local according to their geographical scope and representativeness (number of members); all of them have equal *locus standi*. There is **no control of adequacy of representation**, neither for the NGO nor for the citizens.

However, some doubts have arisen concerning the need for a geographical link between the plaintiff and the issue of the lawsuit whenever the subject of the appeal does not concern the entire national territory (e.g. when some action causes damages/pollution in a restricted area). Local and regional NGOs have a geographically limited scope set in their internal statute, which indirectly limits their legal standing. Some academics contend that such a restriction should also apply to citizens;<sup>4</sup> however, there have not yet been a significant number of court decisions on this matter.

Such a broad *locus standi* brings some peculiarities to the judicial procedure.

**Article 14 of PAL** sets a “**special regime of procedural representation**” by stating that in popular action proceedings, the petitioner represents, on its own initiative and without needing a mandate, all other individuals having the same general interest. However, the concerned individuals have the possibility of opposing this representation by expressly excluding themselves from the proceeding.

The possibility of opting out, or intending to exclude individuals from the binding force of the final decision, better suits the so-called “uniform individual interests” (common in consumption issues), in which a group of persons has the same individual and separate interest affected by a common cause. As a result, one of them might not want to have his/her particular situation ruled on by a court decision in a proceeding in which he/she did not take part. On the other hand, the object of a diffuse interest is not divisible and the damages caused to it by an offence cannot be individually measured, which means a ruling on such a matter necessarily affects all individuals (e.g. the interdiction of an activity that causes pollution).

However, the possibility of becoming a party of the proceeding can be an interesting way of gathering support if it is not possible to do so before filing the petition (given the fact that persons concerned can

<sup>4</sup> TEIXEIRA, Carlos Adérito, “Acção Popular- Novo Paradigma”, in “Boletim de interesses difusos”, Lisboa, 1996  
[www.diramb.gov.pt/data/basedoc/TXT\\_D\\_19868\\_1\\_0001.htm](http://www.diramb.gov.pt/data/basedoc/TXT_D_19868_1_0001.htm)

be spread all over the entire territory). In the absence of a more detailed provision, it has been upheld that this subsequent intervention can be used not only to support the pleading initially presented by the first plaintiff, but also to present a new petition, which would represent a deviation of general rules of accumulation of requests. This mechanism has hardly ever been used.

As a consequence of this representation scheme, and bearing in mind the particular feature of diffuse interests as mentioned above, the final decision of the court is, as a general rule, binding for all individuals concerned by the general interest that have not opted out – *res judicata erga omnes*.

**Article 19 of PAL** includes some exceptions to avoid the instance that a less diligent conduct of the petitioner impairs the interests of those not participating in the lawsuit. Thus, the judgment only binds the parties of the lawsuit whenever: (a) the court comes to a decision of insufficient evidence (*non liquet*), and therefore dismisses the case (the lawsuit failed because the petitioner did not meet his burden of proof); or (b) the judge decides differently based on special circumstances of the specific case (e.g. the particular situation of the petitioner).

Establishing a *res judicata inter partes* in such cases allows for the presentation of further lawsuits in the same matter by whomever was not a party in the first proceeding.

#### 4.2 Possible judicial procedures

The Administrative Code of 1940 establishes the so-called “corrective popular action”, which can be used by any citizen who has the right to vote in order to challenge any alleged illegal decision of local administrative organs of his residence. The cause of action is the supposed illegality of the decision and not necessarily the violation of a diffuse interest. However, the subject matter of the lawsuit can only be a decision of the local administrative organs.

**Law 83/95** does not set a specific judicial proceeding to protect diffuse interests, such as the right to a healthy environment. Instead, it states that popular action can take the form of any civil or administrative judicial procedure established by general administrative and civil procedural law, including provisional remedies. There are, however, some procedural peculiarities, both in Popular Action Law and other environmental legislation, to be taken into account.

**Article 18 of PAL** enables the judge to grant **suspensive effect to a judicial appeal**, in cases where procedural law does not provide it, in order to prevent irreparable or hardly repairable damage.

The interpretation of this provision has not at all been consensual: some courts consider it as a provisional remedy to be used as accessory to the main administrative judicial proceeding against an administrative act (this proceeding is called “appeal” though it is brought before a first judicial instance). This understanding would make the provisional remedy, which is set by the general procedural law to obtain the suspension of an administrative act, unnecessary and consequently unusable in popular action. On the other hand, according to other judgments, article 18 refers not to a provisional but to a main procedure: the request to a higher court to reverse the decision of a first instance court (an appeal in the literal sense of the word).

**Article 42 of Basic Principles of Environmental Law** (Law 11/87) establishes the so-called “**administrative embargos**”, which maintains that whoever feels offended in his/her rights to a healthy environment may request the immediate suspension of the activity causing the damage. The only additional reference made to this procedure is in **article 45 of BPEL**, which grants the competence to judge these “embargos” to civil courts.

While it is not a consensual opinion, some doctrine<sup>5</sup> and jurisprudence take these provisions into consideration to allow for extended use of a provisional remedy, as set in the Code of Civil Procedure (immediate suspension of a work), to cases in which the petitioner claims the protection of environment, even if the work is being conducted by the state and there is no administrative act that can be suspended (which was not possible under article 414 of Code of Civil Procedure). However, there have been a number of contradictory court decisions (mainly on formal aspects), surrounding the competent jurisdiction (whenever it asked the suspension of a work by the Administration) and the specific procedural rules that should be applicable to regulate the way the request should be addressed or ruled by the court. **Law 13/2002 of 19 February** not only reforms administrative procedural law but also modifies article 45 of Law 11/87, thus recognizing that both jurisdictions are competent according to the issue discussed (the use or not by the Administration of powers of authority). This will hopefully bring some clarification to this controversy.

**Article 25 of PAL** regulates the participation of citizens and environmental NGOs in penal judicial procedure. Thus, they can intervene by informing the public prosecutor of any acts that may constitute an environmental crime, regardless of whether they

<sup>5</sup> SILVA, Vasco Pereira da, “Os denominados embargos administrativos em matéria de ambiente”, *Revista Jurídica de Urbanismo e Ambiente*, separata dos n.º 5/6, Junho/Dezembro 1996

have suffered a direct damage. After an investigation of these facts, the public prosecutor may or may not sue. Citizens and NGOs can act as a private prosecutor, which means they can participate in the enquiry and the instruction (a stage of the procedure at which a judge controls the decision to prosecute or dismiss the case made by the public prosecutor) by presenting and requiring evidence; accuse (subordinated to the accusation by the public prosecutor); require the opening of the instruction (whenever the public prosecutor decides not to sue) and also appeal against a decision that affects them, even if the public prosecutor has not done so.

According to the general rules of Penal Procedural Law, it is possible, under some conditions, to claim compensation for damages in the penal proceeding. However, there have been some court decisions making use of a provision of Code of Penal Procedure (article 82 (3)) that allows the penal judge to refer the parties to civil courts whenever the decision of the claim excessively delays the penal proceeding.

#### 4.3 Powers of the court

Taking into account the supra-individual feature of the interests in question, the legal obligation of assuring equal substantive positions for all parties (usually difficult to attain in environmental disputes against big companies or even the state) and the danger of abusive representation, Law 8/95 provides a specially active role for the judge in popular action proceedings. This creates exceptions to the general rules of civil, penal and administrative procedural law.

Immediately following the filing of the lawsuit the judge analyses it and makes a preliminary ruling on its merits. Based on a prognosis, the judge can decide to reject the petition whenever he considers it is clearly unlikely that the plaintiff will win the case.

The judge may take initiative regarding evidence. In other words, within the scope of the fundamental issues raised by the parties the judge may collect evidence other than that which is presented by the parties.

Even though there is no control of adequacy of representation in the beginning of the proceeding, the judge can, when making the final decision, dismiss the case based on special circumstances of the specific case, namely the lack of representation or abusive representation by the plaintiff. In these cases, the judgment will not bind all other interested persons that were not parties in the proceeding, which allows them to present another lawsuit on the same matter.

Finally, as mentioned above, the judge can grant suspensive effect to an appeal, even if procedural law does not provide for it. **Article 18 of PAL** has been interpreted in different senses by the courts, as already mentioned. Some judges see a specific provisional remedy while others uphold that this clause applies to appeals of court decisions to higher courts.

#### 4.4 Legal representation

According to **Article 5 of Law of Administrative Courts Procedure**, parties must always be represented by an attorney in administrative judicial proceedings.

Regarding civil jurisdiction, legal representation is compulsory whenever the value of the matter in controversy exceeds the limit of the respective jurisdiction. Whenever it is not possible to give an economical value to the interest to be protected by the lawsuit, the interest is considered to have the value of the limit of jurisdiction of the second instance plus one cent, thus, consequently requiring the presence of an attorney.

If a citizen or NGO decides to become a party in a criminal proceeding acting as private prosecutor, legal representation is also compulsory.

Court costs, which are to be paid by the losing party, may include attorney or expert's fees. According to **article 21 of PAL**, the judge decides the amount that will cover attorney's fees. In lack of a clear and precise criterion to determine the expenses that the losing party has to pay, the courts have been very restrictive in not allowing, in most cases, an effective payment of all expenses.

There is, however, a mechanism of legal aid through which the State supports the fees of attorneys for (natural and legal) persons lacking financial resources. Within this legal aid system, the fees of the attorney, appointed by the state or chosen by the petitioner, are pre-set by a government regulation (at a lower level than those paid by private clients, making it very unattractive for senior attorneys). There was supposed to be a specific regulation for cases of diffuse interests but it has not been enacted until now.

In some cases, however, attorneys work *pro bono*, especially to assist environmental NGOs.

However, NGOs still point to the high costs of hiring an attorney as a reason for not using judicial procedures more often.

#### 4.5 Court costs

Economical reasons should not be an obstacle for access to justice, namely to popular action.

Therefore, **article 20 of PAL** determines that no prepayment has to be executed when filing the

petition. When the plaintiff wins the case or is partially declared to be in his/her right, he/she does not have to pay the costs. If the case is dismissed, the judge, taking into account the economical situation of the plaintiff and the reason of the dismissal of the case, will determine a reduced amount of the costs the plaintiff has to pay (between 1/10 and 1/2 of the normal costs). This can sometimes still be a considerable amount, depending on the values of the lawsuit and its complexity.

The legal aid system should also cover the court costs.

These rules do not apply to environmental NGOs since they are exempted by **article 11 of Environmental NGOs Law** of the duty to pay costs of proceedings.

#### 4.6 *Publicity of the decision*

Given the wide scope of the interests at issue, **article 19 of PAL** states that the final decision shall be published, at the expenses of the losing party, in two newspapers, selected by the judge (preferably the ones with larger circulation among the persons concerned by the interest at issue).

### 5 The Judicial Practice

The existing court statistics do not put in evidence the specific lawsuits introduced by environmental NGOs and citizens in cases related to environmental protection. A few empirical researches exist on this matter in Portugal, and therefore, it is not easy to have an accurate view of what has been the practice of the *actio popularis*.

From November until May 2003, EURONATURA was the Portuguese sub-contractor of a study conducted for the European Commission by the Centre d'Étude de Droit de l'Environnement and the Öko-Institut. In order to assess both the development in recent years and the present situation regarding access to justice in environmental matters, the national experts were asked to give an overview on the number and outcome of administrative or judicial proceedings under environmental law by environmental NGOs and, to the extent possible, citizen initiatives in the past 5 to 10 years.

This research was based on questionnaires addressed to all courts and to some NGOs and inter-

views with some key-players (lawyers, academics and NGO members). Even though the number of replies to the questionnaire was low, the interviews allowed a qualitative perspective of how access to justice in environmental matters has worked and has been used in Portugal in the past years.

The main conclusion of this study was that even though broadly admitted by law, the use of judicial procedures by citizens and NGOs in Portugal is still very scarce (101 cases were identified in the period between 1995 and 2002). However, there has been a growing number of cases, especially since the enactment of the Popular Action Law in 1995. Hence, the figures reveal remarkable progress.

Since threats to the environment very often derive from actions of the state while acting within its powers of authority, the amount of judicial proceedings before administrative courts is higher than that of any other jurisdiction (61 cases). However, the results of these proceedings have been limited. With the exception of procedures to obtain access to documents, there are few decisions on the merits and even fewer cases have been won. Civil judicial procedures are not as frequent but seem more successful.

It was possible to identify the following obstacles to access to justice: some insufficiencies of the law (as pointed out above); the complexity of the organization of the judiciary system (the distinction between civil and administrative jurisdiction is still often not clear); the resistance of administrative courts to the new values and principles of environmental law; lack of resources by NGOs; lack of knowledge by citizens and some NGOs regarding the judicial means at their disposal, which adds to a general disbelief in the judicial system.

As a final remark, it should be noted that the overall outcome of existing judicial procedures has only allowed limited protection of the environment but is contributing to a change of mentalities of courts and public authorities. Better regulation and more public awareness and initiative towards judicial instruments would enable better access to justice and, consequently, faster development and more effective protection of the environment.

## The Reform of the EU Common Fisheries Policy – A Step Towards Greater Precaution in the Conservation of Fishery Resources

*Miriam Dross and Felix Bloch*

The “historic milestone”<sup>1</sup> of the European Union’s fisheries policy, the reform of the Common Fisheries Policy (CFP), dates back to December 2002, almost a year ago. Thus the time has come to review the development of the CFP, the outcome of the reforms and what has been achieved since then.

The widespread overexploitation of marine fish stocks has been a source of concern for years.<sup>2</sup> Although it must be emphasised that fisheries statistics are hardly reliable data, recent figures released by the UN Food and Agriculture Organization (FAO) indicate that about 47 to 50 percent of worldwide stocks are fully exploited. This means that the stocks are very close to their maximum limits with no room for further increase.<sup>3</sup> While scientists debate the exact figures, the overall account that overfishing poses a problem is not disputed. This fact has also been recognized by the European Union and its member states. The Commission pointed out that the state of many fish stocks was indeed alarming in that they were beyond safe biological limits<sup>4</sup> and further warned that if current trends continued, many stocks could collapse in the near future.<sup>5</sup> Not surprisingly, fisheries particularly valuable from an economic standpoint, such as cod and hake, are among the most affected

stocks.<sup>6</sup> It seems appropriate to say that this situation poses the greatest challenge that the EU has had to face since the inception of a Common Fisheries Policy (CFP). The Commission, therefore, presented a Green Paper on the Future of the CFP in March 2001.<sup>7</sup> After controversial debate, a reform package aiming at building a revised and comprehensive overall framework for fisheries in Europe with a clear focus on the conservation of resources was adopted by the Fisheries Council in December 2002.<sup>8</sup>

This article attempts to sketch out the development and structure of the CFP up to last year’s Council meeting before describing its outcome. Subsequently, it evaluates the reform and the first steps taken in CFP implementation and presents a tentative outlook towards future developments.

### The Evolution of the Common Fisheries Policy

The first Community measures in the fishing sector date back to the 1960s.<sup>9</sup> However, it was not until 1983 that a common policy was adopted with the basic Council Regulation (EEC) No. 170/83, relying on (then) Art. 43 EEC. Two factors mainly influenced the policy of the Community in those early years. Firstly, the United Kingdom, Ireland and Denmark, representing strong fishing nations, joined the EEC in 1973. Secondly, the establishment of the so-called Exclusive Economic Zones (EEZ) extending 200 nautical miles was proclaimed by many coastal States even before the adoption of the UN Convention on the Law of the Sea in 1982 (UNCLOS).<sup>10</sup> As intended by coastal States, EEZs significantly reduced the traditional freedom of the

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<sup>1</sup> Commissioner Franz Fischler at a press conference in Brussels on 20 December 2002,

[http://europa.eu.int/comm/fisheries/news\\_corner/discours/speech34\\_en.htm](http://europa.eu.int/comm/fisheries/news_corner/discours/speech34_en.htm).

<sup>2</sup> See *The Economist*, *Ocean’s eleventh hour?*, May 17<sup>th</sup> 2003, p. 80; R.R. Churchill & A.V. Lowe, *The Law of the Sea*, p. 223 (1988). According to the “State of the World” Report by the Worldwatch Institute of 1998, eleven of the world’s fifteen major fishing areas and sixty-nine per cent of the world’s major fish species were in decline and the yield of high-value species had dwindled by twenty-five per cent, while the world’s fishery fleet had thirty per cent more capacity than it needs to catch the entire world’s commercial stocks. Anne Platt McGinn, *Promoting Sustainable Fisheries*, in: *State of the World*, p. 60 (1998).

<sup>3</sup> FAO (Ed.), *The State of World Fisheries and Aquaculture, Part 1, Fisheries Resources: Trends in Production, Utilization and Trade*, 2000.

<sup>4</sup> A fish stock is considered to be outside safe biological limits when the stock size falls below the *precautionary biomass limit* ( $B_{pa}$ ). The *precautionary biomass limit* marks a buffer zone above the *biomass limit* ( $B_{lim}$ ) at which stock recovery will be seriously impaired. In EU waters only 16% of the 113 fish stocks assessed by the International Council for the Exploration of the Sea (ICES) were within safe biological limits in 2001. See ICES, *Environmental Status of the European Seas*, p. 40.

<sup>5</sup> Communication from the Commission on the reform of the Common Fisheries Policy (“Roadmap”), COM(2002) 181 final, p. 3.

<sup>6</sup> See Roadmap, *supra* note 5, p. 3; ICES; see also C. Hammer, T. Gröslér and C. Zimmermann, *Lage und Entwicklung ausgewählter Fischbestände: Einschätzung des ICES im Juni 2002*, *Inf. Fischwirtsch. Fischereiforsch.* 49 (2/3), 2002, p. 35 et seq..

<sup>7</sup> Green Paper on the Future of the Common Fisheries Policy, COM(2001)135 final, 20.3.2001.

<sup>8</sup> European Commission, *Outcome of the Fisheries Council of 16-20 December 2002*, press release, 23.12.2002, [http://europa.eu.int/comm/fisheries/news\\_corner/press/inf02\\_61\\_en.htm](http://europa.eu.int/comm/fisheries/news_corner/press/inf02_61_en.htm) (visited 16 June 2003).

<sup>9</sup> See C. Nonnenmacher, *Das EG-Fischereiregime als supranationale Ressourcenordnung*, *EuR* 1989, 30 at 34.

<sup>10</sup> S. Oda, *Exclusive Economic Zones*, *EPIL*, Vol. II, 1995, at 305. UNCLOS entered into force on November 16, 1994 (For the EC, see Council Decision of 23.3.1998, OJ 1998, L 179/1). On the EC and the Law of the Sea in general see W. Graf Vitzthum, *Die Europäische Gemeinschaft und das Internationale Seerecht*, 111 *Archiv des öffentlichen Rechts* (1986) 33.

high seas and, therefore, international access to fishing grounds.

