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3 The Route of Environmental Regulation in European Integration with Examples

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3.1 Historical Introduction

A review of the 60 years of the Treaty of Rome requires an analysis of the emergence of environmental regulations, its reasons and history, as well as its present and possible future, since this field is gaining more and more weight in the EU law. In the absence of precise data, it is currently estimated that environmental law represents 12-14% of the EU law that determines the basis for the member states' environmental regulations – at least according to the overview 10 years ago, that has not been significantly altered ever since. (This was backed up by relevant data: '*EU legislation lies behind some 80% of national environmental legislation.*'[1]) The number of the infringements proceedings is also considerable[2] as *most of the infringement procedures are initiated in environmental fields* relatively – according to the data surveyed a year ago – and that is 23.7% of all the cases which is followed by 22.3% in transport cases and 13.8% in taxation falling far behind. And we have not even mentioned how many cases are proposed for preliminary ruling. Sticking to the allure of numbers that also prove the true dimensions of the subject, here is one last number:[3] Natura 2000 nature reserves represent 18% of the land area of the EU and 6% of the seas making it the world's greatest chain of Protected Areas treated uniformly.

However, this does not mean that the EU environmental law, although impressive in quantity and in the size of the covered area, also functions smoothly and perfectly in

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1 Brussels, 30.4.2007 COM(2007) 225 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-term review of the Sixth Community Environment Action Programme, p. 4.

2 http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm.

3 http://ec.europa.eu/environment/nature/natura2000/index_en.htm.

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every aspect. After the thorough and detailed implementation report issued in 2017 and its attached country reports,[4] another overarching programme called "Environmental compliance and assurance"[5] has been accepted whose lead document is a Commission Communiqué.[6] A few words from the introductory paragraph:

> "The EU already has an extensive body of mature environmental legislation. However, there are *major challenges to its implementation*… These are linked to persistent environmental problems such as diffuse water pollution, poor urban air quality, unsatisfactory waste treatment, and species and habitats in decline. There is also a serious incidence of environmental crime, and a high number of environmental complaints to the Commission and petitions to the European Parliament. The costs of non-implementation are estimated at 50 EUR billion per year. Many benefits can be obtained through improved implementation without creating new legislation."[7]

This can illustrate well how EU environmental law has evolved which did not even exist at the time of the signing of the Treaty of Rome, not even in people's minds.[8] In reality, *one can only talk about environmental policy* if it means more than just isolated occasional moves in different areas but manifests itself in coherent, coordinated action affecting the environment as a whole, as well as its elements and the human impacts on the environment. Although there have been many examples since World War II regarding its occasional emergence, the strengthening of the area started mostly after the 1960s.

Collaterals and adverse effects of the exponential economic growth, and the industrial-technical revolutions – we are now beyond gene engineering, in the era of nanotechnology – often resulted in more serious damages than the expected benefits originally set. All this required a deliberate limitation of the environmental impact whether caused by individuals or households, or the regulation of economic processes and workflowa or environmental aspects of international cooperation. This certainly requires measures affecting the freedoms of the European integration, which may have a significant impact on the market, starting from marketing restrictions or even banning certain products, ingredients or chemicals, via specific licensing procedures and requirements, constant mon-

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results', Brussels, 3.2.2017 COM(2017) 63 final.

5 These documents are available at http://ec.europa.eu/environment/legal/compliance_en.htm website.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'EU actions to improve environmental compliance and governance', Brussels, 18.1.2018, COM(2018) 10 final.

7 Id., p. 1.

8 Rachel Carson's "Silent Spring" was published in September 1962 as the first documentation of the negative effects on the agricultural use of chemicals.

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itoring and reporting expectations or even shifting the rules of responsibility to objective liability.

The Treaty of Rome that established the European Economic Community (EC) *did not provide regulations on environmental policy* as environmental protection did not directly affect the Customs union at that time. By the end of the sixties it was clear that *failing to cooperate in environmental issues hinders the progress of integration and therefore it has a direct impact on the economy.* Council Directive on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (67/548/EEC) adopted in 1967[9] was the first Community legislation whose preamble named the diversity of the environmental laws of the six member states as a Trade barrier.[10] This was not an official environmental act yet but certainly had such an impact. We should not forget that during the last five decades this field has been modified and renewed more than any other within the integration and the reason for that is very simple: the named dangerous substances, unlike their names, are not a specific group but in reality describe the chemicals that exist all around us.

To properly illustrate the significance of legislation affecting these chemicals I want to draw attention to some data prior to the adoption of the regulation[11] renewed more than 10 years ago. Only in 1981 did the mandatory notification system, in essence a filing system, appear in the EU. This legally distinguishes two groups of chemical agents: one group is the so called "existing chemicals", those that were already on the market before 18th September, 1981. The number of such existing chemicals is 100 106 (!) and they are listed on the so called EINECS list. The other group of the chemical agents is the so called "new chemicals" entering the market afterwards. All new chemical agents had to be notified prior to being placed on the market. According to the regulation all manufacturers and importers were obliged to have their manufactured or imported agents tested when exceeding 10 kg per year. Only 3 700 agents had been notified before the REACH entered into force. These are listed on the so called ELINCS list. Chemical agents on the ELINCS list are properly tested and went through risk analysis. This is why the preamble of the REACH regulation pointsout: "(17) All available and relevant information on substances on their own, in and in articles should be collected to assist in identifying hazardous

9 Council Directive of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (67/548/EEC), OJ L 196, 16.08.1967, p. 1.

10 "Whereas the differences between the national provisions of the six Member States on the classification, packaging and labelling of dangerous substances and reparations hinder trade in these substances and preparations within the Community and hence directly affect the establishment and functioning of the common market;"

11 Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

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properties, and recommendations about risk management measures should systematically be conveyed through supply chains, as reasonably necessary, to prevent adverse effects on human health and the environment. In addition, communication of technical advice to support risk management should be encouraged in the supply chain, where appropriate." So the main reason for the adoption is the assessment and management of risks as well as the fact that the related requirements are rephrased in a regulation.

The above numbers clearly show *the possible effects of a non-harmonized* – unified only after the REACH regulation – *legislation if the purpose is to create a single market yet each member state requires the use of stricter rules due to health and environmental aspects.* This is where the legislation we call today environmental legislation started. No wonder that all other rules on the chemical agents are primarily linked to the market, working on how to remove the obstacles to the "common market."[12]

3.2 Action Plans and Other Policies

Parallel to the emerging environmental policy making, increasing attention had to be paid to the creation of a political declaration of intent, and the rising UN environmental activity provided solid grounds, whose official starting point was the Stockholm Conference on the human environment in 1972. At the same time the statement issued by the heads of state and government[13] at the *Paris summit* organized in *October 1972* stated that

> "*Economic expansion is not an end in itself*. Its first aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. *It should result in an improvement in the quality of life as well as in standards of living.* As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind."

A concrete result of the Paris Summit was the adoption of the first action plan,[14] followed by six more, currently the *implementation of the 7th Environment Action Plan*[15] *accepted in 2013,* is in progress. Action plans are political documents that designate the directions

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12 Council Directive 70/157/EEC on the permissible sound level and the exhaust system of motor vehicles or Council Directive 70/220/EEC on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles.

13 The text of the Statement issued at the Paris Summit is here: The First Summit Conference of the Enlarged Community, Bulletin of the European Communities, Vol. 5. 10-, Brussels, quote: pp. 14-16.

