

# AVOSETTA MEETING, STOCKHOLM, 2-3 OCTOBER 2009

## TOPIC AND QUESTIONNAIRE

### ENFORCEMENT OF EC ENVIRONMENTAL LAW EIA Projects, IPPC Plants, ET Allowances, Natura 2000 Sites, and Water and Air Plans<sup>1</sup>

#### 1. Topic of the Stockholm Meeting

The Avosetta meeting in Stockholm will address the enforcement of European Community environmental law, which has been a major concern for many years. As this short memo, the questionnaire and – not least – the meeting will reveal, enforcement involves numerous aspects of control by administrative authorities in the member states as well as by the European Commission, and it pertains to access to justice and effective remedies for individuals and civil society organisations.

We can distinguish between enforcement at the European Community level and at the national level. Within each member state, enforcement also triggers measures at different levels – from central to local contexts, and with the engagement of different actors – and it may be based on private law, administrative law or criminal law.

The purpose of the Avosetta meeting in Stockholm is to highlight the different means of enforcement at the European Community level and in the member states. Below, in section 2, you find a short presentation – drafted by Peter Pagh with inputs from some of the Avosetta members – indicating different aspects of enforcement, which provides a useful background for the questionnaire and the upcoming discussion. In section 3 you find the questionnaire.

**You are kindly asked to submit your answers to Jonas Ebbesson before noon Monday 21 September.**

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<sup>1</sup> EIA-projects refer to projects within the scope of the EIA-directive 85/337; IPPC-plants refer to industrial installations within the scope of the IPPC-directives (96/61); ET-allowances refer to the directive 2003/87 on emission trading (ET-directive); Natura 2000 sites refer to sites designated under the bird directive (79/409) and the habitat directive (92/43); water plans refer to the plans for improving quality of water that must be adopted according to the water frame directive (2000/60); air plans refer to the plans for improving quality of air that must be adopted according to the air frame directive (2008/50).

Your paper should not exceed three pages, and it is suggested that you present your answers in bullet points, where possible. The paper should highlight significant developments, good practices and failures in national environmental law (cases, new laws, new institutional arrangements, significant new policies) with regard to enforcement – of interest to other Avosetta members. The chair persons will be asked to provide cross cutting analyses of the most interesting aspects and lead the discussion accordingly. We should avoid long and tiring conventional country by country presentations in the discussions.

## **2. Enforcement of EC Environmental Law: European Community and National Perspectives**

### ***2.1 European Community Perspective***

From an EC perspective, the infringements of EC environmental law can be divided into four categories: (1) *formal notification* of the Commission; (2) *formal transposition* of the EC-obligation laid down in directives (and partly regulations) into binding enforceable national law; (3) the obligation to ensure *adequate and efficient enforcement* of the EC obligation under national law, and (4) the obligation of the member states to ensure *in fact* the protection of the environment required by EC law.

From a legal perspective, the *first* category of infringement is easy to detect and deal with.

The *second* category includes a variety of legal problems. In some cases, such transposition is simple and may not require much action – and it is not much disputed. In other cases it is much more troublesome to detect whether the formal transposition into national law is sufficient because the lack of structural similarity between the EC-legislation and the national legislation. The complexity and variety of environmental law structures in the member states often require a comprehensive study from specialists to detect errors in the national transposition of EC directives concerning the environment. Silence from the Commission on a notification by a member state on how the EC directive has been transposed into national legislation does not constitute an informal acceptance of the national legislation. In contrast, the passivity will often reflect the lack of full understanding of the complex environmental legislation in each member state. Since the EU still recognizes the principle of institutional autonomy there seems to be no way to solve the problem within the Commission. Infringement procedures can therefore not be expected to deal with more than the top of the iceberg. However, one could suggest that the Commission, in the enforcement, uses comprehensive legal studies carried out by independent national experts based on a rotation system which involves all member states but on different directives. This would not solve the problem but it could reduce the deficit in correct implementation.