Against this background, the EEC sought to establish an *acquis communautaire* relating to fisheries, which the new members were asked to accept, and to develop a common position with regard to the proliferation of EEZs.<sup>11</sup> The original focus of European fisheries management was the question of access to national waters, markets and the structure of the fishing industry in Europe.

After long and arduous negotiations, the "new generation CFP" was finally established in 1983, thus creating a comprehensive European Community regulatory framework.<sup>12</sup> Council Regulation (EEC) No 170/83 provided for conservation and management measures, rules for use and distribution of resources as well as special rules for coastal fishing and supervisory measures. The regulation thus foresaw an annual determination of so-called total allowable catches (TACs), *i.e.* a determination of the overall amount of fish of a certain species to be caught in European waters. The TAC system was then combined with a quota system, which provided for a division of the catch and an allocation to individual member states on a year-to-year basis. This division was to be arranged on the principle of "relative stability", which meant that the quotas of the year 1982 were in fact to be upheld in subsequent years.<sup>13</sup> This basic two-step approach of setting TACs and then distributing them among member states by use of quotas still remains the approach of the CFP today.

In January 1993, Council Regulation 3760/92/EEC came into force, thus further developing the system and replacing the 1983 regulation.<sup>14</sup> This new regulation determined the operation of the CFP for the following ten years and tried to address the difficult imbalance between shrinking resources and the large fishing fleet of the member states, which had become even larger with the accession of Spain and Portugal to the Community. The new regulation provided *inter alia* for the introduction of a number of different measures allowing for better implementation of conditions of access to waters and e-

sources and the pursuit of exploitative activities (such as the establishment of protected zones, specific catch limits, technical measures, etc.). It introduced a fisheries licensing system as well as the possibility of emergency measures, the elaboration of a Community control system, and a new structure of consultative committees.

On the basis of these developments, the CFP today is commonly said to cover roughly five main areas: (a) conservation and management of stocks, (b) structural policy, (c) common market organization, (d) external relations, and (e) monitoring and inspection.

(a) The basic mechanism of fisheries management continues to be the setting of TACs.<sup>15</sup> These limits determine the overall amount of fish of a certain species to be caught in a particular marine area. The TACs, which are proposed by the Commission, are theoretically based on scientific advice following consultation with the Scientific, Technical and Economic Committee for Fisheries (STECF). The data on the state of different fisheries, upon which the TACs should be based, come mainly from the International Council for the Exploration of the Sea (ICES), an independent organization providing scientific background in the field of marine resources management in the North Atlantic for its 19 Member States.<sup>16</sup> However, according to the European Court of Justice, the Commission and Council enjoy a wide margin of appreciation in the determination of TACs, which the Court will not examine in detail, unless "there has been a manifest error or misuse of power" or "the authority in question has clearly exceeded the bounds of its discretion".<sup>17</sup> Thus, according to the NIFPO jurisprudence, the Council may well - within certain limits - disregard the advice given by marine scientists. This point was reiterated by the Court in the case of Spain *vs.* Council of October 1999.<sup>18</sup> As mentioned above, the TACs are then divided up into quotas and allocated to individual member states on a yearly basis.<sup>19</sup> At the same time the notion of "relative stabil-

<sup>11</sup> See C. Nonnenmacher, *Das EG-Fischereiregime als supranationale Ressourcenordnung*, EuR 1989, 30 at 35.

<sup>12</sup> Council Regulation 170/83/EEC established a Community system for the conservation and management of fisheries resources, OJ L 24/1, 27.01.1983.

See R. R. Churchill, *The EEC's Fisheries Management System: A Review of the First Five Years of its Operation*, 25 *Common Market Law Review* (1988), 369 and Hartmut Schneider, *Die Erhaltung und Bewirtschaftung der Fischereiresourcen im Rahmen der Gemeinsamen Fischereipolitik der EG*, RIW 1989, 873.

<sup>13</sup> See ECJ Case 46/86 *Albert Romkes v. Officer van Justitie for the District of Zwolle*, 16 June 1987, ECR 1987, page 2671.

<sup>14</sup> Council Regulation No 3760/92/EEC, OJ L 389/1, 31.12.1992.

<sup>15</sup> It must, however, be pointed out that this does not apply to the Mediterranean where mostly technical measures were adopted. See, in particular, Council Regulation (EC) No 1626/94 of 27 June 1994, which lays down certain technical measures for the conservation of fishery resources in the Mediterranean, OJ L 171/1, 06.07.1994.

<sup>16</sup> See <http://www.ices.dk>. ICES, not legally binding on the Council. See, for instance, ECJ judgment of 5.10.1999, C-179/95 *Spain v. Council*.

<sup>17</sup> ECJ, *Northern Ireland Fish Producers' Organisation Ltd. (NIFPO) and Northern Ireland Fishermen's Federation and Department of Agriculture for Northern Ireland*, Case C-4/96, at 42.

<sup>18</sup> ECJ, *Spain vs. Council*, Case C-179/95, at 29. See also T-196/99, 46.

<sup>19</sup> The TACs currently in force can be found in Council Regulation (EC) 2341/2002 of 20.12.2002, OJ L 356, 31.12.2002, 12. See generally R. R. Churchill, *EEC Fisheries Law* (1987), 115 *et seq.* On the legal aspects of the mechanisms of determination of TACs and the division into quotas, in particular on the national level in Germany: Ulrich Nußbaum, *Im Netz der*

ity” applies, providing that the quotas agreed upon in 1983 present the basis for any future quota allocation.<sup>20</sup> In 1983, the allocation was adopted to reflect socio-economic and political aims (see the recitals of Regulation 170/83).

Apart from the TAC and quota system, so-called technical conservation measures can also be introduced.<sup>21</sup> As of today, a vast number of detailed technical measures include minimum mesh sizes, other gear restrictions,<sup>22</sup> minimum fish sizes, closed seasons and closed areas. Moreover, the Commission can adopt emergency measures in cases of threat to fish stocks by “serious and unexpected upheaval”.<sup>23</sup>

(b) One important aspect of the CFP is the structural policy, which is implicitly called for in Article 33 para.1 TEC, since one objective of the CFP is to ensure increasing productivity and a fair standard of living for fishermen. Since 1983 the structural policy was primarily aimed at adjusting fleet capacity. As it was then understood, this meant not only a reduction in but also a modernisation of the fleet. Furthermore, a capacity adjustment policy known as the multi-annual guidance programme (MAGP) was introduced. The first two MAGPs<sup>24</sup> did not succeed in reducing the capacity of fishing vessels in Europe. Under MAGP III, which ran from 1992 to 1996, the fishing effort was, therefore, calculated by multiplying the capacity of a fishing vessel expressed in tonnage and engine power by the number of days spent at sea. Member states could then achieve the mutually established reduction of fishing effort not only by scrapping vessels but also partly by “tie-ups”, i.e. keeping vessels in port for a set period of time. Using this calculation method, reductions of the fishing effort were agreed upon in

MAGP III and IV. However, by 1992 it was clear that a more fundamental restructuring of the whole fisheries sector was essential.

In 1993 all structural measures were combined under a single financial instrument, the Financial Instrument for Fisheries Guidance (FIFG)<sup>25</sup>, in order to avoid the “scrap and build” policy of financing the decommissioning of vessels and their replacement by new vessels under different budget lines.<sup>26</sup> Between 1994 and 1999 a fourth of the funds available went into the modernisation and renewal of fleets. Other funded measures included the elimination of fleet overcapacity, aid to the processing industry, socio-economic measures to train fishermen leaving the industry, early-retirement schemes and compensation to fishermen for temporary cessation of fishing activities. While funds for aquaculture and market development were newly introduced, national subsidies for new fishing vessels could not be entirely banned.

(c) Another cornerstone of the CFP is the common organisation of the market in fisheries and aquaculture products. The common organisation saw its reform already in 1999, when a new basic regulation was adopted.<sup>27</sup> The objective continues to be a common market for fishery products that would match production to demand for the benefit of both producers and consumers. To this end, common marketing standards were introduced in order to reduce trade barriers between member states. However, the core of the common organisation of the market is a price support system. The Council regularly sets so-called guide prices for certain fisheries products. If the price then falls below a certain level (the so-called Community withdrawal price set by the Commission), producer organisations will withdraw the products from the market and products will not be sold below this price. Once the products are withdrawn, fishermen will receive compensation through their respective producer organisation.<sup>28</sup> Products that were subject to withdrawal may nevertheless be processed or stored for later consumption (so-called carry-over); carry-over aid is granted for producers.<sup>29</sup> Furthermore, Regulation

Grundrechte: Die Verteilung deutscher Fangquoten nach Gemeinschafts- und nationalem Recht, in Bröhmer (Ed.), *Der Grundrechtsschutz in Europa* (2002), 121.

<sup>20</sup> Cf. Art. 8 para. 4 Regulation No. 3760/92.

<sup>21</sup> See especially Regulation (EC) No 894/97, OJ L 132 23.5.1997, 1.

<sup>22</sup> For an example of a case concerning the withdrawal of a licence for reasons of non-compliance with gear restrictions, see Court of First Instance, T-46/00 (*Kvitsjøen AS*).

<sup>23</sup> One such measure was at issue in the now famous *Jégo-Quéré et Cie SA* case – T-177/01 – when the Court of First Instance decided that individuals could, under certain circumstances, rely on Art. 230 (4) EC in order to contest the legality of Community measures of general application which directly affect their legal situation. This was found to be the case if the measure in question affect their legal position, in a manner which is both definite and immediate, by restricting one’s rights or by imposing obligations on an individual, without the number and position of other persons who are likewise affected by the measure, or who may be so, being of any relevance in that regard. This decision was subsequently overruled by the ECJ in the judgement of 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union* C-50/00.

<sup>24</sup> So far four multi-annual guidance programmes were adopted: MAGP I (1983 – 1986), MAGP II (1987 – 1991), MAGP III (1992 – 1996) and MAGP IV (1997 – 2001).

<sup>25</sup> See Council Regulation (EC) No 2792/1999 of 17.12.1999, OJ L 337, 30.12.1999.

<sup>26</sup> Financial aid for the fisheries sector is, however, also available under other structural funds because many fisheries-dependent areas are eligible for support, i.e. the European Regional Development Fund (ERDF), the European Agriculture Guidance and Guarantee Fund (EAGGF) and the European Social Fund (ESF) as well as the PESCA initiative (1994-1999).

<sup>27</sup> Basic Regulation 104/2000/EC on the common organization of the market in fishery and aquaculture products of 17 December 1999, OJ L 17/22, 21.01.2000.

<sup>28</sup> Art. 21 of Regulation 104/2000/EC.

<sup>29</sup> For instance through freezing, salting, drying, etc. see Art. 23 of Regulation 104/2000/EC.

140/2000 contains rules for trade with non-EU countries.<sup>30</sup>

(d) When the long-distance fishing-fleet of the Community<sup>31</sup> lost access to coastal waters due to the proclamation of EEZs, the Community concluded fisheries agreements with relevant coastal states. The content of these agreements differs according to the interests of the countries concerned. For instance, external relations with Norway aim to exchange fishing rights (reciprocal agreements)<sup>32</sup>, while treaties with numerous developing countries primarily provide for access to their waters in exchange for financial and technical resources.<sup>33</sup> The latter would be surplus agreements in the sense of Art. 62 para. 2 UNCLOS. Apart from the negotiation of these bilateral fishery agreements, the EU is also a member of numerous fishery organizations, such as the North West Atlantic Fisheries Organization (NAFO).

(e) Enforcement of CFP rules is guided by Regulation 2847/93/EEC (the “control regulation”).<sup>34</sup> It lays down measures that member states must adopt in order to safeguard implementation of conservation regulations such as quota management and the implementation of technical measures and the like. Accordingly, the enforcement of CFP rules is mainly up to the member states (see e.g. Art. 4). Thus, the existing Community Inspectorate is limited to the verification of member states’ enforcement measures. Although the control regulation was amended numerous times since 1993, many aspects of member states’ control activities such as procedures for the prosecution and punishment, as well as penalties imposed, were criticised as poorly coordinated.

<sup>30</sup> The conformity of rules for the importation of sardines with WTO law was at issue in the WTO dispute EC – Trade Description of Sardines (WT/DS231).

<sup>31</sup> Long distance fishing south of EC waters is mainly done by Spanish vessels (around 88% of all EC vessels operating long distance. See Adela Rey Aneiros, *La Unión Europea frente a las transformaciones del derecho internacional de la pesca* (2001).

<sup>32</sup> See Council Regulation (EEC) No 2214/80 of 27 June 1980 on the conclusion of the Agreement on fisheries between the European Economic Community and the Kingdom of Norway, OJ L 226, 29.08.1980, 47 (cf Art.1 of the agreement).

<sup>33</sup> See, for instance, the Agreement with the Gabon: Framework Agreement (Council Regulation (EC) No 2469/98 of 9.11.1998, OJ L 308, 18.11.1998, 3) and the Protocol currently in force (2001 – 2005) setting out the fishing opportunities for EC vessels and the related financial contribution (in this case €1,262,500 per year), see OJ L 73, 15.3.2002, 19.

<sup>34</sup> Council Regulation 2847/93/EEC of 12 October 1993 established a control system to the common fisheries policy, OJ L 261, 20.10.1993, p. 1, amended six times until 1997.

## Signalling Reform: From the Green Paper to the Roadmap

Since Council Regulation 3760/92/EEC foresaw the revision of some of its provisions by the end of 2002, the Commission seized the opportunity and embarked upon an overall reform of the CFP. After some consultation, the Commission published a Green Paper on the future of the CFP in March 2001.<sup>35</sup> Its conclusion was grim: the Commission had to acknowledge that the 1991 reforms of the CFP had not adequately addressed the problems.<sup>36</sup> At the same time, the fisheries sector had undergone a dramatic decline: 66,000 jobs lost in the catching sector reflected the threat to traditional fishermen as well as to the catching and processing industry. In its assessment of the CFP, the Commission came to the conclusion that:

*“[t]he policy has not delivered sustainable exploitation of fisheries resources and will need to be changed if it is to do so. Its shortcomings can be expressed in conservation, economic and political terms. As far as conservation is concerned, many stocks are at present outside safe biological limits. They are too heavily exploited or have low quantities of mature fish or both. The situation is particularly serious for demersal fish stocks such as cod, hake and whiting. If current trends continue, many stocks will collapse. At the same time the available fishing capacity of the Community fleets far exceeds that required to harvest fish in a sustainable manner.”<sup>37</sup>*

The Green Paper was followed by extensive discussions among both member states and stakeholders, confronting the Commission with several hundred comments on the Green Paper. Following this consultation, in Göteborg in June 2001 the European Council agreed that the review of the CFP should “address the overall fishing pressure by adapting the EU fishing effort to the level of available resources, taking into account the social impact and the need to avoid over-fishing”.<sup>38</sup>

These debates led to the publication of a number of legislative proposals for CFP reform in May 2002, including the so-called “Roadmap” for CFP reform indicating steps for its implementation.<sup>39</sup> Some of

<sup>35</sup> Green Paper on the Future of the Common Fisheries Policy, COM(2001) 135 final 20.3.2001.

<sup>36</sup> Green Paper on the Future of the Common Fisheries Policy, COM(2001) 135 final, Report on the Implementation of the Community System for Fisheries and Aquaculture over the Period 1993-2000, p.4.

<sup>37</sup> Ibid.

<sup>38</sup> Presidency Conclusions – Göteborg, 15 and 16 June 2001 (SN 200/01); No.31

<sup>39</sup> Communication from the Commission COM(2002) 181 final of 28.05.2002.

these proposals have already been dealt with, others are subject to deliberation and more legislative proposals are yet to come.

### Outcome of the Fisheries Council of December 2002

On the occasion of the annual meeting of the Fisheries Council in December 2002 important steps were taken towards a new CFP with the adoption of three regulations, the most important one being the new basic Regulation No 2371/2002 replacing the CFP Regulation of 1992.<sup>40</sup> Together with new Regulations on emergency Community measures for scrapping fishing vessels<sup>41</sup> and the Community structural assistance in the fisheries sector<sup>42</sup>, this Regulation is the basis for the reorientation of the CFP. What are the facets of the “New Common Fisheries Policy”?

### Multi-Annual Stock Management

The most important result of the reforms in regard to stock conservation will probably be the creation of two novel instruments, the recovery plan and the management plan. While management plans may be adopted by the Council “as far as necessary to maintain stocks within safe biological limits”<sup>43</sup> and will establish targets for stocks that are at or within safe biological limits, thus aiming at the long-term conservation of stocks, recovery plans may be introduced for stocks, which are outside safe biological limits<sup>44</sup>. As the sixth recital indicates:

*“The objective of sustainable exploitation will be more effectively achieved through a multi-annual approach to fisheries management, involving multi-annual management plans for stocks at or within safe biological limits. For stocks outside safe biological limits, the adoption of multi-annual recovery plans is an absolute priority. In line with scientific advice, substantial reductions in fishing effort may be required for these stocks.”*

While this long-term approach may be achieved by implementing recovery and management plans, the characteristics of a given recovery plan may vary according to political decisions by the Council and

with relation to management plans. These must only be adopted as far as necessary (Art. 6 para. 1). It would, therefore, seem premature to tell whether a multi-annual approach will characterize the CFP in the future. It can be hoped, also from the standpoint of fishermen, that the Council will wisely use these two instruments in order to achieve the stated goal of “ensuring exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions”. In any event, the regulation states that both plans have to be consistent with the precautionary approach.<sup>45</sup>

Recovery plans may include all measures set forth in Article 4 para. 2 lit. c – h. This means for instance limiting catches, fixing the number and type of fishing vessels authorised to fish, and also the limitation of the so-called fishing effort. The fishing effort is legally defined as “the product of the capacity and the activity of a fishing vessel; for a group of vessels it is the sum of the fishing effort of all vessels in the group” (Art. 3 lit. h). This means the number of days a particular vessel is allowed to go out to sea. Of course, specific technical measures may also be adopted.

At the upcoming Fisheries Council in November 2003 two proposals will be on the agenda again concerning recovery measures for cod and northern hake.<sup>46</sup> They were already presented under a single proposal two years ago, but no consensus could be reached. Thus, only temporary measures were agreed on, whose validity will expire in December of this year. The proposals aim at achieving an increase in the quantities of adult fish in cod and hake stocks over the next 510 years by setting TACs at sustainable levels.<sup>47</sup>

Finally, the Commission is authorized to take emergency measures “if there is evidence of a serious threat to the conservation of living aquatic resources resulting from fishing activities and requiring immediate action.”<sup>48</sup> The measures shall not last more than six months but can be extended up to one year. Similarly, member states can take emergency measures in cases of “evidence of a serious and unforeseen threat to the conservation of living aquatic resources” and “where any undue delay would result in damage that would be difficult to repair”. Member states’ emergency measures may be ap-

<sup>40</sup> Council Regulation 2371/2002/EC on the conservation and sustainable exploitation of fisheries resources under the CFP, OJ L 358/59, 31.12.2002, hereafter referred to as Framework Regulation.