14 OJ C 112, 1973. 12. 20.

15 Decision No. 1386/2013/EU (20 November, 2013) of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' is a text related to EEA, OJ L 354, 28/12/2013 p. 0171 – 0200.

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for the common actions, defining the basic institutions the development of which are of high importance. These are political declarations of intent that define the instruments and priorities scheduled for a specified period and can also set deadlines while still remaining relatively general. They are not obligatory rules, the compliance with the last two action plans is an expectation only for Community bodies. The auditor of the European Parliament summarized it during the audit of the last, seventh action plan:[16] "This program has a moderate influence on the environmental policy and the climate policy and it also gives strategic guidance both at EU level and at the member states level. It facilitates the coherence and the formulation of a long term plan among the different sectors."

The first program was accepted by a statement and all others by decisions that confirms these are the Council's political opinion. In the successive series of action programs, you can see the extension of time horizons, from the first three years to today's 8 years, and beyond (some issues have been discussed up to 2050), and the increasing complexity of areas and tools. There is no doubt that there will be an 8th Action Plan, only more focused, which the EP draft report describes as:[17]

> "There is strong support among stakeholders for an 8th EAP. Paradoxically, although many suggestions have been put forward for new sub-objectives in a future EAP, stakeholders also considered that such a programme should be simpler and more focussed than the existing one. More and better indicators would improve monitoring and feedback."

The Seventh Action Programme covers a period until 2020 and the most important words from its preamble are:

> "(1) The Union has set itself the objective of becoming a smart, sustainable and inclusive economy by 2020 with a set of policies and actions aimed at making it a low-carbon and resource-efficient economy…
> (18) The Union has agreed to stimulate the transition to a green economy and to strive towards an absolute decoupling of economic growth and environmental degradation […]."

A significant part of this action program is the Annex – "Living well, within the limits of our planet" (Action Programme to 2020) – a set of 9 priority objectives from the protection of natural resources to the enhancement of sustainability of the cities, of which the most relevant is the objective 4:

16 Draft Report on the implementation of the 7th Environment Action Programme 2017/2030(INI) by the European Parliament 2014-2019, Committee on the Environment, Public Health and Food Safety, p. 3.
17 Id., p. 4.

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> "65. In order to maximise the benefits of Union environment legislation by improving implementation, the 7th EAP shall ensure that by 2020:
> – the public has access to clear information showing how Union environment law is being implemented consistent with the Aarhus Convention;
> – compliance with specific environment legislation has increased;
> – Union environment law is enforced at all administrative levels and a level-playing field in the internal market is guaranteed;
> – citizens' trust and confidence in Union environment law and its enforcement is enhanced;
> – the principle of effective legal protection for citizens and their organisations is facilitated."

It is considerable that *the programme attaches great importance to the participation of citizens and society* as three out of the above five thoughts emphasize that while the other two cover basic aspects of the implementation. It seems that there is more trust for realization of environmental regulation in public participation then through its institutionalized, authoritative forms.

Environmental action plans are not the only means of the environmental regulations in the European integration. It is enough to think about how the *sustainable development idea* widespread[18] after the second UN conference as sustainability had been part of environmental policy far before the independent, overarching sustainability strategy was invented. Besides covering environmental protection issues, the idea of sustainable development also supports economic growth goals not necessarily harmonized with environmental goals thereby generating the opposite reaction.

The first step towards this was the Gothenburg[19] strategy but it is recommended to start with the Cardiff Process[20] that was a trigger for a more integrated process and although based on environmental protection, it represented a wider perspective, yet was still not successful. The purpose was to realize sustainability in practice, integrating environmental goals into other EU politics. *Integration is deemed to be coupled with or rather taken as a synonym of sustainable development* meaning the proceeding that facilitates different environmental aspects to become incorporated in legislation outside of the strict field of environmental law. Such integration has not been realized ever since. After creat-

18 Conference on Environment and Development, Rio 1992.

19 Commission Communication of 15 May 2001 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development' (Commission proposal to the Gothenburg European Council) [COM (2001) 264 final – not published in the Official Journal].

20 Communication from the Commission to the European Council of 27 May 1998 on a partnership for integration: a strategy for integrating the environment into EU policies (Cardiff- June 1998) [COM(1998) 333 – Not published in the Official Journal].

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ing the *Sustainable Development Strategy* the "global partnership" concept has come into the European policy[21] introducing the EU as an active leader of the international cooperation. The SDS (Sustainable Development Strategy) was renewed in 2005[22] and a new SDS has been adopted by the Council as a result of a review.[23] The importance of the substance development was highlighted in building a sustainable society and economic growth was a demand in general. It became clear that the EU shall not disregard economic growth.

Fundamental economic strategies appeared parallel with development strategies, of which the most important is the Lisbon Strategy issued in 2000,[24] that has since been updated and reconsidered several times. As a result of the economic crisis a new development programme had to be adopted that will last until 2020. The recommendation[25] was different from the essential idea of a uniformly managed sustainability as it approached sustainability in a narrower, materialistic aspect:

> "Europe 2020 has three priorities linked to each other:
> – Smart growth: economic growth driven by knowledge and innovation.
> – Sustainable growth: more resource-efficient, environmental friendly and competitive economy.
> – Inclusive growth: encouraging to increase employment, and creating an economy with social and territorial cohesion."

The 2008 crisis did not make the way easier for sustainability, but restructured the systems and priorities. Simply the change of words – growth instead of development – may result in serious consequences as it is not clear whether it only signals a different word choice or a different attitude. In any case, the developments in recent times did not reassure people who care about the future of the environment. We shall not go into further details of the sustainability and economic policies, nor their changes in the past few years, and the fact is that there have been no major innovations. More ideas came together with the adoption of the SDG issued by the UN in 2015[26] – sustainable devel-

21 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Towards a global partnership for sustainable development, Brussels, 13.2.2002, COM(2002) 82 final.

22 Communication from the Commission to the Council and the European Parliament on the review of the Sustainable Development Strategy – A platform for action, Brussels, 13.12.2005 COM(2005) 658 final.

23 Council of the European Union, Brussels, 26 June 2006, (OR. en) 10917/06.

24 Presidency conclusions Lisbon European Council, 23 and 24 March 2000.

25 Council Recommendation No. 2010/410/EU of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union, OJ L 191, 23/07/2010, pp. 0028 – 0034.

26 Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015 (UNGA A/RES/70/1).

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opment goals – where[27] resilience offers somenovelty among other very similar goals that look at development as a determining factor. Section 35 of the EU communiqué is a great example: "Environmental sustainability, including a stable climate, is indispensable to poverty eradication and sustainable development, particularly for the poorest sections of society. Human well-being and resilient societies depend on healthy ecosystems and a functioning environment."

3.3 Primary Legal Basis of Environmental Protection

Environmental policy, sustainability and other policies alone are not … to create a legal base for the policy making therefore it was an interesting challenge – especially at the beginning – to find a primary legal basis and if so, what background will that provide. The environmental policy of the EEC clearly had no direct legal base at the beginning and therefore based on the so called "implicit powers" for the first 20 years *the primary reference was Article 100 of the EC that set the operation of the internal market as a goal and the other reference was Article 235 that prioritised the general goals of the Community.*

According to Article 100, directives can be issued binding Member States if approximation of laws or administrative decisions and practice is required where they have direct influence on the creation or operation of the common market. The idea is that the different national environmental rules hinder the smooth operation of the common market through restricting the free market among the member states. In the beginning the application of Article 100 as a legal basis for the functioning of the common market focused on harmonizing product (environmental) standards, later the protection of the quality of the environment or environmental elements also started to increasingly rely on Article 100 as legal basis, given that the differences in the production cost factors are also influencing the competitive position of market participants. However, the harmonization of legislation on product standards or rules affecting the conditions of competition does not allow environmental legislation not closely linked to production or commercial activity, and therefore Article 100 cannot be taken as a solid legal basis for a broad environmental policy and legislation.