The *third* category refers to the obligation to ensure proper enforcement. This notion has been upheld by

the ECJ in many cases, and it justified penalties under article 228 in C-304/02 *Commission v. France* because of insufficient enforcement of EC law on fishery. However, the Commission has only raised few infringement actions before the ECJ with respect to the lack of national enforcement of EC environmental law.

The *fourth* category concerns the responsibility of the member state to ensure that the environment is protected at least as much as required and defined by EC law. It follows from the ECJ case law that non-compliance *in fact* with obligations, such as exceeding EC water quality standards or insufficient protection of Natura 2000 sites and endangered species, is an infringement of the Treaty. At least in this respect it seems certain that the member state is responsible for compliance with EC law even if the non-compliance is caused by illegal acts of the citizens. In the *San Roco* case C-365/97, concerning an illegal waste dump, the ECJ expanded the responsibility of the member state even further. Even though the Italian authorities raised a criminal action against the person responsible for the illegal act, Italy was found in non-compliance with the waste directive. The ruling of the ECJ could indicate that although adequate enforcement against a company offending EC environmental law is needed to comply with EC law, such enforcement is not always enough. The member state may still be held liable for the illegal acts of the company at the ECJ. The ruling in the *San Roco* case could however also be understood more narrowly in light of the fact that the illegal dumping had gone on for years (see Jans, p. 155-156).

## ***2.2 National Perspective***

Enforcement of EC Environmental Law at national level raises a complex of difficult and partly interrelated questions.

Without being exhaustive, in particular the following issues have occupied legal theory:

1. Whether third parties (NGOs and /or affected citizens) have standing to challenge lack of enforcement from public authorities (vertical effect)?
2. Whether third parties (NGOs and /or affected citizens) have access to means for direct enforcement of the obligation against the polluter (horizontal effect). This concern is based on the notion that environmental law often reflects a triangle: the *obligations* on the polluters often imply *rights* for the public and (in some cases) for NGOs and/or affected citizens. The authority would be responsible to ensure that the obligations are complied with and the rights are ensured, but the horizontal effect is mainly left to national law based on the principle of institutional autonomy.
3. To what extent national law provides injunctive relief and other remedies in cases where EC environmental law obligations are offended.
4. To what extent, in practice, national authorities and courts acknowledge the direct effect of EC environmental law, with respect to procedural matters (e.g. providing information and public participation) and substantive matters (e.g. air and water quality; and perhaps protected areas).
5. Whether the discretion to derogate from essential obligations prevents direct effect. If so, how?

6. If the member state could be held liable for environmental damage under the Francovich ruling. The overall conclusion in legal theory is that the answer depends on the concrete legislative act taking into account objective, wording and context.

### ***2.3 The IPPC Directive: a useful Illustration***

To illuminate at least some of the problems of enforcement, the IPPC Directive can be used as an example of potential offences which in one way or another could be subject to enforcement:

***An IPPC facility is operated without an IPPC permit.***

- procedural error
- responsible party: the polluter
- the obligation to have a IPPC-permit might have direct effect if the operation needs other permit under national law – see C-201/02 *Wells*.

***The IPPC permit has been issued without an EIA in accordance with the EIA Directive.***

- procedural error
- responsible party: the authority
- the EIA obligation has direct effect if the operation needs other permit under national law – see C-201/02 *Wells*
- three answers to the substantial effect of the procedural error: (1) full substantial effect - the permit is invalid; (2) no substantial effect; (3) the permit is invalid only if the procedural error has significant effect on the conditions of the permit – for example (see Jans, p. 172-173).

***The IPPC permit gives the IPPC facility the right to discharge pollutants to a water area which will cause higher pollution of the water than allowed by EC water quality standards in conflict with the IPPC Directive article 10.***

- substantial error
- responsible party: the authority
- direct effect disputed (?).

***The IPPC permit does not include the BAT requirement as prescribed by the IPPC Directive.***

- substantial error
- responsible party: the authority
- direct effect disputed (?).