<sup>41</sup> Council Regulation 2370/2002/EC established an emergency Community measure for scrapping fishing vessels of 20 December 2002, OJ L 358/57, 31.12.2002.

<sup>42</sup> Council Regulation 2369/2002/EC amended Regulation (EC) 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector, OJ L 358/49, 31.12.2002.

<sup>43</sup> Article 6 (1) Regulation 2371/2002.

<sup>44</sup> Article 5 Regulation 2371/2002.

<sup>45</sup> Articles 6 (3) and 5 (3) of the Framework Regulation. “the absence of adequate scientific information should not be used as a reason for postponing or failing to take management measures necessary to conserve target species.” Article 3 (i) of the Framework Regulation. The precautionary approach is also mentioned in the “objectives” of the CFP, Article 2 (1).

<sup>46</sup> COM(2003) 237 – IP/03/631 and COM(2003) 347 – IP/03/910.

<sup>47</sup> See also Conclusions and Outlook.

<sup>48</sup> Article 7 (1) of the Framework Regulation.

plied for up to three months. A state must notify the Commission, the other member states and the Regional Advisory Councils concerned of its intention to take such measures. Within their 12 nautical mile zone, member states may also impose long-term conservation restrictions, provided that they are non-discriminatory and the Commission, the other Member States and the Regional Advisory Councils have been consulted.<sup>49</sup> In the case of such measures by member states, the Council, acting by qualified majority, may, however, take a different decision.

### Adjustment of Fishing Capacity

One of the most controversial issues of the December Council was the question of state aids for the replacement and modernisation of the fishing vessels.<sup>50</sup> Even though all member states acknowledged the over-capacities of the Community fleet, the timeframe for the phasing-out of subsidies was hotly disputed. The Council agreed on a compromise, thus abolishing the Multi-annual Guidance Programmes (MAGPs), which had proven to be ineffective and too complicated. According to Article 11 of the new basic Regulation No 2371/2002, member states have to “adjust the fishing capacity of their fleets in order to achieve a stable and enduring balance between such fishing capacity and their fishing opportunities”.

The starting point for the management of the fishery fleet is now fixed in Article 12. Reference levels are set based on the MAGPs of 1997-2002 for each segment as fixed for 31 December 2002. Article 13 introduces the so-called Entry/Exit scheme aiming at an overall capacity reduction, which every member state has to implement. Thus, the introduction of new vessels into the fleet *without* public aid must be compensated by a previous withdrawal of at least the same amount of capacity.<sup>51</sup> In cases of new vessels assisted with public subsidies, the provision differentiates between smaller and larger vessels: For new vessels of 100 GT<sup>52</sup> or less, the withdrawal capacity must equal the amount of entering capacity, and for vessels of more than 100 GT, the reduction must be at least 1.35 times the new amount of capacity. Moreover, from 1 January 2003 until 31 December 2004 each member state choosing to enter into new public aid commitments for fleet renewal after 31 December 2002 is obliged to

achieve a reduction in the overall capacity of its fleet of 3 % for the whole period in comparison to the reference levels.

Interestingly, conditionality is introduced relating to Community financial assistance: Member states are only eligible for funds if they have met the requirements mentioned above.<sup>53</sup> However, things are even more complicated, for a number of subsidies for fishing vessels remain:

- Aid for the renewal of fishing vessels will be available only until 31 December 2004 and only for vessels under 400 gross registered tonnes (GT).<sup>54</sup>
- Aid for the modernisation of fishing vessels that are at least five years old can be granted until 2006 to improve safety, product quality or working conditions, switch to more selective fishing techniques or to equip vessels with a monitoring system (VMS).
- So-called scrapping-premiums can still be paid, i.e. aid for the final cessation of a vessel's fishing activities. In addition, an extra “scrapping fund” of 32 million Euros was established as an “emergency Community measure” to support fisheries affected by a recovery plan adopted by the Council according to the new framework regulation. This measure is planned for the period from 2003 to 2006.<sup>55</sup>
- Aid for the permanent transfer of EU vessels to third countries, including through the creation of joint enterprises with third country partners will be available under certain conditions until the end of 2004, but generally limited to countries with which the EU has signed a fisheries agreement and provided that “appropriate guarantees” exist “that international law is not likely to be infringed, in particular with respect to the conservation and management of marine resources or other objectives of the [CFP] and with respect to working conditions of fishermen”.<sup>56</sup>
- Finally, aid may also be granted in cases of “a permanent reassignment of fishing vessels for non-profitable purposes other than fishing”.

<sup>49</sup> Article 8 and 9 of the Framework Regulation.

<sup>50</sup> Danielle Charles le Bihan, *La réforme de la politique commune de la pêche*, Revue du Marché commun de l'Union européenne, no. 465, Février 2003, p. 85.

<sup>51</sup> Capacity meaning a vessel's tonnage in GT and its power in kW.

<sup>52</sup> See the Eurostat overview: Statistics in focus: “11% reduction in EU fishing fleet in 5 years”, Theme 5 – 32/2003.

<sup>53</sup> See Article 16 para. 1. This does, of course, not apply to funds for the scrapping of fishing vessels.

<sup>54</sup> See Article 9 of Council Regulation No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector, as amended by Council Regulation No 2369/2002 of 20.12.2002 (OJ L 31, 1.2.2002, p. 25).

<sup>55</sup> See Art. 1, 2 of Council Regulation 2370/2002/EC, supra note 41. In order to be eligible, a fishing vessel has to be obliged to reduce its fishing effort by 25 % or more as a consequence of a recovery plan.

<sup>56</sup> See Article 7 of Council Regulation No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector, as amended by Council Regulation No 2369/2002 of 20.12.2002 (OJ L 31, 1.2.2002, p. 25).

Socio-economic measures in favour of fishermen associated with the adjustment of fishing capacity stemming from the new framework regulation were also approved.<sup>57</sup> Eligible measures may include national early-retirement schemes, individual compensatory payments to fishermen, and the retraining of fishermen outside marine fisheries.

### Control and Enforcement

A major shortcoming of the existing CFP was the member states' control, which was insufficiently executed and allowed for differences in its enforcement. The sanctions imposed by the member states were not always sufficiently harsh to act as a disincentive for fishermen.

In the future, the Framework Regulation will oblige member states to ensure a more effective enforcement of CFP measures. The Council shall establish a catalogue of measures to be applied by the member states in regard to serious infringements.<sup>58</sup> This will result in more transparent and effective control of the CFP. However, the Commission's possibilities to carry out inspections without the assistance of the member states concerned under the Regulation are more limited than foreseen in the proposal.<sup>59</sup>

A new feature of the enforcement system is the possibility of member states to control other EU vessels in its own waters, in Community waters as well as in international waters subject to certain restrictions. This measure is supposed to reinforce co-operation between EU countries and improve enforcement.

Following the December Fisheries Council, the Commission presented a Communication on a uniform and effective implementation of the CFP in March 2003.<sup>60</sup> Herein the Commission observed that conservation and control measures in the past have not been fully implemented. In order to change this, the Commission proposes firstly an action plan for more effective control and secondly the creation of a joint inspection structure (JIS). The action plan puts forward 10 points, which mainly intend to strengthen the surveillance of the Commission over

the national inspections but also to better coordinate and standardise controls.

The JIS proposed by the Commission meets certain limits due to restricted funds and competencies of the Community Fisheries Control Agency (CFCA), which only has 25 inspectors. The Commission, therefore, wants the member states to assign means to the joint implementation pool. While stressing that the member states remain responsible for control and enforcement of the CFP, the Commission intends to institutionalise the cooperation not only between the member states and the Commission but also among the member states themselves.<sup>61</sup>

Since the December Council, The Commission has proven that it will take the issue of enforcement seriously. In June 2003 the Commission introduced a "public compliance scoreboard" on the Internet.<sup>62</sup> This tool provides online information about member states' compliance with their obligations under the CFP as well as the state of infringement procedures in relation to fisheries. The Commission has intensified the use of the latter to act against member states, which fail to effectively enforce fisheries rules. Just recently, the Commission instituted proceedings against Spain and the UK for "a series of grave failings including serious shortcomings in inspections and monitoring of fishing and landing activities, validating and cross-checking of data, follow up of infringements and applying deterrent sanctions against wrong-doers."<sup>63</sup>

### Participatory Decision-Making

The Roadmap stressed the need to improve transparency and participatory decision-making as a reaction to complaints by fishermen, their organisations, non-governmental organisations and other stakeholders. The Framework Regulation therefore provides for the establishment of so-called Regional Advisory Councils (RACs) that may, but do not have to, be consulted about proposals for measures such as multi-annual recovery plans.<sup>64</sup> A Commission's proposal of 15 October 2003 for a Council Decision sets out the details of the RACs organisation and work.<sup>65</sup> These councils will be composed primarily of fishermen and other representatives of interests affected by the CFP, such as representatives of the fisheries and aquaculture sectors, environment and consumer interests and scientific ex-

<sup>57</sup> See Article 12 of Council Regulation No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector, as amended by Council Regulation No 2369/2002 of 20.12.2002 (OJ L 31, 1.2.2002, p. 25).

<sup>58</sup> Article 25 (4) of the Framework Regulation.

<sup>59</sup> The Council restricted the Commission's inspections to areas or stocks which are subject to a specific monitoring programme. In addition, the inspections only take place on fishing vessels and in places of first landing.

<sup>60</sup> European Commission, Communication from the Commission to the Council and the European Parliament, Towards uniform and effective implementation of the Common Fisheries Policy, COM(2003) 130 final.

<sup>61</sup> In September 2003, the Commission launched a study on the feasibility of a Joint Implementation Structure, press release of 2 September 2003.

<sup>62</sup> Communication COM(2003) 344 11.6.2003.

<sup>63</sup> Commission Press release of 11 November 2003.

<sup>64</sup> Art. 31 of the Framework Regulation.

<sup>65</sup> Proposal for a Council Decision establishing Regional Advisory Councils under the Common Fisheries Policy, COM(2003) 607 final.

perts from all member states having fisheries interests in the sea area or fishing zone concerned. Hopefully, these new institutions will contribute substantially to the broad consensus among different stakeholders that the Commission aims to reach.<sup>66</sup>

### Action Plan to Integrate Environmental Protection

The Commission also adopted numerous action plans dealing with a variety of aspects of the CFP.<sup>67</sup> Relating to environmental concerns, the Commission came forward with an action plan to integrate environmental protection into the CFP in May 2003.<sup>68</sup> A number of priority measures are identified, the most important being the reduction of overall fishing pressure to sustainable levels, the improvement of fishing methods and the diminution of public aid that implies an increase of fishing capacity. The Communication also contains a number of interesting considerations such as the use of trade measures (compatible with WTO obligations), the use of eco-labels for fisheries products and the drafting for a strategy for distant water fisheries.<sup>69</sup> The integration of environmental considerations into the aquaculture sector is also addressed.

### External Relations

A significant part of the Community fishing sector depends on access to non-Community aquatic resources in order to sustain jobs in this sector and to meet the increasing demand for fish products in Europe. As a result, environmental and social problems may be shifted from European waters to other regions. In the Green Paper and the Roadmap, the Commission underlined the importance of external relations and highlighted a number of environmental and social weaknesses in current bilateral agreements with third party countries.

The Fisheries Council in December 2002 did not agree on decisions concerning external relations. However, the Commission presented a Communication on fisheries agreements with third party coun-

tries.<sup>70</sup> This Communication proposes that the EU fisheries bilateral relations should gradually move from access agreements to partnership agreements with a view to contribute to responsible fishing. To this end, the Community will undertake sustainability impact assessments of fisheries agreements and impact assessment studies in order to evaluate the impact on local economies. The Commission recognizes that the specific objective of the Common Fisheries Policy is to maintain the European presence in distant Fisheries and to protect European fisheries sector interests. On the other hand, the specific objective of the European Development Policy is to foster developing countries' capacities to use their marine resources, to increase local value added and to obtain the fairest price for access rights of foreign fleets to their EEZ. In the future, therefore, financial contributions by the Community will have to be justified by a mutual interest of the two parties to invest in sustainable fisheries policy and not just as a payment for access rights to fishing possibilities for the benefit of European fishing enterprises.<sup>71</sup>

A number of bilateral fisheries protocols have been extended since December 2002, which include innovative elements such as aid to the development of effective control in the developing countries.<sup>72</sup>

### Mediterranean Sea

Often overlooked but socio-economically important are the Mediterranean fisheries. The 40,000 vessels operating in this region account for 12% of EU catches. In the case of the Mediterranean, there is a lack of reliable scientific data on the state of the fish stocks. There is also a presumption that they are in a similar state of overfishing than other EU fisheries. Due to the narrowness of the continental shelf, a

<sup>70</sup> Communication of the Commission on an integrated framework for Fisheries Partnership Agreements with third countries, 23.12.2002, COM(2002) 637 final

<sup>71</sup> This issue is closely connected to the WTO disciplines on fisheries subsidies. In this context, the European Community came up with a proposal in April 2003 prohibiting capacity enhancing subsidies (including subsidies for the permanent transfer of fishing vessels to third party countries, including through the creation of joint enterprises with third country partners), while allowing other categories of subsidies. These non-actionable subsidies would comprise subsidies for retraining fishermen, early retirement schemes, modernization of vessels with respect to safety, product quality, working conditions and more environmentally friendly fishing methods, support in cases of unforeseeable circumstances (natural disasters) or tie-up schemes in the context of recovery plans for overexploited fish stocks, and finally subsidies for the scrapping of vessels and the withdrawal of capacity. (See the Submission of the EC, Document TN/RLW/82, 23.4.2003, p. 2, 3.) At the time of writing this article it seemed premature to draw any conclusions from the discussions so far. However, the expectation of some sort of compromise leading to a strengthening of disciplines regarding subsidies that promote overcapacity and overfishing appears to be reasonable.

<sup>72</sup> These include agreements with Cape Verde (October 2003), Madagascar (September 2003), Guinea (July 2003) and Ivory Coast (June 2003).

<sup>66</sup> Roadmap, p. 4.

<sup>67</sup> E.g. A Strategy for the Sustainable Development of European Aquaculture, 19.9.2002, COM(2002) 511 final; Community Action Plan for the Eradication of illegal, unreported and unregulated fishing, 28.5.2002, COM(2002) 180 final; Action plan to counter the social, economic and regional consequences of the restructuring of the EU fishing industry, 6.11.2002, COM(2002) 600 final; Community Action Plan to reduce discards of fish, 26.11.2002, COM(2002) 656 final.

<sup>68</sup> European Commission, Communication from the Commission setting out a Community Action Plan to integrate environmental protection requirements into the Common Fisheries Policy, COM(2002) 186 final.

<sup>69</sup> C 208/16 3.9.2003

substantial part of the fishing takes place close to the coast. In addition, several straddling and shared fish stocks are present in these waters. This necessitates increased cooperation with the affected member states and other coastal states, which is lacking so far. The management measures that were proposed by the Commission try to tackle these problems.<sup>73</sup>

### Conclusion and Outlook

The reforms adopted by the Council in December 2002 undeniably present a major step towards more sustainable fisheries in Europe. Especially the long-term approach to fisheries management, which will hopefully avoid annual uncertainties about the TACs, must be seen as valuable progress. Whether or not they will be “tailor-made to the state and characteristics of each stock and the fisheries in which they are caught”<sup>74</sup> as the Commission claims and whether this is possible at all, remains to be seen. Although the reforms were criticised for not being comprehensive enough, some important steps have been taken, especially in regard to capacity reduction and conservation measures. The Commis-

sion has also demonstrated increased vigorousness in regard to the enforcement of the CFP, among other things, by the establishment of the “scoreboard”, which is accessible to the public on the Internet and documents the member states' shortcomings.

However, the dispute over a complete moratorium on cod and hake fisheries in 2002, originally proposed by ICES,<sup>75</sup> ultimately only resulted in cuts of 45% of the total allowable catch for cod in the North Sea for 2003, which fell considerably short of the compromises offered by the Commission. This casts a shadow on the prospects of a swift adoption of the necessary recovery plans, especially those for cod and northern hake. These issues are on the table once again for the November 2003 Fisheries Council. It remains to be seen whether the member states will accept the recovery plans, which have been labelled by the Commission as essential and urgent in order to secure the future of these fisheries.

The magnitude of action plans and proposals put forward by the Commission should not conceal the fact that the reform will only be successful if they indeed lead to a reduction of the fishing efforts of the member states.

<sup>73</sup> Proposal for a Council Regulation concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea and amending Regulations (EC) No. 2847/93 and (EC) No. 973/2001, COM(2003) 589 final.

<sup>74</sup> European Commission, press release of 23.12.2002, Outcome of the Fisheries Council of 16-20 December 2002.

<sup>75</sup> European Commission, press release of 28.10.2002, Lack of action depletes fish stocks: scientific advice recommends moratorium on cod fisheries.

## Legal Factors Driving Agrobiodiversity Loss

*Franziska Wolff*

### 1 Introduction

Despite leading a shadowy existence in the public biodiversity debate, the issue of the loss of agrobiodiversity is hotly debated in expert circles. A broad understanding of agrobiodiversity can be described as that part of biodiversity that contributes in the context of agriculture to nutrition, livelihoods and the maintenance of habitats. Its scope covers agricultural crops, productive livestock, raw materials, medical plants and animals used for transport. Agrobiodiversity is highly threatened mostly by the spread of modern agriculture and the globalisation of food markets. This article describes the problem, diagnosis and the causes identified. In particular, it will analyse how legal and institutional structures in the international, European and national realm contribute to the problem. The focus is on intellectual

property rights, sovereignty regimes as well as on seed trade and livestock breeding regulations. Finally, chances for sustainable use and protection of agrobiodiversity in the future are discussed.

### 2 The Concept of Agrobiodiversity

The term agrobiodiversity has evolved only in recent years in the wake of the general biodiversity discourse, which really began in the 1980s.<sup>1</sup> Anal-

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<sup>1</sup> The term “biodiversity” emerged in the context of two important conferences, the US Strategy Conference on Biological Diversity in 1981 and its follow-up in 1986 (Wilson 1988, see also Lovejoy 1980, Norse/McManus 1980).

gous to the term biodiversity, agrobiodiversity encompasses different levels. It relates to the diversity of agro-ecosystems as well as that of species of crops and farm animals, and to the genetic variance within populations, varieties and races.<sup>2</sup> In its broadest sense, agrobiodiversity also comprises soil organisms in cultivated areas, insects and fungi that promote good production, wild species from off-farm natural habitats as well as cultural and local knowledge of diversity and management forms as the basis of the exploitation of diversity.<sup>3</sup> This article focuses on species and genetic diversity.