Environmental legislation not closely linked to economic activities and not having direct effect on the establishment or operation of the common market may not necessarily be justified by economic expediency. Therefore the environmental legislation of the Community used Article 235 as a legal basis since this Article counts as a provision giving a general power. Article 235 empowers the Community with the competence required for the achievement of goals. Another condition of such authorization is that the law should

27 Strasbourg, 22.11.2016 COM(2016) 740 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Proposal for a new European Consensus on Development Our World, our Dignity, our Future.

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be applied during the functioning of the common market and that other special provisions should not give authorization for legislation. This means that, besides referring to the purposes, some kind of economic link would still be necessary even if the conditions of competition for the realization of the common market were not affected. So Article 235 provided legal basis for environmental quality rules, nature conservation rules and it has been used also for laws related to international environmental conventions too.

Several decisions by the European Court of Justice (ECJ) exist from times before the Single European Act that actually – although with some delay – confirm retrospectively why the legal basis for the environmental ruling had to be created. In the words of a former advocate general of the European Court:[28]

> "… *environmental protection as a public interest value was given a constitutional status by the ECJ even before a specific environmental legal basis existed in the Treaty.* It was defined as an essential objective of the Community to which, in certain circumstances and under certain conditions, the principles of free trade must defer."

The *ADBHU* case[29] was similar and was followed by others therefore the "*Danish Bottle*" case is also well-known because of[30] the principle of proportionality.

The most important issue in the *ADBHU* case was to balance the interests between the freedom of the market and environmental protection from the aspect of the general interest. They are both principles and rights. Adopting these goals meant offering an axioma instead of some long argumentation:

> 12 "In the first place it should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the community provided that the rights in question are not substantively impaired.
>
> 13 There is no reason to conclude that the Directive has exceeded those limits. The Directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives."

It should be added that the environmental laws several times referred to both relevant articles of the Treaty of Rome which later, when the appropriate legal basis was available, was not supported by the ECJ.

28 Francis Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment', *Journal of Environmental Law*, Vol. 18, No. 2, 2006, p. 194.

29 Judgment of 7 February 1985 in Case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)*, [1985] ECR 531.

30 Judgment of 20 September 1988 in Case C-302/86, *Commission v. Denmark*, [1988] ECR 4607.

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The *Single European Act has created the primary legal basis from 1987* that still provides background for the current ruling without a change in its structure. The previous Article 100 aiming at harmonization, is still valid with slight modification – first 100a, then 97 and now 114 – whereas Article 235 – today 325 – no longer applies as these articles are now listed under *environment as a separate title* – Article 130r, s, t from 1987, changed to Article 174, 175, 176 after Maastricht and renumbered to Article 191, 192, 193 in the Treaty of Lisbon. Not introducing the different regulatory solutions I now give a short summary and review of the current law in force.

Before diving into environmental legislation it should be emphasized that the *Treaty of Lisbon gave legal force also to the Charter of Fundamental Rights* which does not reference environmental rights in particular, but the provisions in the Solidarity Clause could be interpreted as such: "Article 37 – Environmental protection: A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

The above article captures the tasks and obligations of the institutions – EU or state institutions – rather than the human rights perspective, which still allows it to be classified under the group of environmental rights, with respect to the fact that this is part of a document of fundamental rights. The above statement is true even if many first reactions are considerably more sceptical. Krämer was not enthusiasctic about the EU solution:[31] "The Charter adopted in 2000 did not create clean environmental law. Article 37 merely states that: … Such a provision is quite misleading, as it is unclear in what sense such a formula that almost fully complies with Article 11 of the TFEU creates 'rights'." Moreover the relating article of the Charter has shown up in case law as a reference but only in certain aspects.[32]

Since the Single European Act direct and specific environmental provisions are found in two documents: Article 114 on the approximation of laws related to the internal market since 2017 and Title XX on Environment – besides these there are environmental dimensions in several other fields like energy, agriculture, fisheries, etc.

According to Article 114 the European Parliament and the Council shall "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market." The related recommendations will take as a base a high level of protection, "taking account in particular of any new development based on scientific facts." The so called "*defense clause*" determines the conditions and the possible

31 Ludwig Krämer, *Az Európai Unió környezeti joga* (EU environmental law), Dialóg Campus Kiadó, 2012, p. 150.

32 *E.g.* regarding the high level of protection and improvement of the quality of the environment Case C-444/15, reference for preliminary ruling by Tribunale amministrativo regionale per il Veneto in the proceedings between Associazione Italia Nostra Onlus and Comune di Venezia and other parties 21 December, 2016.

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derogations from the harmonization measures and the reasons include if such derogation has a new scientific explanation or is due to a problem specific for the given member state. Whichever reason for derogation is considered – whether to preserve old provisions or introduce a new, different provision – the authorization of the Commission is required, and in this process the derogation can only be approved if the Commission is convinced it is not arbitrary discrimination or a hidden means to discourage trade between the Member States.

The title 'Environment' reflects the messages of previous provisions almost fully, albeit with new numbering and completed with a few new features / novelties like climate protection:

- Article 191
  - environmental policy aims (paragraph 1.)
  - basic principles applied in environmental law (paragraph 2.)
  - preparing policy on the environment (paragraph 3.)
  - divided competences in international cooperation (paragraph 4.)
- Article 192. authorization on the legislation.
- Article 193. clause for least stringency.

Among the *environmental policy objectives* preserving the quality of the environment, protection and improvement has always been a top priority since the Single European Act and these objectives are followed by protecting human health, prudent and reasonable utilization of natural sources. The sequence in this sense signals a message, instead of humans it puts the environment – independently – at the top. The question of natural resources is only a direct consequence. Fourthly, tackling regional or global environmental problems – and in particular the fight against climate change – reminds us that the EU is happy to act as an active participant in international co-operation, even as a leader.

The Principles have not changed since Maastricht, as that included the precautionary principle. The principle of high level of protection also remained – which is immediately relativised by the fact that according to the Treaty differences between the regions of the EU must be considered,[33] which are the principles of prevention, "polluter pays" and the principle of the prevention of environmental damage at their source. The greatest challenge of the above is the precautionary principle, since it gives authorization for inter-

33 Specifying that the high level does not mean an absolute value – see *e.g.* para. 44 of the judgment of C-444/15 as cited in footnote 32: "Whilst it is undisputed that Article 191(2) TFEU requires EU policy in environmental matters to aim for a high level of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be the highest that is technically possible."

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vention even if it is not fully proven – in other words in case of "scientific insecurity", and thereby reversing the burden of proof.[34]

Issues providing the ground for environmental policy are of particular importance during the preparation of lawmaking, since their purpose is to keep regulatory efforts at bay through the suggested responses to the listed general questions. At the same time, none of the listed aspects poses a serious obstacle, yet is capable of making the affected parties reconsider the question. The available scientific and technical data undoubtedly not only justify but also continuously require the revision of environmental regulation, since the potential benefits and costs of interference or non-interference should also be interpreted, as sustainable development, while fundamentally ecologically oriented, is still embedded in the economy. The EU's specific character is the reference to The economic and social development of the Union as a whole and to the balanced development of its regions, and the re-emergence of regions in other respects that recognize the differences in environmental conditions.