***The IPPC facility operates in accordance with the IPPC permit, and the competent authority has not revised the conditions of the permit despite the pollution being so significant that the limit values of the permit need to be revised under article 13 of the IPPC Directive or because of new water plans under the Water Framework Directive.***

- Substantial error
- responsible party: the authority
- direct effect doubtful.

***The IPPC facility is a large combustion power plant and operated in accordance with the IPPC permit but the discharge of green house gases exceed the allowances of the facility under the ET Directive.***

- Substantial error
- responsible party: the polluter
- direct effect unclear – might include competitors.

***The IPPC facility is a pig farm operated in accordance with the IPPC permit but causing disturbance of a Natura 2000 area in conflict with article 6(2) of the Habitat Directive.***

- Substantial error
- responsible party: the polluter
- direct effect unclear – two problems: (1) is the obligation in article 6(2) unconditional or could it be implemented so the obligation depend on an administrative order (se C-418/04 *Commission v. Ireland*) – (2) is the obligation under 6(2) pre-empted by a permit the article 6(3) procedure – see: C-127/02 *Waddenzee*.

***The IPPC facility causes environmental damage within the meaning of the Environmental Liability Directive***

- Substantial error
- responsible party: the polluter
- direct effect unclear – if liability is excluded when operated in accordance with the permit

### 3. Questionnaire on National Laws, Practices and Experiences on Enforcement

1. Please describe generally the most important tools for the enforcement of environmental law in your country. Also describe the relative “weight” of private law, administrative law and criminal law for the enforcement.
2. Please answer sub-questions I-IV **for each situation listed as a-i below**. Also indicate whether you know of national cases where these issues have been dealt with:  
**I:** Which sanctions are provided under national law (criminal, administrative etc.)?  
**II:** Can NGOs and/or citizens challenge the enforcement – or lack of enforcement – by the competent authority, or is it within the full discretion of the competent authority to decide whether and how offences should be sanctioned? (If NGOs and citizens can challenge such decisions and omissions, including failures of a procedural character, please describe how.)  
**III:** In light of European Community law, including the possible direct or indirect effect of directives, does national law grant NGOs and/or affected citizens the right to take direct enforcement measures against the polluter?  
**IV:** Could the competent authority under national law be held liable for erroneous acts and for omissions (non-enforcement) in the cases listed below? If so, how?
  - a. When an EIA project is established without an EIA permit.
  - b. When conditions attached to the EIA decision, granting a development consent, are disregarded.
  - c. When an IPPC facility is established without an IPPC permit.
  - d. When an IPPC facility is permitted without prior assessment in accordance with article 6(3) of the Habitat Directive.
  - e. When an IPPC facility is operated in violation of conditions of an IPPC permit.
  - f. When an IPPC facility releases greenhouse gases beyond what is provided for by allowances under the ET Directive.
  - g. When an IPPC facility has negative impact on Natura 2000 sites beyond the threshold in article 6(2) of the Habitat Directive.
  - h. When water plans adopted under the Water Framework Directive – or for the moment existing water quality standards laid down in the “old” water directives – are not complied with.
  - i. When air plans under the Air Framework Directive are not complied with.

Please, comment on whether you find the national means of enforcement adequate, and if, based on the national experiences, you have any general suggestions for improving the enforcement.

3. How is article 9(3) of the Aarhus Convention, regarding access to administrative or judicial procedures for members of the public to challenge violations of environmental law, complied with? In which situations is it NOT complied with?
4. Please identify possible factors, such as costs, length of procedures or other practical matters, that may prevent effective access to justice for members of the public.
5. Do NGOs and/or citizens have access to injunctive relief and interim legal remedies? Do you know any national cases which have dealt with this?
6. Are there any examples where a final administrative decision has been reopened because of a complaint based on later case law from the ECJ?

7. Has there been any national case in which the State or the local authority have been held liable for not remedying environmental damage or other damage in violation of EC environmental law?
8. Do you know of any significant developments, good practices or failures (e.g. cases, new laws, new institutional arrangements, or new policies) with regard to the enforcement of EC environmental law, not covered by the previous questions, that you would like to highlight?