Though the term agrobiodiversity emerged late, a wide intersection of the topic was already analysed under the term "genetic resources" in the 1960s when the Food and Agriculture Organisation (FAO) of the United Nations started to discuss the genetic foundations of plant breeding<sup>4</sup>.

During the last three decades the understanding of agrobiodiversity has developed from the recognition of the importance of genetic diversity, particularly for crops and an emphasis on the *ex situ* conservation<sup>5</sup> of genetic resources in the 1970s, to the adoption of an *in situ*/on farm approach where plants and animals are kept in natural surroundings or used within agricultural production systems in the 1990s. Finally, agrobiodiversity thinking has become em-

bedded in an integrated, holistic agro-ecosystem approach.<sup>6</sup>

The crucial difference between wild biodiversity and agrobiodiversity (for the most part) is characterised by the proximate interaction between natural 'material' and human action. The diversity of productive livestock and crops is the result of a century of human breeding efforts based on locally differentiated resources. It reflects the diversity of various agricultural production systems and their cultural and social dependency. Maintenance of agrobiodiversity is inseparably linked to the use and utilisation by humans (unlike with wild biodiversity, protection in the sense of 'leaving it alone' does not suffice). These differences are broadened in the political discourse. While "general" biodiversity was made a central theme by nature protectionists, agrobiodiversity or plant and animal genetic resources were embraced as a topic by agriculturalists and breeders. Since agriculture has been, and still is, seen as one of the destructive factors for biodiversity, it somewhat stands to reason that agrobiodiversity was not on the agenda of nature protectionists. Therefore, also in the context of the Convention on Biological Diversity (CBD), agrobiodiversity was only explicitly addressed from 1996 onwards.<sup>7</sup>

### 3 Agrobiodiversity Loss: From Riches to Risk

While in animal breeding genetic erosion is conceded by most relevant actors, with respect to plants the diagnosis of agrobiodiversity loss is not undisputed. The plant breeding industry, e.g. stresses that "although the visible diversity in farmers' fields may have been reduced, the diversity of valuable genes has been increased by introgression of new materials"<sup>8</sup>. Not only does the analysis vary according to the level of diversity analysed (genetic, species, ecosystem), but also according to the measures of diversity and the methods of analysis employed. However, the following data and assessments can be considered reliable. In the report on the "State of the World's Plant Genetic Resources for Food and Agriculture (PGRFA)", the FAO describes as "substantial" the loss in diversity of plant genetic re-

<sup>2</sup> Cf. the definition in Decision V/5 of the Convention on Biological Diversity: "Agricultural biodiversity is a broad term that includes all components of biological diversity of relevance to food and agriculture, and all components of biological diversity that constitute the agro-ecosystem: the variety and variability of animals, plants and micro-organisms, at the genetic, species and ecosystem levels, which are necessary to sustain key functions of the agro-ecosystem, its structure and processes, in accordance with annex I of decision III/11 of the Conference of the Parties to the Convention on Biological Diversity." Agrobiodiversity includes aquatic and forest genetic resources, which, however, are not specifically addressed in this article.

<sup>3</sup> Thrupp *Cultivating Diversity: Agrobiodiversity and Food Security*, World Resources Institute, Washington, 1998; Brookfield, *Exploring Agrobiodiversity*, New York, 2001.

<sup>4</sup> Genetic resources for food and agriculture (GRFA), generally speaking, encompass the genetic material contained in (traditional and modern) plant varieties and farm animal species as well as in primitive and wild relatives that are used, or may be used, for the production of food and agriculture. See, FAO Report on the State of the World's Plant Genetic Resources for food and agriculture, prepared for the International Technical Conference on Plant Genetic Resources Leipzig, Germany 17-23 June 1996. The term of agrogenetic resources therefore not only embraces diversity in actual use, but also that of potential use and value ("latent diversity", cf. Gollin/Smale, *Valuing genetic diversity: Crop plants and agroecosystems*. In: W. Collins/C. Qualset (ed.): *Biodiversity in agroecosystems*. Boca Raton, 1999, pp. 237-265.). They are the raw material from which new crop varieties and breeds are being developed. In the field of plant breeding, Plant Genetic Resources may consist of a plant breeder's own plant varieties and lines, the material of other breeders, accessions of used crops in national or international gene banks, landraces, primitive or wild forms of the species and relatives from a different plant species. The breeding value of the plant genetic resource decreases in this order (Röbbelen 2003: 28).

<sup>5</sup> Outside of natural habitats, i.e. in genebanks, botanic gardens, zoos etc.

<sup>6</sup> Aarnink, W./Bunning, S./Collette, L./Mulvany, P., *Sustaining Agricultural Biodiversity and Agroecosystem Functions. Opportunities, incentives and approaches for the conservation and sustainable use of agricultural biodiversity in agroecosystems and production systems*. Report of an International Workshop, FAO Headquarters, Rome, 2-4 December 1998.

<sup>7</sup> Third Conference of the Parties, Buenos Aires.

<sup>8</sup> ASSINSEL: ASSINSEL Position on Maintenance of and Access to Plant Genetic Resources for Food and Agriculture (PGRFA), Adopted in May 1996.

sources for food and agriculture (PGRFA)<sup>9</sup> including the disappearance of species, plant varieties and gene complexes (“genetic erosion”).<sup>10</sup> World nutrition today is mainly based on a mere ten crops.<sup>11</sup> For Germany it is estimated that, compared to the first half of the twentieth century, 75 percent of cultivated plants in agriculture and horticulture have disappeared;<sup>12</sup> in some areas “genetic erosion” is even supposed to have reached over 90 percent.<sup>13</sup> Similar processes have been taking place globally from the mid nineteenth century onwards.<sup>14</sup> Concerning livestock, half of the breeds that existed in Europe at the turn of the century have become extinct; a third of the remaining 770 breeds are severely endangered. In Germany only 5 out of at least 35 indigenous breeds of cattle remain. The FAO predicts that worldwide 28 percent of livestock breeds are currently at risk of extinction.<sup>15</sup>

Why is this loss problematic? Firstly and most importantly, genetic resources, along with soil and water, constitute the foundation upon which agriculture and world food security are based.<sup>16</sup> Beyond the immediate uses of agrobiodiversity as described above (relevance to nutrition, livelihoods, habitats), agrobiodiversity is important to preserve possible future development paths. Genetic diversity found in domestic animal breeds and plant varieties allows farmers and breeders to select stocks or develop new breeds and varieties in response to changes in the environment, threats of disease, new knowledge of human nutrition requirements, changing market conditions and societal needs, all of which are largely unpredictable. The protection of landraces and indigenous livestock breeds is worthwhile despite their lower yields because they often possess valuable traits such as disease and pest resistance

and are better adapted to harsh conditions and poor quality feed, which are qualities desirable for low-input, sustainable agriculture. On the other hand, agrobiodiversity also protects against vulnerability to e.g. climate stress, insect pests and diseases that can devastate a uniform crop, especially on large plantations. With farm animals, too, genetic diversity enables adaptation to diseases, parasites, or variations in the availability and quality of food. Thus, agrobiodiversity loss increases the risks for individual farmers, and can thus undermine the stability of agriculture.<sup>17</sup> This loss also accounts for further environmental damage. The reason for this link is that genetically homogenous varieties and high performance animals are more vulnerable, often prone to diseases caused by breeding (“burn out syndrome”) and dependent on high and stable inputs of fertilizers and pesticides in the case of plants, and food, energy, and pharmaceuticals in the case of animals.

#### 4 Causes of Agrobiodiversity Loss

The causes of agrobiodiversity loss are manifold and interrelated. The spread of modern, commercial agriculture and intensive, high-input production systems features as the prime driver of diversity decrease, putting native varieties and breeds at risk.<sup>18</sup> Native varieties and breeds are substituted with high-yielding crops and breeds that no longer need to be adapted to natural (climate, soil etc.) conditions, since machinery, irrigation, fertilizers and pharmaceuticals homogenize habitats (in a both costly and environmentally harmful way). In developing countries, this process has been reinforced by a donor policy that has promoted the import of exotic breeds and crossbreeding and that threatens the survival of local breeds.<sup>19</sup> Both the markets for agricultural inputs and for agricultural outputs have been increasing in size, thus feeding into a globalising food market that demands goods in huge consignments. In order to process them industrially, those agricultural goods need to be homogenous. Therefore, apart from the yields it is the requirements of industrial cultivation,<sup>20</sup> husbandry<sup>21</sup> and

<sup>9</sup> FAO, Report on the State of the World's Plant Genetic Resources for food and agriculture, prepared for the International Technical Conference on Plant Genetic Resources Leipzig, Germany 17–23 June 1996.

<sup>10</sup> While varieties can disappear without a corresponding loss in genetic diversity (the genes in a lost variety might still exist in other varieties), varieties as unique combinations of genes can have a particular value and immediate utility.

<sup>11</sup> Wheat, rice and maize cover half of the global energy need for nutrition from plants; seven further species (sorghum, millet, potato, yam, soybean, sugar cane and sugar beet) make up for most of the rest, cf. FAO (Food and Agricultural Organisation): Food Security. <http://www.fao.org/biodiversity/sd/foodsecur.asp>, September 2000.

<sup>12</sup> UBA (Umweltbundesamt), Beiträge zur nachhaltigen Entwicklung. Nachhaltige Entwicklung in Deutschland. Die Zukunft dauerhaft umweltgerecht gestalten Berlin, 2002, p.403.

<sup>13</sup> TAB (Büro für Technikfolgenabschätzung) Gentechnik, Züchtung und Biodiversität. TAB-Arbeitsbericht Nr. 55, Bonn, 1998.

<sup>14</sup> GTZ (Gesellschaft für Technische Zusammenarbeit), Sicherung der Agrobiodiversität im ländlichen Raum. Homepage <http://www.gtz.de/agrobiodiv/u-blick/u-blick.htm> (July 2003).

<sup>15</sup> FAO, Agrobiodiversity: the case for conserving domestic and related animals. FAO Fact sheet on the conservation of domestic animal genetic resources. <http://www.fao.org/docrep/v1650t/v1650t0y.htm>, 1993.

<sup>16</sup> FAO, supra note 9, p. 6.

<sup>17</sup> Thrupp, Lori Ann, Linking biodiversity and agriculture: Challenges and opportunities for sustainable food security. World Resources Institute, Washington D.C., 1997.

<sup>18</sup> FAO, supra note 9, p. 13.

<sup>19</sup> Ellen Geerlings / Evelyn Mathias / Ilse Köhler-Rollefson, Securing tomorrow's food. Promoting the sustainable use of farm animal genetic resources. Published by the League of Pastoral People, Ober-Ramstadt, 2003, p.6.

<sup>20</sup> E.g. resistance to toxic pesticides, response to chemical fertilizers.

<sup>21</sup> I.e. the conditions of modern livestock production: the selection for the intensive production of meat, milk or eggs (“single purpose animals”: layers vs. broilers, dairy cows vs. beef cattle) at high feeding levels in highly controlled conditions (e.g. caging).

processing<sup>22</sup> (and to some extent consumer demand) that determine the breeding objectives rather than improved adaptation to natural conditions.

Modern, highly selective breeding methods contribute to agrobiodiversity loss, too. In livestock breeding e.g. artificial insemination, multiple ovulation and embryo transfer are applied to reproduce only a few top performers; a huge number of other individuals are thus excluded from breeding and the genetic distance within populations is correspondingly reduced. Hybrid breeding, with both animals (e.g. poultry, pigs) and plants (e.g. corn, rice), and in the future cloning are methods used to reproduce genetically homogenous and high performing livestock and plant varieties. In the case of animals, impacts on the genetic pool are expected when traditional pure breeding gets replaced by the modern methods.<sup>23</sup> Also, since hybrid breeding produces infertile breeds and seed farmers cannot use the material to continue breeding/growing according to their own selection preferences,<sup>24</sup> they have to instead content themselves with commercially bred/grown livestock and seeds, which they even have to buy again every year. In plant breeding, 'Genetic Use Restriction Technologies' (GURTs) have the same effect.<sup>25</sup>

Besides these factors, legal regimes have contributed to agrobiodiversity loss. A selection of these factors is discussed in the following chapter.

## 5 The Role of Legal Regimes and Governance Structures

The economic and technological developments described above were partly supported by policies and legal structures such as intellectual property rights and sovereignty regimes that regulate access to and control over genetic resources as well as seed and livestock breeding law. Those have intentionally, or as side effects, supported the orientation towards high output and homogenisation, thus also

affecting the choice of plants and livestock in agricultural use.

### 5.1 The regulation of access and control

Access to and control of plant and farm animal genetic resources is regulated by Intellectual Property Rights (IPRs) in the realm of private law and, in the context of public (international) law by sovereign rights of states.<sup>26</sup>

#### 5.1.1 Intellectual Property Regimes

Breeding, particularly of plants, heavily relies on Intellectual Property Rights.<sup>27</sup> The background of this can be found in the specialised nature of agricultural production and the fact that breeding involves a high amount of work as well as intellectual and financial efforts. Especially for new plant varieties (not so much for animals),<sup>28</sup> breeders' returns are endangered by the biological possibility that farmers would reproduce the seeds. Without breeders' efforts, on the other hand, it is argued that the supply of agricultural production with high quality seeds would suffer.<sup>29</sup> Against this backdrop, in the early twentieth century intellectual property rights that originally applied to industrial inventions were merely extended to living matter to compensate breeders' efforts.

Two major IPR regimes can be distinguished that impact on agrobiodiversity in varying degrees: plant variety protection (PVP), applying only to plants, and patents.

#### Plant Variety Protection (PVP)

PVP systems have emerged in Europe from the late 1920s onwards. At the core of PVP are the so-called Plant Breeders' Rights (PBR), a specific form of Intellectual Property Right, which provides an exclusive right over the variety a breeder has developed. The main difference from patent protection lies in the restriction of PBRs to the concrete variety as a marketable product, while patents provide generic protection. In the 1960s an international harmonisation of national plant protection laws took place and the International Union for the Protection

<sup>22</sup> E.g. suitability of wheat for processing in mills.

<sup>23</sup> Frank Wetterich, Biological Diversity of Livestock and Crops: Useful Classification and Appropriate Agri-environmental Indicators. In: OECD (ed): Agriculture and Biological Diversity: Developing Indicators for Policy Analysis. Proceedings from an OECD Expert Meeting. Zurich/Switzerland, November 2001, p. 45.

<sup>24</sup> With hybrid seeds (so called HYVs/high-yielding varieties or HRVs/high-response varieties), farmers de facto cannot even re-sow material from the previous harvest because the seeds lose general agronomic value when being replanted.

<sup>25</sup> These genetic technologies either render the harvested seeds sterile ('Varietal' or 'VGURTs', popularly dubbed 'Terminator technology') or 'turn off' certain agronomically valuable traits in a plant when it is replanted ('Trait-related' or 'T-GURTs', partly dubbed 'Traitor technology'). Here, too, further adaptation through the farmer is rendered impossible. Farmers are thus pushed further into a dependency from agribusiness: in no way can they re-use the seeds, and mostly they have to purchase chemical inputs from the same company in order to stimulate the plants to reach the promised yields.

<sup>26</sup> Annie Kameri-Mbote/Philippe Cullet, Agro-biodiversity and international law – a conceptual framework. In: Journal of Environmental Law, Vol. 11 (2) 1999, pp. 257-279.

<sup>27</sup> IPRs provide breeders with the exclusive right to commercialise his or her creation for a limited time. This includes the authority to decide about the products utilisation and, in the case of patents, the right to exclude third parties from using it. In Europe, this instrument to protect breeders from abuse through farmers is complemented by seed laws which in turn aim at protecting farmers as the consumers of seed from abuse through breeder.

<sup>28</sup> With animals, breeders do not develop new races (as the taxonomic equivalent to plant varieties) but rather attempt to 'optimise' individuals. The question of IPRs therefore has not the same relevance as with plant breeding.

<sup>29</sup> Franz Wuesthoff/Herbert Leßmann/Gert Würtenberger Handbuch zum deutschen und europäischen Sortenschutz. Weinheim, 1999, p. 96.

of New Varieties of Plants (UPOV) was founded. Today, with 53 member states (increasingly from the developing world, too) the UPOV Convention has become the international reference system for PVP.

Plant Breeders Rights require that anybody who (re-) produces, conditions, offers for sale, markets or imports/exports propagating material of the protected variety needs the authorization of the breeder, which the breeder may subject to conditions (usually royalties) and limitations (Art. 14 UPOV Convention). The breeders rights are restricted by the so-called breeders' exemption and the farmers' privilege (Art. 15.1, 15.2), both of which were cut back in 1991. The breeder's exemption constitutes the right to use protected varieties for the breeding of other varieties and for experimental purposes, while the farmer's privilege refers to the farmer's right to save and re-use (formerly also to sell) harvested material.<sup>30</sup> Depending on national implementation, the plant variety protection may cover all plant varieties and needs to last a minimum of twenty years<sup>31</sup> (Art. 3, 19 UPOV Convention).

#### *Effects on agrobiodiversity*

In two senses the plant variety protection system of UPOV can be seen as harmful to agrobiodiversity. Firstly, the criteria for variety protection – the so called “DUS requirements” on Distinctness, Uniformity/Homogeneity and Stability of new plant varieties – impact on plant variability. Secondly, it is argued that Plant Breeders Rights, like other IPRs restricting access to genetic resources, have indirect effects on agrobiodiversity.