The *mandate for international cooperation* as a shared competence would not in itself be an interesting legal matter, but the way through which environmental cooperation has evolved contained some twists. Legal interpretation has evolved from the *Bolivian wildcat* case[35] through *the Berre Lake* case[36] until it reached the very clear position that the *Slovak brown bear* case[37] summarizes as follows:

> "30. The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union…"

and it goes even further:

> "39 …consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations."

34 *See* more details: Gyula Bándi, 'Gondolatok az elővigyázatosság elvéről', *Jogtudományi Közlöny*, Vol. LXVIII, No. 10, 2013, pp. 471-480.

35 Judgment of 29 November 1990 in Case C-182/89, *Commission of the European Communities v. French Republic*, [1990] ECR 4337.

36 Judgment of 7 October 2004 in Case C-239/03, *Commission v. French Republic* [2004] ECR 9325.

37 Judgment of 8 March 2011 in Case C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, [2011] ECR 1255.

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The empowerment of explicit environmental legislation, in addition to Article 114, is set out in Article 192, applying the ordinary legislative procedure, in consultation with the Economic and Social Committee and the Committee of the Regions, with a majority decision and only a small number of unanimity.

The *clause for least stringency* in Article 193 empowers Member States to maintain or introduce more stringent safeguard measures if they are compatible with the Treaties or to simplify the procedural requirement in relation to the defence clause as the Commission should only be notified of these.

The *Treaty on the Functioning of the European Union* (TFEU) marginally covers the basics:

- paragraph 2 or Article 4 mentions environmental protection within the shared competence between the EU and the Member States;
- Article 11 is deemed to be the one that formulates the principal of integration as it says: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development." It is regrettable that the apparent priority of environmental integration has ceased to exist in Lisbon, and is now just one of the few integrating aspects without any hierarchy[38] – in line with the general trend that derogates sustainable development to sustainable growth;
- but it should also be noted that Article 36 allows the introduction of certain prohibitions or restrictions "on imports, exports or goods in transit" which, inter alia, protect the health and life of humans, animals and plants, in order to protect national treasures of artistic, historic or archaeological value, so that they cannot be a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The *Treaty on the European Union* also has important environmental provisions, mostly via theoretical approach:

- Article 3 provides theoretical principles, paragraph 3 links sustainable development in Europe together with a high level of protection and improvement of the quality of the environment to the internal market;
- Article 5 is also important as it calls attention to applying the principles of subsidiarity and proportionality when exercising EU competences;
- the Charter of Fundamental Rights has been entered into force by Article 6 but it has already been mentioned.

38 *See more details on this*: Gyula Bándi, 'Környezetvédelem, fenntartható fejlődés és integráció' (Environmental protection, sustainable development and integration), in: Anna Halustyik & László Klicsu (eds.), *Cooperatrici veritatis: Ünnepi kötet Tersztyánszkyné Vasadi Éva 80. születésnapja alkalmából,* Budapest: Pázmány Press, pp. 49-70.

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3.4 Secondary Right of Environmental Law

Moving to the topic of secondary law, it is essential to talk about the *outstanding role of the EU Court of Justice in the field of environmental protection*, which has been emphasized by experts for decades. "It may be safely concluded that the Court of Justice plays a crucial role in giving practical effect to European environmental law."[39] The Court's legal practice may be deemed as one that makes EU law – that many still do not deem as part of their national law – really lifelike through everyday cases. "The precedents of the Court's case law are important sources for the formation and interpretation of the law."[40] And if we still have doubts in its role, we can refer to the 15-year old thought, still applicable today: "Indeed, the Court has, overall, broadly interpreted the rules of the protection of the environment, deciding in favour of the environment wheret his was possible and innovated in order to improve the existing rules."[41] Lately a Mexican author has analyzed the EU point of view on sustainable development and the role of the ECJ as a model for Mexican courts to follow.[42] Even experts of international law offices have pointed out the determinative, forward-looking nature of certain ECJ judgements.[43]

It is impossible to analyse the secondary law in such an overview assessment and therefore I will not attempt to do so. Let us be content with stating the growing scope for European legislation in environmental protection and if the 80% coverage mentioned in the introductory section – which is the ratio of the direct impact of the EU in each national regulation – is true, then it would be unnecessary for me to present the environmental protection regulations in a few pages. Instead I would like to emphasize two topics:

- some exciting intersections of the 43-year-old waste rules; and
- the leitmotiv of the so called Environmental Liability Directive (ELD).

39 Luc Lavrysen, 'The European Court of Justice and the Implementation of Environmental Law', in: Richard Macrory (ed.), *Reflections on 30 Years of EU Environmental Law,* Europa Law Publishing, Groningen, 2006, p. 447.

40 Alexandre Kiss & Dinah Shelton, *Manual of European Environmental Law*, Grotius Publications, Cambridge, 1993, p. 22.

41 Ludwig Krämer, *Casebook on EU Environmental Law,* Hart Publishing, 2002, p. V.

42 Luis A. Avilés, 'Sustainable Development and Environmental Legal Protection In The European Union: A Model for Mexican Courts to Follow?' *Mexican Law Review*, New Series, Vol. VI, No. 2, Jan-June 2014, pp. 251-272.

43 EU Court of Justice landmark rulings on access to environmental information By Claudio Mereu and Koen Van Maldegem | 30 Nov 2016 http://www.fieldfisher.com/publications/2016/11/eu-court-of-justice-landmark-rulings-on-access-to-environmental-information-1#sthash.3uhhCH4e.dpbs, wrote this about information on the environment: "Finally, it should be highlighted that these two judgments confirm the current trend which the CJEU follows regarding access to environmental documents. Indeed, according to the CJEU, exceptions to disclosure must be applied restrictively as they derogate from the general principle of widest possible access to documents on emissions to the environment."

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The first one is a great example for a topic of the secondary law; the second one points out the horizontal rules, giving particular attention to subsidiarity.

3.5 Waste Law

Two directives signalled the beginning of European waste regulation in 1975, the more important of these was the waste framework[44] regulation, the other the issue of waste oils.[45] The latter was the legal basis for the first major judgment legitimizing the environmental objectives retrospectively.[46] The legal framework has been modified several times since then, and has been renewed, most recently in 2008.[47] The process of renewal has not come to a halt, the "circular economy", which, according to its own assessment on the referenced websites, boosts global competitiveness, strengthens sustainable economic growth and contributes to the increase of the number of jobs.[48] Among the themes of circular economy it is precisely waste that plays a prominent role and is still under review today in many other areas besides the Framework Directive.[49] We should not forget that the case law of the European Court of Justice has played a decisive role in the evolution of waste regulation, providing a good example of the rational repercussions of the problems of law enforcement in legislation.

As far as waste is concerned, from the beginning of the legal regime, *the most exciting legal question is clarifying the definitions.* The *definition of waste* was already given in the First Waste Framework Directive adopted in 1975, but the new directive, entering into force in 2010, made only one amendment, namely, omitting a reference to an Annex to the original Directive, found to be unnecessary, as it did not provide adequate assistance for a proper interpretation. Therefore: "1. 'waste': means any substance or object which the holder discards or intends to discard or is required to discard;." No wonder that many people say that this concept does not really support an accurate interpretation – one author even said that such a concept is not really needed in this vast framework.[50] Hence,

44 75/442/EEC Directive on waste.

45 75/439/EEC Directive on the disposal of waste oils.

46 Case 240/83, *ADBHU.*

47 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

48 *See e.g.* the relevant EU homepage http://ec.europa.eu/environment/circular-economy/index_en.htm, Hungarian sources: http://circularfoundation.org/hu/korforgasos-gazdasagrol or Gyula Bándi, *A fenntarthatóságtól a körkörös gazdaság felé: EU stratégiák alakulása és ennek jogi következményei* (From sustainability to a cyclic economy: Development of EU strategies and their legal consequences), FONTES IURIS: Professional journal of the Ministry of Justice, Vol. 2, No. 1, 2016, pp. 13-21.

49 *See* more details: http://ec.europa.eu/environment/waste/target_review.htm.

50 Csaba Kiss has given an incisive title to his related work: Csaba Kiss, 'A hulladék veszélyes fogalma – avagy miért nincs szükség a hulladék jogszabályi definíciójára' (The hazardous term of waste – or why is waste not needed to be defined by law), *Jogi Fórum*, http://www.jogiforum.hu/publikaciok/143, 13 June 2004.

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it is even more understandable why European law has relied on the case law since the beginning.

One of the decisive elements of the case law on waste was the consolidated *Vessoso-Zanetti* case.[51] The case was based on a criminal proceeding where the defendants collected, transported and stored waste without the permit required by Italian law implementing the above directives. That is a crime under the Italian law. The defendants argued that the materials they collected were not waste because they were suitable for further economic exploitation. In this case, the *relativity of the definition of waste* is well-perceived – according to the defendants, if something might be used later, it is not waste. The Court has not accepted their reasoning:

> "9. The answer to the first part of the question must therefore be that the concept of waste within the meaning of Article 1 of Council Directive 75/442 and Article 1 of Council Directive 78/319 is not to be understood as excluding substances and objects which are capable of economic reutilization."

The waste hierarchy of today is also based on this interpretation, as it treats the utilization of waste as a priority.

One of the primary issues involved in the conceptual clarification was *the recognition of waste as goods*, the essence and importance of which was the most explicit in a Belgian case:[52]

> "23. It is not disputed that recyclable and reusable waste has an intrinsic commercial value, possibly after being treated, constituting 'goods' for the purposes of the Treaty, and consequently comes under Article 30 et seq. of the Treaty. …
> 27. … the distinction between recyclable and non-recyclable waste is particularly difficult to apply in practice… That distinction is based on factors which are uncertain and liable to change in the course of time according to technical progress. Furthermore, whether waste is recyclable or not also depends on the cost of the recycling process and consequently on whether its proposed reutilization is viable, with the result that classification of waste is necessarily subjective and depends on variable factors.
> 28. It must therefore be concluded that waste, whether recyclable or not, is to be regarded as 'goods' the movement of which, in accordance with Article 30 of the Treaty, must in principle not be prevented."

51 Judgment of 28 March 1990 in Joined Cases C-206/88 and C-207/88, *Criminal proceedings against G. Vessoso and G. Zanetti*, [1990] ECR 1461.

52 Judgment of 9 July 1992 in Case C-2/90, *Commission v. Belgium*, [1992] ECR 4431.

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Although reference to the Annex within the definition of waste is no longer part of the interpretation, it is worth considering this to illustrate the reason why it has become unnecessary. In fact, the regulatory framework could hardly do anything other than use a very general concept including a number of subjective elements since, if it is to define it more accurately, it will certainly be restrictive in some respects. The referred Annex 1 simply lists waste categories without giving any further guidance with the list. The Court notes regarding the joint interpretation of the concept and the annex:

> "42. …The annex clarifies and illustrates that definition by providing lists of substances and objects which can be classified as waste. However, the lists are only intended as guidance, and the classification of waste is to be inferred primarily from the holder's actions and the meaning of the term 'discard' …."[53]

Csaba Kiss, in his above-mentioned article, correctly writes:

> "Let us not go into the analysis of the false, seemingly objective definition. Annex 1 does not assist in the interpretation of the concept, as it is a perfect example of 'inaccurate formulation', 'tautology' and a regulation, which actually leaves the question unregulated through line 16 of Annex 1 (Categories of waste): 'Any other product or substance that is not listed in the above categories'."

The definition of waste was challenging for a long time until *we reached the Palin Granit case*,[54] that is *one of the first, determining steps towards a more characteristic and daring case law*, where the essence of the question is the future handling of the remaining stones and the rocks of rubble from the granite mining site and their legal assessment. According to the ECJ, when it comes to waste classification, it is necessary to consider the likelihood of recovery of the substance, without further treatment. If this option includes that the holder may receive economic advantage for such utilization, the likelihood of recovery is high. Under such circumstances, the substance in question cannot be a waste that they want to get rid of, but becomes goods.

This development continues in a Finnish[55] case, the so called *AvestaPolarit Chrome* case where the main difference compared to the Palin Granit case is whether the part of the remainder or residue in question is directly used in the mine while the rest is stored.

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53 Judgment of 7 September 2004 in Case C-1/03, *Paul Van de Walle, Daniel Laurent, Thierry Mersch v. Texaco Belgium SA*, [2004] ECR 7613, para. 42.

54 Judgment of 18 April 2002 in Case C-9/00, *Palin Granit Oy and Vehmassalon kansanterveystyön kuntayhtymän hallitus*, [2002] ECR 3533.

55 Judgment of 11 September 2003 in Case C-114/01, *AvestaPolarit Chrome Oy*, [2003] ECR 8725.

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> "43. The answer to the national court's first question must therefore be that, in a situation such as that at issue in the main proceedings, the holder of leftover rock and residual sand from ore-dressing operations from the operation of a mine discards or intends to discard those substances, which must consequently be classified as waste within the meaning of Directive 75/442, unless he uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose."

The so called *Niselli* case[56] is also relevant, interpreting the concept of waste related to the utilization of scrap waste and where the concept of a by-product and its relation to the basic definition of waste is increasingly apparent. "45. However, having regard to the obligation to interpret the concept of waste widely in order to limit its inherent undesirable or harmful effects, recourse to the reasoning applicable to by-products should be limited to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any prior processing and as an integral part of the production process (see *Palin Granit*, paragraph 36)."

In the case of waste, *the term 'discard' is thus a decisive aspect*, a starting point which apparently includes a subjective element, but this cannot be identified in every case with the activities arising from the holder's intent, as established recently in the 'Erika' case,[57] – in relation to compensation of damages caused by oil spilling into the sea as a result of a tanker accident, when the basic question to be decided was whether the oil was waste or not.

> "45. In addition to the criterion of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not the substance is waste within the meaning of Directive 75/442 is thus the degree of likelihood that the substance will be reused without prior processing. If, in addition to the mere possibility of reusing the substance, there is also an economic advantage to the holder in so doing, the likelihood of such reuse is high. In that case, the substance in question can no longer be considered a substance which its holder seeks to 'discard' and must be regarded as a genuine product (see *Palin Granit*, paragraph 37). […]
> 59 It is common ground that the exploiting or marketing of such hydrocarbons, spread or forming an emulsion in the water or agglomerated with sediment, is very uncertain or even hypothetical. It is also agreed that, even assuming that it

56 Judgment of 11 November 2004 in Case C-457/02, *Criminal proceedings against Antonio Niselli*, [2004] ECR 10853.

57 Judgment of 24 June 2008 in Case C-188/07, *Commune de Mesquer v. Total France SA and Total International Ltd.*, [2008] ECR 4501.