Within the DUS requirements it is particularly the uniformity criterion (Art. 5 (1) iii, Art. 8 UPOV Convention) that meets with criticism. It aims at restricting genetic diversity within a plant variety, because in order to apply a Plant Breeder's Right it is necessary to unequivocally distinguish the variety from other varieties. This presupposes physical distinctiveness and uniformity, which disappear at the expense of significant genetic variability.<sup>32</sup> In

the field, uniform varieties are less able to buffer stress (diseases, lack of growth factors) without suffering major qualitative and quantitative losses.<sup>33</sup> At the same time, the uniformity criterion precludes the protection of old landraces, which are frequently rich in genetic diversity within a variety.<sup>34</sup> From a broader perspective, the uniformity criterion is identified as a factor that makes PVP biased towards plant breeding for industrial agriculture.<sup>35</sup> Compliance with the criterion inclines breeders to develop varieties that have low adaptability and are highly adjusted to monocultural production systems for large markets. Contrary to this rationale, it is also argued that PBRs enhance genetic diversity because the introduction of PVP regimes has boosted the growing number and registration of new varieties.<sup>36</sup> However, linking the number of licensed varieties and the degree of genetic diversity neglects the issue of genetic distance or the degree of relationship between varieties. Phenotypical diversity does not give evidence of the genetic diversity of a plant variety.<sup>37</sup>

The indirect impacts of PVP on agrobiodiversity result from the restricted access they determine. The breeders' authorisation to (re-) produce, condition or market propagating material means that the material is not freely (i.e. free of charge) accessible. For the breeder, the right, in the first place, increases the incentive for commercial plant breeding. Secondly, it promotes the development of varieties with the largest market potential. This leads to the predominance of major crops that are widely adapted across large areas and that feature characteristics that best meet the needs of commercial farmers and the marketing or processing industries.<sup>38</sup> This impedes diversity.<sup>39</sup> Therefore, the strengthening of PBRs in

<sup>30</sup> Today, UPOV exempts from the breeder's rights only the re-use of seeds from a farmer's harvest on his own holdings and the non-commercial exchange, though a wider version of the farmer's privilege may be codified at the national level (“within reasonable limits” and subject to the “legitimate interests of the breeder”). Among others, this revision had made necessary an amendment of the FAO International Undertaking (IU) on Plant Genetic Resources for Food and Agriculture. The IU was still based on a wide conception of the farmers rights that included the right to also sell propagating material (as opposed to only exchange it non-commercially).

<sup>31</sup> Respectively 25 years in the case of trees and vines.

<sup>32</sup> Crucible Group, *People, plants and patents. The impact of intellectual property on biodiversity, conservation, trade and rural society*. Ottawa: IDRC, 1994. Thus, the uniformity criterion does not lead back to quality assurance but rather to the applicability of IPRs.

<sup>33</sup> J. Léon, *Züchtmethodik bei Getreide*. In: Steinberger, J., *Workshop Züchtung für den Ökolandbau am 10. und 11. Juni 2002 in Hannover – Kurzfassung der Vorträge und Stellungnahmen sowie Zusammenfassung der Ergebnisse*. Herausgeber Bundessortenamt, 2002, pp. 30-31.

<sup>34</sup> Graham Duffield, *Intellectual Property Rights, Trade and Biodiversity*. London, 2000.

<sup>35</sup> GRAIN, *Plant variety protection to feed Africa?* In: Seedling, December 1999.

<sup>36</sup> UPOV, *International Harmonization is Essential for Effective Plant Variety Protection and Transfer of Technology* (Based on an intervention in the Council for TRIPS, September 19, 2002, Geneva).

<sup>37</sup> Hans Neumeier, *Sortenschutz und/oder Patentschutz für Pflanzenzüchtungen*. Schriftenreihe zum gewerblichen Rechtsschutz des Max-Planck-Instituts für ausländisches und internationales Patent, Urheber- und Wettbewerbsrecht 80, 1990, p. 231; L.J. Butler/ B.W. Marion, *Impacts of Patent Protection in the U.S. Seed Industry and Public Plant Breeding*, Univ. Wisconsin, 1983, p. 72; Ursula Prall, (1998): *Saatgut und internationale Vorgaben des gewerblichen Rechtsschutzes*, in: BUKO Agrar Koordination/Forum für Internationale Agrarpolitik. Saatgut. Stuttgart, 1998, S. 52-55.

<sup>38</sup> Crucible Group, *supra* note 32.

<sup>39</sup> Some argue that also the charge of royalties for replanting of PVP-protected seeds hampers agrobiodiversity which was made possible by the UPOV revision of 1991. However, though this cutback of the so-called farmers' privilege raises the fiscal pressure on farmers and their depend-

the 1991 UPOV revision is to be seen critically. PBRs have been strengthened with respect to the object of protection (extension to all plant genera and species), to the scope of protection (extension to 'essentially derived' varieties<sup>40</sup> and to harvested material<sup>41</sup>) as well as to the possibility for member states to grant patents on top of breeders' rights ('double protection'). At the same time, the Breeder's exemption was restricted.<sup>42</sup> These revisions mostly go back to pressures resulting from the growing importance of biotechnology.<sup>43</sup> A further indirect effect of PVP is that it probably reduces the flow of scientific information and germplasm from the private to the public sector (Butler 1996). This is due both to the private sector's interest in not having public competitors who develop varieties for public welfare as well as to the forced market orientation within public research institutes in times of scarce public funding.

### Patents

Originally, patent law was not designed to apply to living matter, i.e. to material capable of self-reproduction or of being reproduced in a biological system. However, in the United States plant patents have been granted since the 1930s. Internationally, patent law is becoming more and more important with the growing relevance of biotechnological methods, in particular genetic engineering. The patenting of biological material is regulated in international patent law such as the WTO Agreement on Trade Related Intellectual Property Rights (TRIPs) and the European Patent Convention (EPC). The interpretation of these, however, led to a number of highly contentious questions. The TRIPs constitutes the international minimum standard for all WTO members and codifies that member states need to provide patents "for any inventions, whether products or processes, in all fields of technology" (Art. 27 (1) TRIPs, italics added). At the same time, "plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-

biological and microbiological processes" may be excluded from patentability in national legislation. However, states are bound to provide for the protection of plant varieties either by patents or by effective *sui generis* systems (e.g. plant variety protection)<sup>44</sup> or a combination of the two regimes (Art. 27.3 (b) TRIPs). In the industrialized world, there is usually a lot less leeway in terms of legal coverage. In the EPC, patents in the field of biological matter are excluded merely for "plants or animal varieties or essentially biological processes for the production of plants or animals" (Art. 53 (b) EPC, italics added). This implies that plant and animal components such as genes, gene sequences or cells, individual plants/animals as well as certain (non-microbiological) processes actually are patentable. The patent exemption on plant and animal varieties as well is being watered down by the European Patent Office judicature.<sup>45</sup> In the EC Biotechnology Patent Directive,<sup>46</sup> plant and animal varieties *prima facie* are also excluded from patentability (Art. 4.1 (a)) However, this provision is qualified by the clause that "Inventions which concern plants and animals shall be patentable if the technical feasibility is not confined to a particular plant or animal variety" (Art. 4.2). US patent law is even more expansive.

What is the background of this discussion? Generally, in order to receive a patent, an innovation in the first place needs to qualify as an invention. The term "invention", though, is defined in none of the international agreements on patent law.<sup>47</sup> Nonetheless, there is a general agreement that innovations need to be practical and technical. In a second step, in order to be eligible for patent protection, the invention needs to be new, involve an inventive step (i.e. are 'non-obvious') and be capable of industrial application ('usefulness'). Finally, the granting of patent protection requires the disclosure of the invention. As for patents on biological matter ('biopatents'), a major dispute surrounds whether or not plant or animal genetic material may at all constitute the subject of an invention.<sup>48</sup> This raises

ency on agribusiness under the given structures there is no immediate impact on agrobiodiversity: the replanting of high yielding crops is usually not linked to a substantial diversification in terms of adaptation or cultivating.

<sup>40</sup> Varieties that are developed by adding through genetic engineering one or two genes to a variety that was developed in a longstanding plant breeding process.

<sup>41</sup> As opposed to reproductive material only. This will impact on the farmers' possibility to replant harvested material.

<sup>42</sup> In the development of an 'essentially derived variety' from an already existing protected variety the grant of the PBR now depends on the authorisation of the original breeder who will most likely link it to royalties.

<sup>43</sup> Susan Bragdon/David Downes, Recent policy trends and developments related to the conservation, use and development of genetic resources. Issues in Genetic Resources No. 7, June 1998, p. 20.

<sup>44</sup> Dan Leskien/Michael Flitner, Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System. IPGRI (Hg.), Rom, 1997.

<sup>45</sup> Cf. *Ciba-Geigy Case* (EPOR Vol. C 758); *Lubrizol Case*, EPO Decision T320/87 Lubrizol/Hybrid plants (EPOR 173); *Plant Genetics System*, EPO Decision T356/93, Official Journal EPO 1995, 545.

<sup>46</sup> cf. Directive 98/44/EC Of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.

<sup>47</sup> Relevant in this context: the Paris Convention for the Protection of Industrial Property (1883), the Patent Co-operation Treaty (PCT) adopted 1970 under the auspices of the World Intellectual Property Organisation (WIPO), TRIPs (1994) or the European Patent Convention (EPC).

<sup>48</sup> WTO, The relation between the TRIPs Agreement and the Convention on Biological Diversity. IP/C/W/368, 2002; WTO, Environment and TRIPs, WT/CTE/W/8, 1995; Patricia Lucia Cantuaria Marin, Providing Protection for Plant Genetic Resources. Patents, Sui Generis Systems and Biopart-

doubts with respect to both practicality and technicality. In terms of practicality, it is still controversial whether products of biotechnology that are, or are based on, genes or cells taken from nature or isolated from pre-existing living matter constitute a product of nature and as such a unpatentable discovery, or whether they are patentable inventions. In the court practice of most industrialized countries, however, there is a clear, though not uniform, trend towards recognizing naturally occurring substances as patentable subject matter if they were isolated or purified and if their existence was previously unknown.<sup>49</sup> The patentability as such of living matter is no longer disputed by most courts. In terms of technicality, over the last years in many countries (as well as implicitly in the TRIPS Agreement) living beings have been ascribed a 'technical nature' that is a prerequisite for patenting. Reproducibility, as an additional requirement to prove technicality, leads to the necessity of disclosing inventions relating to or relying on biological material that is not publicly available and cannot be described in writing alone; this conundrum is partly resolved by the possibility of depositing biological material for the purpose of sufficiently describing a product patent. On top of the decision of whether plant and animal genetic innovations fulfil the legal criteria of an invention at all (practicality, technicality), the specific patent requirements of novelty, non-obviousness/inventive step, usefulness/ industrial applicability as well as sufficient disclosure need to be satisfied.<sup>50</sup> Then again, these requirements are insufficiently specified in international agreements (e.g. TRIPS) and interpreted in different ways in national legal systems. However, they have proved not to be insurmountable for the granting of biopatents.

#### *Effects on agrobiodiversity*

Patents impede the development of agrobiodiversity by restricting access to genetic resources used in breeding and research.<sup>51</sup> Similar to Plant Breeder's Rights in conventional plant breeding, the utilisation of germplasm, seeds of animals with a patented element (product patent), presupposes the right-holder's authorization. However, patents are more exclusive since licences to competitors can be ex-

fused. Only research without market-orientation is exempted. Also, licence fees are more costly than PBR royalties and may develop even prohibitive effects.<sup>52</sup> When processes for the genetic modification of plants and animals are patented (process patents) third parties depend on the patent holder's authorisation not only for the immediate application of the patented process, but also for the use, selling or import of products immediately derived from the process. Not only due to this generic protection, but also due to the lack of a breeder's exemption and a farmer's privilege, the exclusive right provided by a patent has stronger exclusive effects than Plant Breeder's Rights. It is unclear whether a system of compulsory cross-licensing between patents and plant breeders' rights will suffice to secure access to genetic material for breeding purposes.

Experience with patents on plant biotechnological innovations corroborates the feared restrictions on access and utilisation of the protected products and processes. Patent licences, if granted by the patent holder, reduce the incentives for third parties to engage in research and breeding within the scope of protection of the patent. This indicates that broad patents, which extend to second-generation uses, have stifling effects on the breeding efforts of competitors of the first patentee. An example was the US patent on all transgenic cotton plants.<sup>53</sup> With its extremely wide-ranging exclusive rights it had caused a standstill in cotton research so that in the end, the US Agriculture Department attained the patent's annulment.<sup>54</sup> The problem is aggravated by the cumulative application of IPRs. Developing a transgenic plant variety may lead to multiple rights, such as Breeder's Rights (on the variety) and patents (on selectable marker genes, traits, as well as transformation and gene expression technologies).<sup>55</sup> There are already over 9000 patents on staple crops;<sup>56</sup> in the case of animals, in Europe alone more than 50 animals have been patented with some 600 animal patents awaiting approval.<sup>57</sup> The multi-

nerships. New York, 2002; Jayashree Watal, Intellectual Property Rights in the WTO and Developing Countries. The Hague, 2001.

<sup>49</sup> Leskien/Filtner, supra note 44, p. 9.

<sup>50</sup> Carlos M. Correa, Biological Resources and Intellectual Property Rights, in: EIPR Nr.5/1992, pp.154-157; Carlos M. Correa, Intellectual Property Rights, the WTO and Developing Countries. New York und Third World Network, Penang, 2000; Marin, supra note 48; Duffield, supra note 34; Leskien/Filtner, supra note 44.

<sup>51</sup> CIMMYT, Dimensions of diversity in: CIMMYT bread wheat from 1965 to 2000, 2000, p. 26.

<sup>52</sup> India for example had to forgo the adoption of a specific technology for cotton pest control (b.t. technology) into their national breeding programmes since royalties at the rate of US-\$ 7.7 Million demanded by agro-multinational Monsanto were considered too high (RAFI 1996: 36).

<sup>53</sup> US patent No. 5159135.

<sup>54</sup> Achim Seiler, Die Bestimmungen des WTO-TRIPS-Abkommens und die Optionen zur Umsetzung des Art.27.3(b): Patente, Sortenschutz, Sui Generis. Studie im Auftrag der GTZ, Frankfurt, 2000, p. 16. Patents with similar width have been granted by the European Patent Office, e.g. to soy (Patent specification 0301749 B1).

<sup>55</sup> Suri Seghal/Jan van Rompaey, IPR Complexities in the Global Seed Industry: "Seed World", May 1992.

<sup>56</sup> Action Aid/Berne Declaration/IATP/Misereor: Trips on Trial - The Impact of WTO's Patent Regime On the World's Farmers, the Poor and Developing Countries, 2001, p. 8

<sup>57</sup> Greenpeace, Zootiere, Rennpferde und Menschen. Patente auf Leben: Dokumentation über Anmeldungen am Europäischen Patentamt 1999-2000. Hamburg 2001, p. 8.

tude of IPRs and their accumulation will step up the costs of the breeding process as well as that of the end product. In the case of plants, this will increase the pressure to develop 'universal varieties' with a big market share that can be cultivated under very different natural conditions and feature only a minimum of uniform characteristics. It will also shift any added value from farmers to agribusiness and within agribusiness from small breeders to major companies that are equipped with the appropriate technology and with patents. Today, four multinationals hold 44 per cent of all patents on staple crops.<sup>58</sup> Concentration processes are likely, leading to the fusion of corporate genebanks and breeding populations, thus not only reducing diversity of breeding strategies but also increasing the risk of genetic erosion.<sup>59</sup>

#### *Current developments*

Against this backdrop, the current tendencies of strengthening international IPR regimes are questionable. While TRIPS is still being severely criticized (especially from a developing country perspective), a new trend has emerged especially with the US, but also in the EU, to conclude bilateral "TRIPS Plus" treaties with developing countries that go beyond TRIPS. For example, they define the UPOV 1991 provisions<sup>60</sup> as an effective *sui generis* system and demand "the highest international standards" in intellectual property rights protection, including patent protection of plant and animal varieties and of biotechnological inventions.<sup>61</sup> At the same time, the development of the Substantive Patent Law Treaty (SPLT) under the auspices of WIPO is being pushed.<sup>62</sup> The draft treaty not only strives for minimum standards (like TRIPS) but it defines both the top and the bottom line of IPR standards. The draft strongly expands the conditions of patentability (no concept of invention, no technicality), will probably restrict exclusions from patentability and aims at prohibiting member states from making any further demands<sup>63</sup> on patent applicants than those found in the treaty.<sup>64</sup> Some potential for a movement away from mere tightening of

patent regimes might be provided by internal processes in the WTO. Firstly, in 1999 a review of TRIPS Art. 27.3 (b) was started. It was initiated largely because the United States, under pressure from private industry, wanted to negotiate stronger life patenting requirements without exclusions for plants and animals.<sup>65</sup> However, other members have perceived the review as an instrument to drive back bio-patenting. As the process has reached a deadlock, it is at present unforeseeable whether the US position will prevail. Secondly, the Doha Mandate in § 19 sets on the negotiation agenda the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD). This raised the question whether TRIPS should be amended to incorporate certain requirements of the CBD.<sup>66</sup> Particularly, patent applicants might be required to disclose the origin of any genetic material or traditional knowledge used in inventions and to demonstrate that they have obtained prior informed consent from the competent authority in the country of origin and entered into appropriate benefit-sharing arrangements. Though it is unclear whether the development of an IPR regime for traditional knowledge<sup>67</sup> might not lead to a further tightening up of the IPR system, which can be considered detrimental to agrobiodiversity, disclosure of origin and prior informed consent address "bio piracy" of biological resources and traditional knowledge, thus adding to a more equitable system (Correa 2003: 1). However, determining the "origin" of genetic resources for food and agriculture will prove difficult, since international exchange in breeding has led to a strong interdependency among countries. A last strand of discussion to mention is the debate on the design of "effective *sui generis* systems" under Art. 17.3 (b) TRIPS. This provision is only relevant for developing countries, which have yet to dispose of a regime for plant variety protection. A number of suggestions have been made. They range from the adoption of a UPOV 1991 or UPOV 1978<sup>68</sup> to developing alternative PVP systems with different criteria as well as to an opening of the protection

<sup>58</sup> Action Aid et al. supra note 56, p. 8

<sup>59</sup> For animal breeding, Wetterich (2001: 46) points out that with each merger independent breeding populations are merged in order to increase the selection intensity in the subsequently enlarged population. Since a higher selection intensity implies an increasing exclusion of individuals from reproduction it enhances the risk of genetic erosion.

<sup>60</sup> See some remarks on *sui generis* options below.

<sup>61</sup> GRAIN, TRIPS-plus: where are we now? August 2003.

<sup>62</sup> Cf. WIPO, Draft Substantive Patent Law Treaty. Standing Committee on the Law of Patents, Eighth Session, Geneva, November 25 to 29, 2002.

<sup>63</sup> Such additional demands could include requirements for the disclosure of the origin of genetic resources and traditional knowledge or evidence of prior informed consent and benefit-sharing (see below).

<sup>64</sup> GRAIN, WIPO moves toward "world" patent system, July 2002.

<sup>65</sup> Bragdon/Downes, supra note 43, p. 11; CIEL (Center for International Environmental Law), The 1999 WTO Review of Life Patenting Under TRIPS, 1998.

<sup>66</sup> WTO, The relation between the TRIPS Agreement and the Convention on Biological Diversity. IP/C/W/368, 2002, pp. 3.