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> is technically possible, such exploiting or marketing would in any event imply prior processing operations which, far from being economically advantageous for the holder of the substance, would in fact be a significant financial burden. It follows that such hydrocarbons accidentally spilled at sea are to be regarded as substances which the holder did not intend to produce and which he 'discards', albeit involuntarily, while they are being transported, so that they must be classified as waste within the meaning of Directive 75/442 (see, to that effect, *Van der Walle*, paragraphs 47 and 50)."

As we get closer to the concept of waste, there are still questions of interpretation, especially in the cases where a waste management operation can have higher priority in the waste hierarchy – where prevention is followed by some form of recovery (there is a sequence here as well) and disposal is the least desirable solution – which does not only have theoretical significance, but also a very significant material benefit. Recovery can bring revenue, while disposing is always a cost-increasing factor. *In the case of waste, therefore, recovery*[58] *is undoubtedly the best solution after waste prevention.* Accordingly, the activity of recovery must be supported in such a way as to clarify, where appropriate, the concept of utilization, interpreted to accommodate as many opportunities as possible, of course within the limits allowed by law. It was instrumental to clarify the boundaries between recovery and disposal in the *ASA* judgment.[59] Here is a brief description of facts in the *ASA* case:

> "19. According to that notification, the waste in question was slag and ashes produced as a by-product in the operation of waste incinerators and transformed into a 'specific product' at a waste-treatment plant in Vienna, Austria. The waste was to be deposited in a former salt-mine at Kochendorf, Germany, to secure hollow spaces (mine-sealing)."

The dispute is based on the fact that, while the authorities of the host country, Germany, accepted this rating, the authority of the sender country, Austria, is of the view that the operation in question is disposal, namely dumping. Due to the difference in classification, the exporting company initiated the procedure in Austria and the question of the court

58 Section 15. of Art. 3 of the Framework Directive in force: 'recovery' 'means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. Annex II sets out a non-exhaustive list of recovery operations;"

59 Judgment of 27 February 2002 in Case C-6/00, *Abfall Service AG (ASA) v. Bundesminister für Umwelt, Jugend und Familie*, [2002] ECR I-1961.

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was exactly directed at what the operation qualifies as, what is the decisive criteria of recovery.

> "58. It must be observed, at the outset, that neither the Regulation nor the Directive contains a general definition of disposal or recovery of waste, but merely refers to Annexes II A and II B to the Directive, in which various operations falling within the scope of those concepts are listed. […]
> 65. […] since the deposit of slag and ashes in a disused mine constitutes an operation which, having regard solely to the wording of the operations in question, is capable of falling within the scope of the disposal operation referred to in D 12 of Annex II A to the Directive or of the recovery operation referred to in R 5 of Annex II B to that Directive. […]
> 69. However, it does follow from Article 3(1)(b) and the fourth recital of the Directive that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources. […]
> 71. In view of the considerations set out above […] Such a deposit constitutes a recovery if its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose."

The issue of recovery-disposal still continues to appear in judicial practice, fortunately in terms of continuity and unified interpretation. Here is another case as an example:[60]

> "37. Article 3(15) of Directive 2008/98 defines, inter alia, the 'recovery' of waste as an operation the principal result of which is that the waste in question serves a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function. Recital 19 of the directive is consistent with this approach in that it specifies that the concept of 'recovery' differs, in terms of environmental impact, from the concept of 'disposal' through the substitution of natural resources in the economy.
> 38. Thus, that definition corresponds to the definition developed in the Court's case-law, according to which the essential characteristic of a waste recovery operation is that its principal objective is that the waste serves a useful purpose in replacing other materials which would have had to be used for that purpose, thereby enabling natural resources to be preserved (judgment of 27 February 2002 in ASA, C-6/00, EU:C:2002:121, paragraph 69).

60 Judgment of 28 July 2016 in Case C-147/15, *Città Metropolitana di Bari, formerly Provincia di Bari v. Edilizia Mastrodonato Srl*, ECLI:EU:C:2016:606.

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> 39. It follows that the main objective of the recovery operation must be the conservation of natural resources. Conversely, if the conservation of natural resources constitutes only a secondary effect of an operation the principal objective of which is the disposal of waste, this cannot affect the classification of that operation as a disposal operation (see, to that effect, judgment of 13 February 2003 in *Commission v Luxembourg*, C-458/00, EU:C:2003:94, paragraph 43)."

The new directive aims to clarify two concepts mentioned above in order to implement the cited priorities for waste management. The preamble says:

> "(22) There should be no confusion between the various aspects of the waste definition, and appropriate procedures should be applied, where necessary, to by-products that are not waste, on the one hand, or to waste that ceases to be waste, on the other hand."

It is necessary to add that the Member States have the right – and even recommended – to develop detailed conditions for the cessation of both the by-product and the waste status discussed below.

Let's first introduce the concepts. The significance of the by-product is that it is generated during a production process where the primary purpose is not the production of this product, but the produced by-products can still be used without further processing, meets the product requirements and, in particular, does not have general harmful effects on the environment and on human health. This is, therefore, a parallel consequence of a production process, a substance or object that has not become waste. The situation is different with regard to the *termination of waste status* when the product, which is now being re-manufactured, was originally waste, but it ceases to be waste. The prerequisite for this is that the product has gone through a recovery process, including recycling, and can be used, has a market, conforms to the current rules on products and does not cause any general harmful environmental or health effects. For both questions, more information and guidelines have been prepared and made[61] since then, and there are more cases before the Court of Justice. I refer to two examples only, which illustrate the Court's approach and the direction of its interpretation.

61 The examples are not exhaustive: European Commission, End of Waste Criteria, Final Report (2008), http://susproc.jrc.ec.europa.eu/documents/Endofwastecriteriafinal.pdf. Communique from the Commission to the Council and the European Parliament: Communication on the Interpretative Communication on waste and by-products, Brussels, 21.2.2007, COM(2007) 59 final. European Commission, End of Waste Criteria, Final Report (2008), http://susproc.jrc.ec.europa.eu/documents/Endofwastecriteriafinal.pdf.

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The central issue of the case related to the by-product[62] is the application of the older directive – the case was before the Court when the new directive in force was already known, but the case in question was still covered by the former legislation which did not exclude the possibility of qualifying as a by-product – and the agricultural use of pig slurry, and in particular its waste nature. A complete and detailed summary of the whole topic can be found in the judgment, which also includes a complete lack of clarity of the answer:

> "60. […] the answer to the first part of Question 1 is that the first subparagraph of Article 1(a) of Directive 75/442 must be interpreted as meaning that slurry produced in an intensive pig farm and stored pending delivery to farmers in order to be used by them as fertiliser on their land constitutes not 'waste' within the meaning of that provision but a by-product when that producer intends to market the slurry on terms economically advantageous to himself in a subsequent process, provided that such reuse is not a mere possibility but a certainty, without any further processing prior to reuse and as part of the continuing process of production. It is for the national courts to determine, taking account of all the relevant circumstances obtaining in the situations before them, whether those various criteria are satisfied."