<sup>67</sup> Cf. WIPO, Consolidated survey of Intellectual Property Protection of Traditional Knowledge. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO/GTRKF/IC/5/7, 2003; IISD (International Institute for Sustainable Development), Traditional Knowledge and Patentability, IISD Trade and Development Brief, No. 7, IISD, Winnipeg, Summer 2003, pp. 4; Graham Duffield, Protecting Traditional Knowledge and Folklore: A review of progress in diplomacy and formulation policy. International Centre for Trade and Sustainable Development (ICTSD), 2002.

<sup>68</sup> which prohibits double protection and still grants both the full farmers' privilege and breeder's exemption.

system for benefit sharing agreements, Farmers' Rights<sup>69</sup> or the protection of communities' intellectual rights.<sup>70</sup>

### 5.1.2 Sovereignty

At the international level the questions of access relates to the public vs. national sovereignty over resources. As with private right restrictions (IPRs), access to, and exchange of genetic resources can be hampered by way of sovereignty regimes.

In 1992 when the Convention on Biological Diversity was passed, a major shift in the property regime concerning genetic resources took place: Up to then, biological resources were considered a "common heritage" or public good, and access to them was unrestricted. Compared with this, the new regime was one of national sovereignty over genetic resources, including those for food and agriculture. Thus, biodiversity was attributed the same status as other natural resources like oil and ores. The background for this change was that during the 1980s the utility value of biodiversity (for pharmaceutical and industrial purposes) became more apparent, especially combined with the emergence of new methods of biotechnological use and bioprospecting. The utilisation perspective began to dominate the international debate on biodiversity loss that led to the CBD negotiations.<sup>71</sup> As it is the South where the major part of global biodiversity is concentrated, developing countries played an important role in raising equity concerns about the open access system. They argued that if Northern companies were to continue to exploit the species and genetic resources of the South, while the South had to pay when making use of the breeding results, an equitable sharing of benefits was necessary to compensate for the unequal exchange. The concept of common heritage favoured by the industrialised countries and nature protectionists was successfully rejected.<sup>72</sup> The CBD instead recognizes the sovereignty of nations over their genetic resources, thus defining property rights. It also requires the establishment of conditions of access to genetic resources and the fair and equitable sharing of the benefits arising out of their utilization (Art. 15

CBD). The core of the access regime is a bilateral system that is subject to mutually agreed terms and prior informed consent. On a case by case basis, nation states and companies that want to use genetic resources from the country sign public-private contracts on the exchange of genetic resources as well as monetary and non-monetary benefits such as technologies and knowledge. A number of such biopartnerships have been agreed with varying degrees of success.<sup>73</sup> The crucial point is the negotiation of fair and clear contractual terms in a situation that might be asymmetric in terms of information and power shares.

As the exchange of genetic material in the field of agriculture is much more common, breeding having long since been an internationalised activity, it was obvious that the CBD bilateral system would not be optimal for agro-genetic resources, for the transaction costs of negotiating bilateral agreements would simply be too high. Also, it was feared that developing countries would stop to contributing genetic material into international gene banks since access to ex situ collections was not addressed by the Convention – a loophole threatening to undermine the CBD. Therefore, in order not to thwart the CBD adoption, it was agreed to regulate this issue under the auspices of the FAO, traditionally responsible for agriculture.<sup>74</sup> This change of forum led to the revision of the International Undertaking on Plant Genetic Resources for Food and Agriculture (IU), a non-binding instrument that had to date governed access to plant genetic resources for food and agriculture (PGRFA). Still based on the concept of "heritage of mankind", the IU needed to be brought into harmony with the CBD. After eight years of tough negotiating, an internationally binding Seed Treaty (International Treaty on Plant Genetic Resources for Food and Agriculture/ITPGR) was signed in 2001, which regulates facilitated access to PGRFA.

### *Different access regimes*

The crucial difference in the access regimes of CBD and Seed Treaty is that the latter is based on a Multilateral System (Art. 10 ITPGR). This Multilateral System consists of a list of 35 food and feed crops for which the member states will provide facilitated access.<sup>75</sup> The respective genetic material belonging to public institutions<sup>76</sup> will be kept in the public

<sup>69</sup> Farmers' Rights cannot be examined further in the context of this article. They were defined in the non-binding International Undertaking on Plant Genetic Resources for Food and Agriculture (IU), in FAO Conference Resolutions 5/89 and 3/91 Cf. Martin Girsberger, Biodiversity and the Concept of Farmer's Rights in International Law, Berne 1999.

<sup>70</sup> Biothai/Grain, Signposts To Sui Generis Rights. Resource materials from the international seminar on sui generis rights, 1998; Leskien/Filmer 1997, supra note 44.

<sup>71</sup> Lorraine Elliott, *The Global Politics of the Environment*. New York 1998, p. 74.

<sup>72</sup> Gudrun Henne, *Das Regime über biologische Vielfalt von 1992*. In: Sebastian Oberthür/Thomas Gehring (Hg): *Internationale Umweltschutzregime*. Opladen 1997, p. 190.

<sup>73</sup> Marin, supra note 48 pp. 120, Harvey Bialy, Latin America. A new look in North-South biopartnerships. *Nature Biotechnology*, vol. 16 (11) 1998, p. 986.

<sup>74</sup> Resolution 3 of the Nairobi Final Act.

<sup>75</sup> This implies that as long as the list is not extended all other crops will fall under the Bilateral System of the CBD.

<sup>76</sup> This refers mostly to national and international (CGIAR) genebanks.

domain. "Facilitated access" means that an exchange free of charge or at minimum fees may exclusively take place for breeding, research and – expressly not for industrial purposes (Art. 12.3 (a) (b)). Unlike in the CBD there is no need to apply prior informed consent procedures on a case-by-case basis. Although a number of countries (among others the EU) aimed at maintaining open access to PGRFA, a restriction in the form of a list was inevitable; especially the Group of Megadiverse Countries under the leadership of Brazil had fought hard for it and wanted to keep it as short as possible. A standardised Material Transfer Agreement (MTA) will specify the details of access and will also be the basis for private contracts between the providers (mostly gene banks) and the demanders of PGRFA. Many questions are still open and will need to be clarified once the Treaty comes into force.<sup>77</sup> One of those questions is the status of intellectual property rights, since the interpretation of the Treaty's wording on the protection of material received via the multilateral system is still very contentious.<sup>78</sup> Some discern it as a loophole since the holder of an IPR, specifically of a patent, could restrict use of the protected sequence or compound by others, and even access if the patent covered the method of isolation, so that the Seed Treaty's intention of facilitating access would be undermined.<sup>79</sup> Despite some weak spots the ITPGR is certainly an essential instrument for ensuring the sustainable use of PGRFA. It might serve as a blueprint for dealing with farm animal genetic resources that have not yet been the object of much specific consideration within international politics.

## 6 Seed and Breeding Regulations

Seed and breeding law is national law, although some aspects in EC countries underlie European harmonisation. As an example, aspects of German seed law and animal breeding law will be described in order to outline what other legal factors apart from IPRs and international access regulation may turn out to restrict the development of agrobiodiversity. They are problematic in terms of agrobiodiversity to the extent that they promote the streamlining of selection criteria. Also, by implicitly furthering

high performance varieties and races they contribute not only the displacement of traditional varieties/races but also to the spread of high input agriculture.

### Seed law

In plant breeding, independent of private law on variety protection, EU member states, most transition countries and some developing countries feature a compulsory variety registration under public law.<sup>80</sup> This means that in order to market seeds commercially, the variety needs to fulfil specific criteria. The basic principle of the German Seed Law (SaatG)<sup>81</sup> concerning agricultural varieties goes: Seeds and seedlings can only be marketed when they are approved of; they will only be approved of when they belong to a variety that is registered.<sup>82</sup> For variety registration, Germany, like many other countries, has established a double set of requirements. Firstly, the "DUS" criteria, that are also crucial for variety protection, demand that plants grown from a specific lot of seeds are *distinct* and *uniform*, and that their characteristics are stable over a minimum of 2 years. For the reasons outlined above (chapter 5.1.1), it is the uniformity criterion (§§ 30.1, 32 SaatG) that some experts are very sceptical about. In addition to the DUS, set seed registration in Germany presupposes that the variety demonstrates value in cultivation and use (VCU) (§ 30 (1), § 34 SaatG). A government agency, the Bundessortenamt (Federal Agency for Varieties), conducts the DUS and VCU tests, which are paid for by the breeding companies, who also pay an annual fee for the listing of registered cultivars. The VCU, or performance criteria, are a bundle of value designating qualities such as qualities of cultivation, resistance, yield and quality. The VCU is, under German Seed Law, the toughest standard that a breeder has to comply with in order to get a new crop registered; some 90% of applications fail, mostly due to lacking VCU.<sup>83</sup> Varieties are considered to have value in cultivation and use when the entirety of their 'value designating qualities' represents a distinct improvement vis-à-vis existing varieties (at least within a regional area) in terms of the exploitation of either the harvested material or

<sup>77</sup> In order to take effect, 40 ratifications are needed. At present, 33 countries have ratified.

<sup>78</sup> Art. 12.3 d ITPGR reads that "Recipients shall not claim any intellectual property or other rights that limit the facilitated access to plant genetic resources for food and agriculture or their genetic parts or components, *in the form received from the Multilateral System*" (italics added). The construction of this phrase opens the door for multiple interpretations.

<sup>79</sup> Graham Duffield, Trade, Intellectual Property and Biogenetic Resources: A Guide to the International Regulatory Landscape. Geneva, 2002: p. 17; Commission on Intellectual Property Rights, Integration Intellectual Property Rights and Development Policy. Report of the Commission on Intellectual Property Rights. London 2002, p. 69.

<sup>80</sup> David Gisselquist, Regulatory Issues. In: D. Wood/J. M. Lenné (ed.): Agrobiodiversity: characterisation, utilisation and management. Oxon 1999, p. 413.

<sup>81</sup> Saatgutverkehrsgesetz (Seed Trade Law) of 20 August 1985, BGBl. I, pp. 1633, last amended by means of the Zweite Gesetz zur Änderung des Saatgutverkehrsgesetzes (Second Law for the Amendment of the Seed Trade Law) of 21 March 2002, BGBl. I, pp. 1146.

<sup>82</sup> Hans Walter Rutz, Rechtliche Rahmenbedingungen für die Sortenprüfung. In: Tagungsreader Workshop Züchtung für den Ökolandbau, 10./11. Juni 2002 in Hannover, p. 8.

<sup>83</sup> Josef Steinberger, Der landeskulturelle Wert im Wandel der Zeit. In: Bundessortenamt 1949-1999, Festschrift 50 Jahre. Hannover 1999, p. 34.

any products thereof. Individual, unfavourable characteristics may be compensated for by other favourable qualities (cf. § 34 SaatG). The specification of VCU, which is crop-specific, is being defined by the Bundessortenamt, i.e. by the executive powers. Although there have been some change in the weighting of the qualities,<sup>84</sup> high yield still constitutes the predominant orientation. In terms of agrobiodiversity, this adds to a relatively mono-structured alignment of plant breeding. Per se, a standardisation of selection criteria is promoted. Thus, variety registration as a means that was, and is, intended for consumer (i.e. farmer) protection as a side effect streamlines plant breeding according to state preferences. And those preferences are not shared by every farmer; organic farmers, for example, require varieties with different qualities since chemical inputs in cultivation are prohibited in organic farming.<sup>85</sup> Another bottleneck of diversity is that seed sale of old cultivars – traditional varieties as well as out-of-date commercial cultivars – is illegal. This issue, however, is being tackled by way of an EU initiative on conservation varieties.<sup>87</sup> Registration of land races and varieties endangered by genetic erosion shall do without the DUS criteria and with liberalised VCU requirements. At the moment, the implementation provisions are still being drawn up by the European Commission.

Beyond seed trade law, marketing standards and grades of goods play an important role in terms of

agrobiodiversity, which shall not be elaborated here in detail.<sup>88</sup>

#### *Livestock breeding law*

The regulatory regime on livestock breeding reflects to a large extent the economic conditions. Over a long period of time, animal breeding and husbandry law have supported one-sided selection strategies focused on economic performance. They have thus contributed to the depletion of farm animal diversity. Although in the meantime the objective of “genetic diversity” is codified in the German Livestock Breeding Act<sup>89</sup> (§ 1.2 (4), § 4.1 TierZG), the longstanding specification of selection criteria through state agencies, which used to build the basis of performance tests and of obligatory assessments of breeding quality,<sup>90</sup> has fostered a narrowing of animal genetic diversity. This trend has been resumed by including into the Breeding Act the promotion of “breeding progress” as an undefined legal term (§ 5 TierZG). As a consequence of this orientation, the administrative bodies give permission for the insemination of cattle, pigs, sheep, goats and horses only if the breeding value of the sperm donating animal is higher than the average breeding value of comparable animals (§ 10.2 (1) TierZG). For chickens, there is no legal control of breeding. Nor is there access to the breeding process for chicken farmers since the existing breeding lines of laying hens and broiler are private property of a small number of trans-national breeding companies; farmers only raise hybrid chickens and they, themselves, cannot breed, correspondingly influencing genetic diversity.

## 7 Conclusions

This article has shown that access restrictions in the form of IPRs and sovereign rights as well as high performance oriented regulations of crop and livestock breeding might impact negatively on agrobiodiversity. The respective regimes have only developed in the past 80 years, gaining rigidity parallel to the increasing relevance of biotechnology.<sup>91</sup> From

<sup>84</sup> Cf. Steinberger, supra note 83.

<sup>85</sup> FIBL/Öko-Institut, Studie zur Abschätzung der Marktabdeckung mit ökologisch vermehrtem Saat- und Pflanzgut und Untersuchung zur Beseitigung bestehender Hemmnisse in der Sortenzulassungspraxis für Sorten, die für den Ökologischen Landbau besonders geeignet sind. Berlin 2003, pp. 55

These varieties might for example not feature certain resistances required in VDU testing because they are necessary in conventional (but not organic) cultivation, so that the respective applications are turned down (cf. Peter Kunz, Photopathologie/Resistenzzüchtung In: Joseph Steinberger, Workshop Züchtung für den Ökolandbau am 10. und 11. Juni 2002 in Hannover – Kurzfassung der Vorträge und Stellungnahmen sowie Zusammenfassung der Ergebnisse. Herausgeber Bundessortenamt 2002, pp. 29-30.). The fact that the BSA conducts performance testing under conventional cultivation conditions might have discriminating effects vis-à-vis organic farming varieties, too, since the different needs of this way of farming are not taken into account.

<sup>86</sup> Cf. Art. 20a, Council Directive 98/95/EC of 14 December 1998 amending, in respect of the consolidation of the internal market, genetically modified plant varieties and plant genetic resources, Directives 66/400/EEC, 66/401/EEC, 66/402/EEC, 66/403/EEC, 69/208/EEC, 70/457/EEC and 70/458/EEC on the marketing of beet seed, folder plant seed, cereal seed, seed potatoes, seed oil and fibre plants and vegetable seed and on the common catalogue of varieties of agricultural plant species. Official Journal of the European Communities L25: 1-26.

<sup>87</sup> Cf. Art. 20a, Council Directive 98/95/EC of 14 December 1998 amending, in respect of the consolidation of the internal market, genetically modified plant varieties and plant genetic resources, Directives 66/400/EEC, 66/401/EEC, 66/402/EEC, 66/403/EEC, 69/208/EEC, 70/457/EEC and 70/458/EEC on the marketing of beet seed, folder plant seed, cereal seed, seed potatoes, seed oil and fibre plants and vegetable seed and on the common catalogue of varieties of agricultural plant species. Official Journal of the European Communities L25: 1-26.

<sup>88</sup> Based on UN/ECE norms, the EC (and for some additional crops Germany) have specified standards for a vast number of fruit and vegetables, potatoes etc. that are relevant in trade. The standards regulate quality grades, sizes (diameter, weight), tolerances vis-à-vis sorting errors, packaging and labelling for agricultural products that are sold freshly (aid 2001). While the standards aim at protecting processors, traders and consumers against cheating and aim at furthering simplification and differentiated sales, they also impact on the variety of marketed crops. Those varieties of apples, tomatoes and potatoes that are bigger or smaller than required, that are not as regular as required cannot be offered for sale to the end user except in direct marketing on farms. This has led to a comprehensive drop out of cultivation and sale of many crop varieties and to the dominance of ‘standard crops’.

<sup>89</sup> Tierzuchtgesetz (BGBl. 1998 I, 145).

<sup>90</sup> “Zuchtwertschätzungen”.

<sup>91</sup> Kal Raustiala/David Victor, The Regime Complex for Plant Genetic Resources. To be published in: International Organisation, No. 1/2004.

the 1920s onwards, these various regimes started to replace an open access regime and a largely unregulated seed and livestock sector. It needs to be stressed that the former regimes actually contained a number of deficiencies. The introduction of variety protection (plants) and performance testing (livestock) certainly increased productivity in times when food security in Europe was still endangered. Also, before the introduction of seed testing there was the danger of cheating farmers by not procuring information on the quality of the seed. The solution of restricting and privatising access and of prescribing selection objectives, however, might turn out to have caused new problems: the loss of agrobiodiversity.

A substantial part of the problem, therefore, can be described as being caused by unintended feedback of a previous strategy. In other words, it was the post-war policy of food security that promoted the industrialization of agriculture, first in the developed nations (e.g. through the EC Common Agricultural Policy) and later in developing countries. The “Green Revolution” – the political push for the introduction of new crops, irrigation, fertilizers, pesticides and mechanization from the 1960s on – aimed at closing the so-called ‘development-gap’ between the South and North. The model of food security not only led to major increases in production output, but also contributed – among other

factors – to the global homogenising of production structures and market conditions. Agrobiodiversity loss can be considered a “second-order problem” (Jahn/Wehling 1998), to the extent that it is at least partly caused by efforts to solve (other) problems. The efforts have led, as a result, to the reduction of the fundamentals of agricultural production: agrobiodiversity. The development, therefore, is paradoxical: the result of breeding for a high yield and homogeneity for “food security” destroys the race, species and genetic diversity and, therefore, the resources on which the breeding itself is established.

The imminent challenge is thus not only about reducing given obstacles and introducing new instruments. It is also about using *reflexive* strategies to avoid causing new problems in the future. Elements of a reflexive strategy could be integrated knowledge production, the anticipation of systemic consequences, adaptivity of problem-solving, as well as participatory evaluation and goal formulation.<sup>92</sup> Some of these elements have already become reality, such as participatory breeding approaches as promoted by the FAO; others need to be developed.

<sup>92</sup> Jan-Peter Voss, *Shaping sustainable Transformation. Introducing reflexivity to processes of socio-ecological change*. Forthcoming.