And later the judgement also added:

> "64. As the Advocate General has observed in point 67 of his Opinion, it is indeed clear that as a general rule, since establishing an intention is involved, only the holder of the products can prove that he intends not to discard those products but to permit their reuse in circumstances that are appropriate for their being classified as a by-product within the meaning of the Court's case-law."

The termination of the waste status was the subject of another case,[63] but this particular case involved hazardous waste, and the question was whether to use chemically treated wooden telecommunication poles as underlay and terminate their original function:

> "53. By its first question, the referring court asks, essentially, whether it follows from the requirement laid down in Article 6(1), first subparagraph, point (d), of Directive 2008/98, according to which, in order for waste to cease to be waste

62 Judgment of 3 October 2013 in Case C-113/12, *Donal Brady v. Environmental Protection Agency*, [ECLI:EU:C:2013:627].

63 Judgment of 7 March 2013 in Case C-358/11, *Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri -vastuualue v. Lapin luonnonsuojelupiiri ry*, ECLI:EU:C:2013:142.

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> when it has undergone a recovery, including recycling, operation, its use must not lead to overall adverse environmental or human health impacts, that waste falling within the hazardous waste category can never cease to be waste. […]
> 60. Therefore, the answer to the first question is that European Union law does not, as a matter of principle, exclude the possibility that waste regarded as hazardous may cease to be waste within the meaning of Directive 2008/98 if a recovery operation enables it to be made usable without endangering human health or harming the environment and, also, if it is not found that the holder of the object at issue discards it or intends or is required to discard it, within the meaning of Article 3(1) of that directive, this being a matter for the referring court to ascertain. […]
> 64. The answer to the second question is therefore that the REACH Regulation, in particular Annex XVII thereto, in so far as it authorises the use, subject to certain conditions, of wood treated with CCA solutions, is, in circumstances such as those in the main proceedings, relevant for the purpose of determining whether such wood may cease to be waste because, if those conditions were fulfilled, its holder would not be required to discard it within the meaning of Article 3(1) of Directive 2008/98."

Legislation, and in many cases judicial practice preceding by several steps in, sought to *meet the dual goal: to protect the environment from the environmental hazards caused by waste, and thus make waste serve other useful purposes partly or wholly instead of – hopefully natural – substances, saving natural resources as well as financial resources.* The classification of waste as a commodity already shows the important role that waste has in the economy, whereby the conclusion that recovery does not, in itself, exclude the fact that the object or substance remains waste, is a good counterweight. The role of individual rating and evaluation remains, placing a meaningful task on law enforcement – authority and court. Legislation follows the route of practice, classifying it as a rule, for example: the concept of the by-product. Clarification of the legal concepts will be significant, even if the concepts are far from being clear, yet they provide the necessary framework, paving the way. And the fact that it is desirable to save waste is not to be judged but to be endorsed, since the gentle treatment of resources is considered thereby along with efficiency.

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3.6 The Liability Directive and Difficulties with Its Application

Finally, turning to a horizontal example, the development of responsibility needs to be addressed, namely the EU's harmonization efforts. In this matter the *Environmental Liability Directive (ELD)*[64] will be discussed briefly, but we cannot forget that there was a similarly successful, ultimately effective move in criminal law as well.[65] I am merely quoting the judgment because its interpretation of the whole harmonization of liability answers possible doubts about subsidiarity, according to which the rules of responsibility should rather remain in the scope of the nation states.

In this particular case[66] the Commission's proposal for a directive was not adopted by the Council in this form, merely as a framework decision, because "14. … The said majority considered that the proposal went beyond the powers attributed to the Community by the Treaty establishing the European Community …." The ECJ did not consider this idea completely foreign yet they still gave an opportunity for the ruling:

> "47. […] As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence […]
> 48. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective."

The environmental liability directive initially started as liability for damages, as one of the key issues of the Fifth Environmental Action Program[67] was the creation of an integrated Community position for environmental responsibility, originating in the Lugano Convention[68] on the Compensation of Environmental Damages, in which the EC was also involved. No wonder that the first comprehensive Community preparatory document in

64 Directive 2004/35 of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

65 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

66 Judgment of 13 September 2005 in Case C-176/03, *Commission of the European Communities v. Council of the European Union*, [2005] ECR 7879.

67 A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, COM(92) 23 final, Vol. II, p. 68.

68 Convention on Civil Liability for damage Resulting from Activities Dangerous to the Environment, Lugano 1993, see: http://conventions.coe.int/Treaty/en/Treaties/Html/150.htm.

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this matter, the Green Paper on Environmental Damage,[69] was soon published, but liability for damages was the central issue also of the White Paper on Environmental Liability,[70] which aimed at the real and practical implementation of the polluter pays principle, preferring in general the objective liability system. The White Paper was the basis for the drafting of the legislation,[71] but the re-interpretation of the liability schemes has already begun, and the elements of civil law responsibility have slowly become less prominent, and a system started to appeared of direct intervention, prevention and recovery elements, with public administration playing an increasing role and responsibility, and responsibility more focused on reimbursement than compensation. Therefore, it is no wonder that the common position[72] emerging after the debates no longer includes some of the classical types of damage – *e.g.* the loss of profit or personal injury.

In any case, finally, the adopted ELD directive, though in its title it seems to include a private law concept – a directive on the prevention and restoration of environmental damage – *has become public law*. The EU has not gone further in private law codification. "It can best be described as a public law regime with minor private law characteristics."[73] The justification and importance of the directive is well illustrated by the opinion:[74] "The powers, duties and self-executing provisions of the ELD, together with the other enforcement provisions, have created the first 'polluter pays' regime under EC law." At first, it seemed that the directive directly affected the damages liability, but ultimately this effect is more indirect, although the link exists.

Contrary to its name, the directive, therefore, *does not cover compensation liability, but rather is of public administrative liability type*, yet it has many elements that can be used in other areas of responsibility. The preamble itself clarifies this as follows: "This Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages." (14)

69 7099/93; COM(93)47 final; Communication from the Commission to the Council and European Parliament and the Economic Comittee, Green Paper on Remedying Environmental Damage.

70 White Paper on environmental liability COM(2000) 66 final 9 February 2000.

71 The Proposal for a Directive of the European Parliament and the Council on environmental liability with regard to the prevention and remedying of environmental damage, COM/2002/0017 final-COD 2002/0021 was eventually adopted by the Commission in February 2002.

72 Common Position (EC) No. 58/2003 adopted by the Council on 18 September 2003 with a view to the adotion of a Directive 2003/…./EC of the European Parliament and of the Council of….. on environmental liability with regard to the prevention and remedying of environmental damage.

73 Lucas Bergkamp: The Commission July 2001 Working Paper on Environmental Liability: Civil or Administrative Law to Prevent and Restore Environmental Harm, *Environmental Liability*, Vol. 9, No. 5, October 2001, p. 208.

74 Valerie Fogleman, 'Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions', *Environmental Liability*, Vol. 14, No. 4, July-August 2006, p. 146.

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The Liability Directive has brought – or generated – a number of noteworthy changes in environmental law.

The Commission's report on the Directive[75] – and even broader reports had[76] been prepared back then, that I do not analyze in this study – says:

> "The main objectives of the Directive are to prevent environmental damage if there is an imminent threat and to remedy it if it has already occurred. In line with the polluter-pays principle, the liable operator must take the necessary preventive or remedial action and must bear all costs. Damage is considered to be remedied once the environment has been returned to its pre-damage state. The ELD covers damage to biodiversity (protected species and natural habitats), water and land. Traditional damage (damage to property, loss of life and bodily injury or economic loss) is not covered by the Directive."

And let us add to this general assessment that the Directive is *based on objective liability*.

In accordance with the polluter pays principle, the economic actor (operator) whose activity causes environmental damage or causes direct risk of environmental damage is financially responsible. As far as environmental damage is concerned, the Directive applies to all economic activities involving risks to human health or the environment. The activities concerned are listed in the Annex of the Directive. The primary task here is to clarify the concepts, since several notions used in the Directive have implications reaching further than the Directive itself. Of particular significance is the concept of environmental damage, although its definition as stated in the Directive covers only certain elements of environmental harm. A precise interpretation is given by the concept of 'environmental damage', which is defined as c meaning measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly. In this regard, the idea of a services provided by natural resources illustrates a new approach, that no EC legislation had referred to before.

Allocating liability in this way does not offer appropriate means of dealing with extensive, diffuse pollution, where it is not possible to establish a causal link between the damage and the activities of individual operators. This application of the Directive requires having the responsible person identified and establishing the causal link between the operator and the damage at hand.

The operator must primarily take preventive measures in particular in the event of imminent threat of damage, and provide information to the competent national author-

75 Brussels, 2016.4.14. COM(2016) 204 final: Report from the Commission to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, p. 2.

76 The best known is REFUT Evaluation of the Environmental Liability Directive, SWD(2016) 121 final, 14.4.2016.

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ity. The same applies to the occurrence of environmental damage. In both cases, the authority may require the operator to take the necessary preventive measures, to give instructions to the operator to that effect or may itself take the necessary preventive measures. Naturally, the costs of preventive action and restorative measures are generally borne by the operator. The Directive provides a statute of limitation period, which is five years from the end of the measures taken or from the identification of the responsible economic operator or third party, whichever occurs later. The Directive provides a number of options to address the individual's interests and to meet the general demand for public participation. Finally, the Directive itself does contain provisions on mandatory financial securities. Although it does not directly compel such insurance schemes, the Directive does encourage Member States to establish such systems in their domestic laws.

Although the Directive leaves out some areas, it does not regulate certain issues of liability, *it has still posed a major challenge for the Member States.* Member States are reluctant to rely on the provisions of the ELD, often referring to the fact that liability issues are not tackled by the Directive but on the basis of domestic law, or at least that is the excuse when trying to explain the delays in implementation. The data from the earlier quoted Commission's report are surprising:[77]

> "As regards the implementation, between April 2007 and April 2013, Member States reported approximately 1 245 confirmed incidents of environmental damage which triggered the application of the ELD, However, the number of cases varies greatly between Member States. Two Member States account for more than 86% of all reported damage cases (Hungary: 563 cases, Poland: 506) and six Member States reported most of the remaining cases (Germany (60), Greece: (40), Italy: (17), Latvia, Spain and the United Kingdom). Eleven Member States have reported no ELD damage incidents since 2007, possibly because they deal with cases exclusively under their national system."

According to the Commission's[78] summary:

> "The implementation of the ELD has improved the prevention and remediation of environmental damage to a limited extent in comparison to the situation before the transposition of the ELD. In particular, the Directive strengthened the polluter pays principle (thus avoiding significant costs for the public budget), implementing strict liability across the EU for environmental damage and raising the remediation standards for restoring damaged natural resources,

77 Fogleman 2006, p. 3.
78 Id., p. 9.

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> in particular for damage to biodiversity. However, the degree of variability among the Member States regulations may be a cause for limited concern…."

The conclusion is moderate but optimistic. It should not be surprising, since this regulation is far more ambitious compared to the Directive on criminal law liability that imposes more moderate goals, which also implies a less active reception.

Following the 2016 reviews, the REFIT report addressed the question of the liability directive and commented on the emerging situation in the European Parliament[79] with 28 comments and suggestions, of which only some are highlighted:

1 implementation has lacked harmonization and effectiveness leading to implementation deficiencies, considerable variability in the number of cases between Member States, and an unlevel playing field for operators;
3 calls for greater clarity of the definition of 'environmental damage';
4 the defininition of environmental damage should include ecosystems, environmental damage and natural resource in the definitions;
9 and 21, 22, 23.: unfortunately no financial securities are mandatory;
12 the list of annexes should be increased;
13 the extention of strict liability should be examined;
18 the creation of subsidiary state liability should be considered in order to ensure effective implementation of the legislation;
26 criminal sanctions to be another important deterrent against environmental damage.

The ELD, in spite of all the obstacles, inefficiency and lacking harmonization measures, seems to pass the test, since its continuous transformation, improvement and supplementation rather than its general revision is expected by one of the highest legislators. No wonder, as the ELD has opened its way to a creative case law that is still under development. This was also the case of *ERG I*,[80] which allowed for presumption in the causal connection, and clarified that the burden of proof shifted through objective responsibility:

> "57. […] in order for such a causal link to thus be presumed, the competent authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution

79 Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on Legal Affairs on the application of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (the 'ELD') (2016/2251(INI)), 20.6.2017.

80 Judgment of 9 March 2010 in Case C-378/08, *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v. Ministero dello Sviluppo economico and Others*, [2010] ECR 1919.

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> found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities. […]
> 67. […] Second, in accordance with Article 8(3) of the directive, such operators are not required to bear the costs of remedial actions where they can prove that the environmental damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place, since it is not a consequence of the 'polluter pays' principle that operators must take on the burden of remedying pollution to which they have not contributed […]"

In essence, therefore, the activities of the EU and its legal predecessors in the field of environmental protection is basically deemed good, covering various areas and, in general, in sufficient depth and detail. The biggest problem – as in environmental protection in general – is not the written rules, but compliance with them. It is also difficult to measure the extent to which a new rule of integration has improved the state of the environment and how much it would have been improved under the national rules by recognizing the self-interest of those concerned. *Regrettably, the state of the European environment is far from being satisfactory, therefore it is required to further strengthen implementation* – as mentioned in the introduction.

Even more important than the proper implementation is *the extent to which environmental values and interests lie in the EU's overall development objectives.* EU environmental law doyen, Ludwig Krämer, wrote about a year ago,[81] when the Commission's White Paper on the Future of Europe was published,[82] that environment almost was not even mentioned in this document as if it had not been recognized that "Environmental regulation – just as human rights or the protection of the weak – is beyond necessity." Krämer also states, appreciating the already mentioned[83] Commission Communication on Enhancing the Enforcement,[84] that it is fairly hypocritical to say this, as the Commission itself does not initiate infringement procedures due to inappropriate practices in the Member States, and "Nothing undermines the credibility of a public authority more than legislation that is not applied" Air pollution – nitrogen oxides, PM10 molecules and others – result in 520,000 premature deaths per year across Europe, and still no effective action is taken. *Indeed, the underlying problem with environmental law is usually the question of inadequate attitudes, whether at a higher, general political level or at the level of everyday life. And there is serious room for improvement here.*

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81 https://www.clientearth.org/commission-white-paper-future-europe-gives-little-importance-environment/.

82 Commission: White paper on the future of Europe, COM(2017) 2025.

83 *See* footnote 4.

84 https://www.clientearth.org/long-awaited-eu-environment-law-implementation-review-shows-commission-cares-little-citizens-health/.

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