## Coexistence of Transgenic Crops and GMO-Free Agriculture - Legal Aspects

Andreas Hermann

### 1 Introduction

To safeguard the coexistence of agriculture that uses transgenic crops and agriculture that does not, it is necessary to establish rules that protect the consumers' and farmers' right to freedom of choice. If the de-facto-moratorium on the approval of transgenic plants in the European Union is lifted and the member states give their consent to the marketing of GMOs,<sup>1</sup> the contamination of crops with GMOs will increase. Without preventive measures for protection against GMO pollination of GMO-free cultures, the freedom of choice and property rights will be endangered. As a rule, property rights are violated when more than 0.9%<sup>2</sup> of the genetic information in organic products originate from GMO. If this is the case, then Regulation 258/97/EC on Novel Foods<sup>3</sup> requires that labelling must indicate the genetic modification. Such mandatory labelling will cause losses for organic farmers, typically, they will be unable to demand the high price that organic products normally achieve relative to conventional products. Nevertheless, conventional farmers could also suffer financial damage if their products are labelled and as a result do not sell.

So far the Commission does not see any necessity to regulate coexistence matters at the EU level. Instead, the Commission wants to gather and coordinate information based on studies at the Community and national levels, observe the developments regarding coexistence in the member states and, on the basis of the information and observations, develop guidelines on the coexistence of genetically modified, conventional and organic crops (Art. 26 a Para. 2 Directive 2001/18/EC). According to Art. 26a Directive 2001/18/EC, member states may take

appropriate measures to avoid the unintended presence of GMOs in other products.<sup>4</sup>

This article provides an overview of the measures member states could implement to avoid the unintended presence of GMOs in crops at the farm level. The proposed measures, especially the amendments of the German Act on Genetic Engineering (Gentechnikgesetz<sup>5</sup>), are necessary to make the coexistence of transgenic crops and GMO-free agriculture happen at the farm level. Some of the proposed measures in this text can also be found in the draft of the third law to amend the German Act on Genetic Engineering from 22/08/2003. At present this draft, laid forth by the Federal Ministry of Consumer Protection, Food and Agriculture (Bundesministerium für Verbraucherschutz, Ernährung und Landwirtschaft - BMVEL), is being discussed in Germany.

### 2 Legal Instruments

This text introduces a variety of instruments for safeguarding coexistence at the farm level including: mandatory instructions on seed product packaging; the introduction of a public register of production sites; the introduction of good production practices in GMO cultivation; and safeguarding of GMO-free production.<sup>6</sup>

#### 2.1 Instructions on Seed Product Packaging

Producers of seed products can be required to instruct users of GMOs on protective measures to prevent GMO pollination by means of labels on the packaging of seed products or instruction leaflets. To this end, seed producers would need to inform users of GMOs about the distance pollen from specific cultures are typically carried into neighbouring cultures and which measures for minimisation are available, such as isolation distances and crop timing. Users of transgenic seeds would thus know the minimum distance they must maintain to avoid

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<sup>1</sup> GMO (Genetically Modified Organism)

<sup>2</sup> See Art. 12 Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, Official Journal L 268, 18.10.2003, p. 1.

<sup>3</sup> Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients. Official Journal L 43, 14.02.1997, p. 1.

<sup>4</sup> Art. 26a Directive 2001/18/EC has been amended by Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, Official Journal L 268, 18/10/2003, p. 1.

<sup>5</sup> Gentechnikgesetz from 20. Juni 1990, BGBl. I 1990, p. 1080, last amendment BGBl. 2002 I, p. 3220.

<sup>6</sup> For more details see: Hermanowski, R./Tappeser, B., Genetic Engineering and Organic Farming, September 2002, Commissioned by the German Federal Environmental Agency, see: <http://www.oeko.de/oekodoc/24/2002-001-de.pdf>

neighbouring cultures exceeding the 0,9% mandatory label indication level, which would constitute a damage. A legal regulation could obligate the seed producer to instruct users. Another conceivable solution would be for the seed industry to voluntarily commit itself to providing instructions on seed product packaging or accompanying leaflets.

Currently, the most widely discussed option for affording protection against property damages is to provide isolation distances between cultures with GMO plants and other managed cultures; another is to demarcate GMO-free regions.

Isolation distances have been used for a long time in seed production to maintain purity of breed. The goal is to keep impurity to a minimum. Statutory minimum isolation distances are based on past experience with seed production and they do not completely rule out hybridisation. Nevertheless, the imposition of safety distances does offer one possible way of protecting GMO-free agriculture. An analysis of empirical data used for defining isolation distances revealed many gaps and, hence, an urgent need for further research. Moreover, for cultures like rapeseed, with isolation distances up to 4,000 meters, pollination rates of male sterile rapeseed are expected to exceed 5% introgression of GMO. Coexistence in that culture seems very difficult to achieve.

## 2.2 Public Register of Production Sites

In order to prevent or minimise introgression of GMOs into neighbouring GMO-free crops, it does not suffice for users of genetically modified plants and other farmers merely to be aware of the distances at which introgression is possible. In order to undertake measures to prevent GMO introgression, it is very important to know the exact planting sites of genetically modified plants and organic plant varieties. In order to take protective measures, users of genetically modified plants and other farmers must be aware of the plots that are subject to risk of GMO introgression or from whence outcrossings can occur. Only then can a user of GMOs know whether he/she can (or must) comply with certain prescribed distances or whether he/she can prevent the introgression of GMOs into neighbouring crops by planting a different plant variety or changing the sowing time. This information can be made available to all farmers using a public register for each farming area.

According to Art. 31 Para. 3 lit. b Deliberate Release Directive, member states must set up registers indicating the location of any GMOs that are planted. These registers are intended, in particular, for monitoring any impacts commercialised GMOs have on the environment according to the provisions of Art. 19 Para. 3 lit. f and Art. 20 Para. 1

Deliberate Release Directive<sup>7</sup>. Art. 19 Para. 3 lit. f Deliberate Release Directive standardises the obligations of persons who commercialise or plant GMOs to report to the Commission and the competent authorities of the member states “concerning a level of information deemed appropriate on their location”. The obvious question here is whether according to the Deliberate Release Directive it suffices to achieve “a level of information deemed appropriate on their location” if the farmer using GMOs indicates a large area or whether a plot-by-plot indication is required. This question can remain unanswered to the extent that Art. 31 Para. 3 lit. b Deliberate Release Directive provides with regard to the planting locations of GMOs that “without prejudice to such provisions in Articles 19 and 20, the said locations shall: - be notified to the competent authorities, and - be made known to the public in the manner deemed appropriate by the competent authorities and in accordance with national provisions”. The Deliberate Release Directive thus leaves it up to the member states to determine how precise the information about the planting locations must be. Moreover, information about the planting location is to be made public and thus accessible to any farmer interested in such affairs regardless of whether or not he/she is located close to the GMO location.

If a farmer is to be able to analyse his/her crops for introgressions following harvesting, then he/she needs information about ways to verify the specific GMO in question. The analysis laboratory can look more specifically for introgressions in the organic crops if it has access to information about the specific identifier for the GMO in question. This eliminates the need for laboratory analysis for a wide spectrum of possible GMO constructs and thereby reduces the analysis costs for the affected farmer. In order to give these farmers access to this information, uninterrupted chain of information from the planted GMO variety back to the notifier data must exist. This uninterrupted chain of information is to be governed by the regulations on the traceability and labelling of GMO food and feed products<sup>8</sup> (Traceability and Labelling Regulation). According to Art. 1, the Regulation provides “a framework for the traceability of genetically modified organisms (GMOs), and food and feed produced from GMOs,

<sup>7</sup> Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC - Commission Declaration. Official Journal L 106 , 17.04.2001, p. 1.

<sup>8</sup> Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC, Official Journal L 268 , 18.10.2003 p.24.

with the objective of facilitating accurate labelling, environmental monitoring and withdrawals of products.” With the traceability and labelling regulations, the Commission meets its obligation from Art. 4 Para. 6 Deliberate Release Directive 2001/18/EC to ensure traceability for each phase of placing a GMO on the market. To ensure traceability, any party who makes a product available to third parties for the first time, whether in return for payment or free of charge, or is involved in any phase of the production or sale of a GMO product that is placed on the market in the Community, must provide the following information to the third party according to Art. 4 Traceability and Labelling Regulation:

- Information that the product contains or consists of GMOs
- The relevant unique code assigned to the GMO.

The public register for GMOs could be based primarily on information gathered within the framework of the Traceability and Labelling Regulation. In order to assess the applicability of the information obtained with the Traceability and Labelling Regulation to a public register. The unique codes defined in the Traceability and Labelling Regulation are not sufficient for verifying possible GMO introgressions into the crops of organic farmers. Contrary to the objectives of the Traceability and Labelling Regulation, not only the code of the GMO but also the identity and properties of the specific identifier must be known in order to analyse the harvest. Disclosure of the properties of the specific identifier in a public register could be to the detriment of GMO manufacturers’ interests, for example, as a result of intellectual property issues related to the GMO construct. Accordingly, the transfer of the exact properties of the identifier must be coupled with a warranted interest on the part of the affected farmer.

The primary objective of the public register is to provide information to farmers about fields planted with GMOs. Since introgression of GMOs can affect immediate neighbours as well as neighbours that are further removed, the public registers need to take into account fairly large agricultural areas. The area covered by the public register, thus, needs to extend at least beyond individual communal districts. Clearly, it is best to establish multiple registers at the individual Länder level or subdivisions thereof instead of having a single register for all of Germany.

In conclusion, it is clear that member states are already obligated according to Art. 4 Para. 6 in conjunction with Annex IV of the Deliberate Release Directive 2001/18/EC to establish a public register indicating any GMOs planted and where

they are planted in order to monitor the environmental effects of GMOs. This register could simultaneously assume the function of a public register for GMOs. The Directive leaves it up to member states to choose how to implement the register. In other words, the Directive would not prohibit requiring farmers to provide plot-by-plot information about any GMOs to be planted by February of each year at the latest. Information concerning the precise design of the GMO and the analytical measures to detect it could be included along the lines of those requirements in the draft of the EU Regulation concerning traceability and labelling. However, this draft only requires that the codes of GMO sequences be published. Since those farmers not using GMOs must be in a position to reliably detect GMO sequences, the cultivation register would need to contain precise information on their identity. Such information would only need to be disclosed to farmers with a justified interest in it.

The Draft of the German Act on Genetic Engineering proposes registers at the Länder level and a central register at the federal level with plot-by-plot information about GMOs two months before they are planted. It is not foreseen that the precise GMO constructs are registered.

### *2.3 Introduction of Good Production Practice in GMO Cultivation*

Protective measures to avoid GMO pollination in GMO-free cultures could be imposed on users of GMO seeds with the introduction of a code of “Good Production Practice in GMO cultivation” (GPP). This GPP code could provide a gauge for determining which measures for the avoidance of GMO pollination are expedient and reasonable. Such measures could include, for example, defensive cultivation planning and the maintenance of specific distances between transgenic and susceptible GMO-free cultures. The GPP code should set up rules for an obligation to minimise GMO pollination of other cultures.

The administration must be empowered to impose specific single protective measures for the implementation of the GPP code. Non-observance of such an order must be penalised as a regulatory offence. The possibility to punish such offences is required, in particular, in cases in which the amount of potential damage to the farmer not using GMOs is lower than the costs of a defensive measure, which the owner of a transgenic culture can be reasonably expected to undertake. Otherwise, in this case, there is the danger that the user of the GMO dispenses according to protective measures since it is more convenient for him/her to compensate the damage, which must still be proven.

The “Good Production Practice in GMO cultivation” (GPP) has been introduced in the draft of the German Act on Genetic Engineering in Art. 16c, but the details describing the GPP are supposed to be addressed in an extra ordinance. Although the GPP would be an improvement of the legal situation, coexistence is only safeguarded if the details about the GPP for each crop are regulated in the ordinance.

#### 2.4 Damage Compensation for GMO Contamination

If the farmer who has GMO contamination in his crops claims damage compensation, the case is likely to fail regularly due to the requirement of proving causation. Often times it will be not possible to prove that the contamination resulted from the introgression of a neighbouring field with transgenic crops. If the claimant fails to prove that the introgression from a certain field was the cause of the contamination, then according to the present rule on burden of proof in German Civil Law, he/she will not succeed with his/her damage compensation claim. Cause or presumption rules can be used as a means to improve the position of the claimant. The German Environmental Liability Act specifies a so-called presumption of cause (§ 6 UmweltHG<sup>9</sup>):

*“If a facility is suited, according to the circumstances of the individual case, to cause the damage that occurred, then it is presumed that the damage was caused by the facility”.*

In the existing version of this law, the presumption is then opposed again by the possibility of contrary evidence of the facility operator who can eliminate the presumption of cause by proving the lack of a disruption to operations. According to this configuration of the German Environmental Liability Act, the presumption of cause of the mere ability of the facility to cause the damage is not effective in normal operation of a facility.

The draft of the German Act on Genetic Engineering in Art. 36 Para. 3 regulates similarly to § 6 UmweltHG in that the user of a GMO crop is assumed to have caused the GMO contamination in a neighbouring crop. The user of the GMO crop can eliminate the presumption if he/she proves that he/she has obeyed the Good Production Practice in GMO cultivation.

#### 2.5 Damage Fund for GMO Pollination

Even if the prescribed GPP are complied with, there is no way to exclude the possibility that transgenic

pollen will be transferred from transgenic cultivations even over very large distances. The consequences of this ubiquitous presence of pollen, which is relevant to many crops, must also be addressed.

In the partially comparable case of forest damage due to large-scale dissemination of airborne pollutants, the Federal Constitutional Court ruled the legislature as obligated to take action even if it is allowed considerable discretion in how it acts.<sup>10</sup> According to the Constitutional Court, avoidance of unacceptable damages to the forest by way of measures to keep the air clean has precedence over other possibilities relating to the government’s obligation to realise legal protection of property according to Art. 14 Para. 1 Sentence 1 GG. Nevertheless, the Court did not exclude the possibility of compensating forest owners for damages with the introduction of compensation regulations.

For GMO introgression due to non-determinant sources, a certain system of compensation for marketing disadvantages of farmers is therefore possible. The compensation could involve a government indemnification statute or a fund model based on government regulation or a voluntary agreement between commercialisers and users of GMOs. In choosing a model for compensation of damages that are worthy of compensation but not authorized, the following basic principles should be considered:<sup>11</sup>

- The compensation model must follow the basic principles of cost/benefit analysis in the broadest sense, i.e. based on a set administrative expense (to be minimised), a financial volume must be distributed in such a manner so as to cover all losses in full or at least mitigate the most severe losses.
- The compensation model may not result in neglect of the existing regulation model under the law of obligations.
- The principle of causal responsibility must be taken into account, i.e. the party causing the damage must bear the cost and not the general public. By placing the burden of the cost on the wrongdoer, the idea is to achieve more optimum solutions in production and distribution for the economy as a whole.
- The prevention principle should help to prevent future damages insofar as it is possible.
- Besides ensuring the preservation and survival of the damaged party, the compensation princi-

<sup>10</sup> Ruling of the Federal Constitutional Court of 26 May 1998, file no.: 1 BvR 180/88.

<sup>11</sup> Cf. Salje, Umwelthaftungsrecht [Environmental liability law] – Commentary, introduction margin no. 22 with numerous further citations.

<sup>9</sup> Environmental Liability Act (Umwelthaftungsgesetz =UmweltHG) of 10 December 1990, Federal Law Journal I, p. 2634.

ple is also intended to make the wrongdoer aware of the full extent of the damages so that he can account for these damages in his balance sheet and consider them in making investment decisions.

In view of the criteria named above, a compensation fund should be given preference over a government indemnification regulation. One factor against a government indemnification regulation is the fact that it is a flagrant violation of the principle of causal responsibility if damages are paid out of general budgetary resources. On the other hand, if the government compensation payments were financed using special charges assessed based on causation, the principle of causal responsibility would still be respected. However, there is still the issue of whether an inadmissible special charge would be introduced in this manner. Further, it would also be necessary to check whether the government regulation would function efficiently according to the cost/benefit principle. As with government regulation, a fund model is based on pure compensation, but it could call upon GMO commercialisers and users to compensate for damages they cause according to the principle of causal responsibility. With regard to the financing and outlay profile, the fund model would be more flexible than a government model integrated into budgetary regulations. Finally, if a fund were organised under private law, the existing expertise of liability insurers could be exploited to administer the ensuing property damages. A fund solution, in which the financing and damage administration were handled directly by the GMO commercialisers and users, could increase the attraction of pursuing (joint) measures to prevent damages.

### *2.6 Protection of the Seed Production*

Production of organic seed as well as conventional seed requires absolute, foolproof protection against the influx of transgenic genetic information. Only if GMO contamination is as low as possible at the seed level is there a chance that in the ensuing harvest and products the labelling threshold of 0.9% will not be exceeded. Furthermore, the integrity of organic agriculture as an alternative production form without the active use of transgenic organisms requires a special legal protection status. In terms of

the requirements for protective measures, a distinction must be made between production of organic basic seed or certified seed and an organic farmer's seed production for replanting. In order to produce certified seed, it is necessary to allocate closed planting areas with sufficient isolation zones. This could involve discretionary assignment of protection zones, e.g. through Länder regulation. Corresponding models for conventional seed production already exist on the basis of §29 SaatG (German Act on Seeds). Currently, closed planting areas are regularly allocated for seed propagation upon request of the participating farmers. Farmers who do not participate in the seed propagation efforts may not plant any competing crops within this designated area in order to prevent foreign genetic information from entering into propagation cultivations as a result of pollen drift.

### **3 Conclusion**

In the overall analysis, taking account of the necessary legal changes, consumers' expectations of transparency and their freedom of choice in buying food, and last but not least the standards of farming, especially that of organic farming, make it clear that the problem of how to arrive at a form of coexistence that does justice to consumers' and farmers' right to freedom of choice will not be solved easily. At present the Commission's policy on coexistence offers the member states the chance to implement measures in order to realise coexistence at the national level. The Federal Ministry of Consumer Protection, Food and Agriculture has taken this chance proposing the aforementioned draft on the Amendment on the German Act of Genetic Engineering. Although the draft supports the legal instruments described in the text above as the minimum criteria for realizing coexistence, the draft is opposed by other German Ministries and the industry in favour of transgenic crops. How the final set of legal instruments will look in the end is to be decided in the coming months. However, coexistence requires substantial efforts from all those involved, the burden of which, should not be placed on the farmers who do not use GMOs.

## The German Banking Act (KWG) – An Obstacle for German Emission Trading?

*Georgios Stratigakis and Christopher Hasenkamp*

### 1 Introduction

The introduction of the EC scheme for greenhouse gas emission allowance trading in order to reduce CO<sub>2</sub> emissions is accompanied by the creation of a market on which companies can buy and sell emission allowances as well as financial derivatives with underlying emission allowances. As certain as the introduction of the emission trading is, a clear legal qualification of the emission allowances as such is still missing. For if allowances are, as some argue, to be regarded as a security or financial instrument in the sense of the German Banking Act (KWG), then a financial service license and a banking license would be necessary for trading. This would mean a substantial increase in financial and organizational expenditures for the companies affected. If emission allowances were not to fall under the KWG, then the forthcoming trade would be made considerably easier.

### 2 Provisions of the Directive and the German Ministerial Draft

The Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community was passed on October 13, 2003 after lengthy discussion.<sup>1</sup> Thus, the structure of emission allowance trading has been set and is scheduled to begin on January 1, 2005.<sup>2</sup> The Directive, however, contains no provisions concerning the question of the legal qualification of emission allowances. Art. 12 para. 1 merely states that “Member States shall ensure that allowances can be transferred between persons within the Community”. Therefore, the arrangement is to be made by the member states.

To this end, a first ministerial bill draft (Referentenentwurf) on the trade of greenhouse gas emission allowances (Treibhausgas-Emissionshandelsgesetz,

TEHG) has been put forward in Germany.<sup>3</sup> Its § 16 Sent. 1 states that emission allowances are, in principle, not considered to be financial instruments in the sense of § 1 Sec. 11 of the German Banking Act (KWG). In contrast, financial instruments derived from emission allowances are, however, considered as such instruments in the sense of the KWG.

With this draft, the Federal Ministry for the Environment has positioned itself in the recently launched debate on the legal qualification of emission allowances. The Federal Financial Supervisory Authority (Bundesamt für die Finanzaufsicht [BaFin])<sup>4</sup> as well as the financial practice<sup>5</sup> seem to maintain the view that emission allowances are securities and therefore fall under the KWG. Consequently, professional commercial trading would require approval from the BaFin.<sup>6</sup> The demands the KWG make on the applicant of such permissions are extremely extensive, and practice without permission is punishable.

### 3 Emission Allowances as Securities?

The KWG distinguishes four kinds of financial products: tradable securities (handelbare Wertpapiere), money market instruments (Geldmarktinstrumente), foreign exchange (Devisen) and derivatives (Derivate). Shares (Aktien), certificates representing shares (Aktien vertretende Zertifikate), debenture bonds (Schuldverschreibungen), participating certificates (Genussscheine) and subscription warrants (Optionsscheine) fall under the security term, as do those securities that are comparable to shares or debenture bonds and that can be traded on a market. Emission allowances are obviously neither shares, participating certificates nor subscription warrants. Therefore, the only question seriously discussed is whether emission allowances are debenture bonds or securities comparable to debenture bonds.<sup>7</sup> If the characteristic of a security is not met, then there is no legal duty to obtain a permit.

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<sup>1</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, see: [http://europa.eu.int/eur-lex/en/oj/dat/2003/l\\_275/l\\_27520031025en00320046.pdf](http://europa.eu.int/eur-lex/en/oj/dat/2003/l_275/l_27520031025en00320046.pdf)

<sup>2</sup> For the principles of emission rights trading see *Koenig*, DÖV 1996, 944 as well as *Pfomm*, sic! 2003, 537 (537f.). See also the fundamental remarks by *Coase*, The Journal of Law and Economics 3 [1960] 1.

<sup>3</sup> Referentenentwurf des Bundesumweltministeriums, Arbeitsgruppe Z III 6, October 20<sup>th</sup>, 2003.

<sup>4</sup> See *Wallat* et 2003, 180 (183).

<sup>5</sup> *Janzig*, Klimagase als Wertpapierderivate, Handelsblatt, 6<sup>th</sup> April, 2003.

<sup>6</sup> A similar view is maintained by the Bundesamt für die Finanzaufsicht in the area of energy brokerage, e.g., see *Auerbach/Forster*, World Power 2002, 130.

<sup>7</sup> *Elspas*, Umweltmagazin 2003, 32.

### 3.1 Not a security in the form of a debenture bond

According to unanimous opinion, emission allowances are not securities in the form of a debenture bond in the sense of § 1 Sec. 11 Sent. 2 Nr. 1 KWG.<sup>8</sup> One characteristic of a debenture bond in the sense of § 793 Sec. 1 Sent. 1 BGB (Civil Code) is that the issuer promises a certain performance (Leistungsversprechen) to the holder. The nature of the performance promised is insignificant. Debenture bonds, however, only certify private rights. In the case of emission allowances, the right to emit one tonne of carbon dioxide equivalent per allowance is based on a public-law regulation (ie the TEHG). Hence, the tradable allowance is not a right to claim (Forderungsrecht) based on the doctrine of privity of contract (Privatautonomie). A debenture bond is therefore not given.

### 3.2 Securities comparable to debenture bonds?

The BaFin supports the view that emission allowances are securities comparable to debenture bonds. Consequently, the KWG would apply. Those securities that embody a claim against the issuer and create at least a *quasi* creditor-debtor-relationship without being a debenture bond fall under the terms of securities comparable to debenture bonds.

#### 3.2.1 Affirmative view

Some people consider the required promise to perform (Leistungsversprechen) as the EC or the issuing state renouncing to take action against carbon dioxide emissions (as pollution) by a company.<sup>9</sup> Since performance can be achieved through action or omission (Tun und Unterlassen), the obligation to tolerate (Duldungspflicht) would be a subspecies of the obligation of omission. By creating emission allowances, the toleration would be economically exploited and therefore – in spite of a public-law aim – become financially valuable content of the obligation to be performed.

Furthermore, the emission allowance enables the certification of a right to claim, which is comparable to a private-law right to claim according to § 241 BGB. The basis of this right to claim is considered an obligation of public-law. Under this obligation, the European Community, or the member state, is, as issuer of the emission allowance, supposed to be the original creditor and holder of the financially valuable performance of the carbon dioxide emission. In this model, the position of debtor is held by the CO<sub>2</sub>-emitting company. The

holder of the emission allowance would then become a creditor of the European Community.

Supposing the confirmation of a promise to perform and a right to claim, all further requirements for a security in the sense of the KWG are also fulfilled:<sup>10</sup> Emission allowances are fungible because they are supposed to be designed to be exchangeable in order to achieve international tradability.<sup>11</sup> Each emission allowance has the authorization to emit one tonne of carbon dioxide equivalent. Allowances are issued as part of a series, and because of their equal portioning, they are interchangeable with every other CO<sub>2</sub>-certificate. Finally, the lack of an actual certification of the emission allowances in writing would not be an obstacle. According to § 1 Sec. 11 Sent. 2 of KWG, there is no explicit need for a certification to be in writing. According to public-law, the protection of the purchaser (Erwerberschutz), implicitly required by the KWG and equal to a certification in writing, is guaranteed by the registry to be installed by the member states. Thus, the registry includes the current status and an exact overview of the issue, holding, transfer and cancellation of allowances.<sup>12</sup>

#### 3.2.2 Rejecting view

This view, however, is met with doubts. Partially, emission allowances are not seen as a right to claim but as a mere form of permission by the state.<sup>13</sup> It is also argued that the securities listed in § 1 Abs. 11 of KWG serve the purpose of investment and include a recurring entitlement to dividend, whilst in the case of emission allowances, the qualification for investment remains questionable.<sup>14</sup> Enjoyment of fruits and benefits is not possible and the limited validity of the allowances and vague hopes for dividends, as sometimes argued, should not allow a comparison of emission allowances to the securities listed in the KWG. While the latter argument concerning the qualification for investment and the enjoyment of fruits and benefits is often not dealt with in literature and considered a requirement for a security in the sense of the KWG<sup>15</sup>, the rejection of the argument of emission allowances as a mere form of permission by the state persists.

<sup>10</sup> Wallat, et 2003, 180 (182 et seq).

<sup>11</sup> Wallat, et 2003, 180 (182).

<sup>12</sup> See also the requirements in Art. 19 of the Directive.

<sup>13</sup> Sommer, et 2003, 186 (188).

<sup>14</sup> Sommer, et 2003, 186 (189).

<sup>15</sup> Explicitly only Beck/Samm, Gesetz über das Kreditwesen, p. 119; see Assmann/Schneider, Wertpapierhandelsgesetz 1995, p. 43; Boos/Fischer/Schulte-Mattler, Kreditwesengesetz 2000, p. 180; Hefermehl/Baumbach, Wechselgesetz und Scheckgesetz 1999, p. 13; Hueck/Canaris, Recht der Wertpapiere 1986, § 1; Szagunn/Haug, Gesetz über das Kreditwesen 1997, p. 97 et seq.; Schmidt, Handelsrecht 1999, p. 689 ff.; Brox, Handelsrecht und Wertpapierrecht 2001, p. 213 et seq.

<sup>8</sup> Wallat, et 2003, 180 (181f.); Sommer, et 2003, 186 (188).

<sup>9</sup> Wallat, et 2003, 180 (182).

In conclusion, if emission allowances are not to be qualified as financial instruments, the possibility of qualification as a commodity<sup>16</sup> or as an instrument of its own kind (*sui generis*) still exists. For trading, neither instance of qualification would pose an obstacle. On the one hand, even though the German Stock Exchange Act (*Börsengesetz*) differentiates between stock exchanges and commodity exchanges, the legal qualification does not necessarily preclude the exchange to be used. A legal clarification permitting emission allowances to be traded at stock exchanges is, in principle, possible. On the other hand, qualification as a commodity or instrument of its own kind – and thus, without the need for a license – would also better comply with the ecological aim of the Directive. In the interest of its ecological purpose, the allowance trading must function, be flexible and not too regulated. A classification of emission allowances as either commodities or instruments *sui generis* and their derivatives as financial instruments would, without endangering the market or questioning the competence of the Federal Financial Supervisory Authority, considerably simplify trading.

### 3.3 Result

The qualification of emission allowances as securities in the sense of the German Banking Act (KWG) is not convincing.<sup>17</sup> However, if only derivative products are within the range of application of the KWG and the supervision of the Federal Financial Supervisory Authority, the trade of the emission allowances themselves and the mediation of such purchases remain free of permission and supervi-

sion. This differentiation equally serves the goals of a solid and an unhindered market for emission allowances.<sup>18</sup> Especially for the operators of smaller installations (SMEs), participation in the trade and the use of allowances as part of their own portfolios is thereby made considerably easier.

## 4 Conclusion

According to the emission trading Directive, the introduction and arrangement of an organised market for emission allowances and their derivative products are left to the market powers. As a result, allowances do not fall under the German Banking Act (KWG), and no special banking licence is needed for trading allowances. However, the continuing discussion shows that there is a need for clarification. In order to facilitate allowance trading and ease the access to the trading scheme, law makers should clarify the process, e.g. with a positive regulation in the TEHG or by changing the KWG

Since they are potential net sellers of allowances, emission allowances of the trading scheme create new opportunities and fields of revenue for German companies. Different kinds of financial products seem plausible. For instance, CO<sub>2</sub>-allowances could be admitted into fonds portfolios or help companies in their security transactions. The reduction of emissions could create additional liquidity and attractiveness for investors. At the same time, the emission of pollution by a company could influence its financial standing.<sup>19</sup> The German Banking Act does not pose any obstacle to the trading of emission allowances per se in Germany.

<sup>16</sup> A similar view was held by Prof. Dr. Gerhard Wagner in his presentation at the 19th Trierer Kolloquium 2003, „Emissionszertifikate und Umweltrecht“, conference papers to be published.

<sup>17</sup> Then differing: Koenig/Braun/Pfomm, ZWeR 2003, 152 (supra note 57 et seq.).

<sup>18</sup> See the explanation to § 16 of the Referentenentwurf.

<sup>19</sup> Janzing, Klimagase als Wertpapierderivate, Handelsblatt, 23<sup>rd</sup> April 2003.

## CONFERENCES

### Access to Justice Study presented in Brussels

On 21 November 2003, the Environmental Law Network International (elni) held a joint workshop with the Centre d'Etude du Droit de l'Environnement (CEDRE), Brussels and the Öko-Institut e.V., Darmstadt to present the outcomes of a recently concluded study. The "*Access to Justice in Environmental Matters*" study, which was commissioned by DG Environment of the European Commission, analysed the number and outcome of NGO environmental law suits in eight Member States over a time period of six years. It was the first European study to provide comprehensive empirical data on public interest actions in the EU.

The workshop took place in the Federal State Office of Hesse in Brussels and was opened by an introductory statement by Benoît Jadot. Mr. Jadot is a member of the Facultés universitaires Saint-Louis (CEDRE) and Premier auditeur au Conseil d'Etat, Belgium. His French language presentation was a strong pleading in favour of a wide interpretation of the Aarhus Convention. According to Mr. Jadot, there should be no "black zones" where there is no control of the correct application of environmental provisions.

### „Good Farming Practice“ in the Context of the EU Common Agricultural Policy – Definitions, Implementation and Experiences: Results of a European Seminar

About 40 experts from 12 EU Member States and Accession countries, from administrations involved in the implementation of standards of "Good Farming Practice" (GFP), the EU Commission, non-governmental organisations and research institutions exchanged experiences and views on the implementation of environmental standards in the context of agricultural support measures during a seminar at the Federal Agricultural Research Centre (FAL) in Braunschweig, Germany, on 2 – 3 June 2003 in Germany.

At the seminar, information was provided on the definition, control and enforcement of codes of GFP in EU Member States and Accession countries as a tool of agri-environmental policy. The focus was on GFP definitions according to the EU Regulation (EC) 1257/1999 („Rural Development Regulation“) as well as Regulation (EC) 1259/1999 („Horizontal

In the first session, Ludwig Krämer, of DG Environment, A.3 European Commission, presented the Proposal for a Directive on Access to Justice in Environmental Matters, COM(2003) 624 final, which had been presented by the Commission on 24 October 2003. The proposal is meant to provide a framework for the Member States, but not hinder them from open access to the courts for any person or organisation. Thus, it only contains minimum rules.

Prof. Dr. Gerhard Roller and Miriam Dross, LL.M., Öko-Institut, presented the main results of the study and the policy recommendations, which resulted from the project. Jonathan Verschuuren of Tilburg University, Netherlands, Isabel Carinhas de Andrade from Euronatura, Portugal, and Maurice Sheridan, Matrixchambers, UK presented the legal framework and the empirical results for the Netherlands, Portugal and the UK, respectively (see the article of Isabel Carinhas de Andrade in this issue).

*The study will be presented in the next issue of the elni review. The final report can be downloaded from the elni webpage at <http://www.oeko.de/elni/elni9news.htm>.*

Regulation“) and their implementation. With the representatives of the EU Commission Dr. Bernhard Berger (DG Environment) and Andreas Lillig (DG Agri) future perspectives of integrating GFP into the EU Common Agricultural Policy were discussed.

GFP is relevant for the correct and complete implementation of Community environmental legislation, i.a. Natura 2000 Directives, the Water Framework and other water Directives, Nitrates and pesticides Directives and objectives of soil protection, and by the same time it is relevant for the competitiveness of the agricultural sector. Standards of GFP can either be legally binding or formulated as recommendations for technical advice. Codes are set up by the state or its agencies, as well as by advisory services, research agencies and farmers or environmental lobby.

However, the focus of the seminar was on GFP standards as a precondition of support for agri-environmental schemes and less favoured area support under the Rural Development Regulation, and as the basis of agri-environmental policy according to the Horizontal Regulation. Here, GFP standards have to be defined either as general mandatory

environmental requirements, or as specific environmental requirements constituting a condition for direct payments („cross compliance“).

The definition and implementation of GFP standards for the Rural Development Regulation (RDR) show a high diversity throughout EU Member States. While most GFP standards contain criteria for fertilising and plant protection, mainly based on national legislation, only few catalogues contain criteria aiming especially at biodiversity and landscape objectives. Some Member States formulated more ambitious criteria beyond legislation, either as a recommendation or as binding standard. In Accession Countries, the process of GFP definition and implementation is not yet finalised.

As a crucial point, the definitions of „verifiable standards“ including appropriate indicators for control and enforcement were discussed. Breach reports have to be legally defensible, so that the enforcement of codes of GFP frequently is concentrated on few, well-defined criteria. These are included in check lists for the regular control of 5% of RDR beneficiaries. Although regular control of GFP is obligatory, information on results is scarce. Controls are normally concentrated on high value claims, new claimants and claimants with history of non-compliance. Beneficiaries to be controlled are mostly extensive farms or those situated in less favoured areas. Due to the mainly payment-oriented selection for control, GFP controls of the beneficiaries of RDR measures tend to show low rates of breaching against environmental standards. Due to this, RDR controls have a low impact on environmental behaviour. In comparison, controls performed by specialised environmental administration are following an environment-oriented risk assessment for the selection of farms to be controlled, and often are done after complaints or due to suspicion. Thus, specific controls lead to more cases of punishment, have stronger effects on enforcement and use scarce administrative capacities in a more efficient way.

Measures according to the Horizontal Regulation, documented in „annual reports“ to the EU Commis-

sion, differ a lot between Member States. While some states use cross compliance to solve specific environmental problems, e.g. restrictions on irrigation in France, control of overgrazing in U.K., or limited pesticide use in maize in The Netherlands, other Member States like Germany report on results of specific controls on selected environmental standards. Due to the fact that most „annual reports“ are not published, implementation of GFP according to the Horizontal Regulation remains widely intransparent. GFP definitions according to the Horizontal Regulation are until now not harmonised with codes of GFP according to the RDR. Another crucial point are the sanctions of breaching. The way to calculate payment reductions differ a lot between Member States, and farmers feel that they are punished two times: by the normal administrative fine and in addition by a reduction or even by total cancellation of payments.

GFP standards could become an even more important element of agricultural policy in future. GFP criteria are the basis for cross compliance actually discussed in the Mid Term Review negotiations. Although many information on this often quite intransparent topic could be exchanged, many questions like the optimal design and implementation of GFP, criteria for and degree of harmonisation throughout the EU and integration into the Common Agricultural Policy remained open.

*Results of the seminar are published on the projects website:*

*<http://www.ieep.org.uk/research/Cross%20Compliance/Project%20timetable%20and%20available%20documents.htm>*

*Contact mail: [bernhard.osterburg@fal.de](mailto:bernhard.osterburg@fal.de), or send a fax to Bernhard Osterburg, FAL, ++49 531 596 5199). The seminar was organised within the EU Concerted Action “Developing cross compliance in the EU – background, lessons and opportunities”. For more information, including further steps in the project, see the website:*

*<http://www.ieep.org.uk/research/Cross%20Compliance/Welcome%20Page.htm>*

## IMPRINT

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