

Crisis, the environment and Avosetta

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There is little doubt that the EU is in a crisis, for reasons which need not be analyzed here. EU environmental policy is impacted by this, as the EU largely abandoned the idea to adopt environmental legislation - apart from climate change/energy-related measures - and to ensure the application of EU environmental law.

The reason, why this has an influence on Member States' environmental policy and law, lies in the fact that numerous States did not develop a national environmental policy, contrary to the basic supposition of the TFEU. They rather relied on the EU legislation and its implementation. This fundamental deficiency remains the main challenge for the present.

Environmental law-making at EU level remains popular in the EU. The last Eurobarometer of December 2016 indicated that more than seventy percent of the EU population were in favour of more environmental decisions being taken at EU level. If one looks at the election programmes of the French and the Dutch extreme right parties, they both attribute a positive value to the environment and are in favour of protecting it. It is true, though, that both think of the environment in purely national limits, without cooperation, joint venturing etc. Consequently, both oppose the Paris Agreement on climate change, Wilders denying that a sensitive man-made impact on climate exists.

I see three main reasons, why environmental law and policy are in a difficult situation at present. These three elements are closely interconnected and intertwined.

(1) The environment is an interest without a group;

(2) The provisions adopted are not applied;

(3) In the conflict between vested economic interests and general environmental interests, politicians and decision-takers favour economic interests.

(1) The environment is an interest without a group

In difference to other societal interests - competition (competitors), transport (transporters), energy (energy companies) social affairs (trade unions, worker-voters, pensionists), agriculture (farmers) - the environment has no social group behind it, and no infrastructure - creditors, newspapers, media, academics, institutes - which is systematically supporting it and which vote. Environmental NGOs are too weak to fill this role; they struggle for obtaining income, campaign to obtain attention, concentrate therefore on actualities, have few communication tools and are all too often not professional.

The result is obvious: numerous legislative initiatives which are useful for society, are not followed by environmentally minded groups (NGOs, academics, journalists). Examples are noise legislation (120 million in the EU suffer from excessive noise levels), air pollution (430.000 in the EU die prematurely per year due to air pollution), flooding, soil erosion, desertification etc. Biodiversity loss creeps on, but is

accepted, in almost all Member State, as the price to pay for progress. The dieselgate scandal, where much too much NO_x - perhaps also of CO₂ - is blown into the air from 11.5 million cars, is typical for the lack of continued, "sustainable" interest in environmental issues.

The 6th or 7th EU environmental action programmes, adopted with the agreement of all 28 Member States, do not find anybody at national level, who pushes for their - national, but also EU-wide - implementation; they are seen as "their" (EU's) programmes. And as there is hardly a national environmental protection policy or an environmental action programme in any of the 28 Member States, no driver exists to push for more national or EU measures (nanotechnology, endocrine disruptors, heavy metals etc). All action plans initiated by the EU suffer from this absence of drivers (biodiversity action plan, noise action plans, marine water plan, flooding plan etc).

(2) The provisions adopted are not applied

Elephants and tigers, seal pups and eagles attract attention, and might stimulate the adoption and/or application of legislation. Other legislation does not obtain the same attention. Civil society is ready to leave the application of environmental law to the public authorities, but does not want to know, what happens, when public authorities do not ensure the application of that legislation. Nothing undermines the credibility of a government more than rules which are not applied.

When Member States adhere to the EU, they have to take over the *acquis communautaire*, and in order to get the entrance ticket to the EU, they do so (SI, HR, Macedonia, Montenegro, Albania, Turkey etc). But environmental legislation in the statute books is dead letter, as long as it is not applied.

The non-application of existing provisions is the biggest problem of environmental law within the EU and its Member States - and very probably also beyond (international agreements).

Everybody - even the populist far right or far left parties - agrees that the environment should be protected, that there should be clean air and clean water, unpolluted food, no waste, no noise and adequate protection of species and habitats. The devil, though, is in the details: the limited number of provisions is poorly applied, and the monitoring of application is left in the hands of public authorities, who are not always keen to ensure application. Public environmental opinion hardly exists and is silenced by louder economic voices.

(3) Politicians favour the economy over the environment

In the conflict between economic interests (agriculture, urban sprawl, industrial pollution, infrastructure development) and environmental interests, the environment is almost always the loser. Politicians look at persons and groups who have the money. Populist politicians (Orban, Trump, Erdogan, Wilders) are not any different, though perhaps they look also at voters, in order to consolidate their power. In energy, transport, competition and other sectors, the protection of the environment is normally seen as an obstacle (EIA, habitat, court procedures). Already the legislation is drafted in a way which allows conflicts to be solved in favour of economic interests. Access to the ear of decision-makers is easier for vested interest defenders, and their allies in administration, parliaments, advisory and scientific bodies do the rest. This also applies to the question, whether new legislation should be adopted. At EU Member State level, people look at the EU. At EU level, politicians see themselves more as the defender of big business and free trade than as defender of the environment, which they consider an obstacle.

Where to go from here

Lawyers try to interpret the rules. Environmental lawyers should try to change them, in order to preserve the environment.

The protection and preservation of the environment is, in Europe, very largely put into the hands of public authorities. Public authorities therefore hold most of the information on the state of the environment, threats, impairments, the need for changes or improvements, in their hands. However, the public authorities are neither the owner nor the trustee of the environment. The environment is everybody's, it is a common interest. The first democratic requirement must therefore be that "the cloak of secrecy" (judge Weeramantry) which surrounds impairments of the environment, be taken away - much beyond the present grant of access to information which is constructed more than an act of grace than a duty of administrations. This refers to emissions, products, installations (nuclear waste), negotiations (TTIP) data for new legislation, data on existing structures, activities, etc.

Environmental lawyers have a professional obligation to raise their voice, when the environment is impaired and in particular, when provisions to protect the environment are not applied. They are not to sit in their corner contemplating and wait, until they are asked to interpret this or that provision of (environmental) law. Teaching students is important, yet insufficient, as this will bring students into the same apathy (wait and see) situation. The environment has no voice. It is up to environmental lawyers to give it a voice.

This inevitably leads to controversies, if not to more, with public authorities which love to cooperate with environmental lawyers, provided they align to the approach which public authorities took with regard to the environment. Public money might be taken away from environmental lawyers, who raise their voice, and other disadvantages might occur. However, protecting the environment against polluters and administrative and political inertia is, at the end of the day, the objective for which environmental lawyers are paid for - and stand for.

The White Book questions

Following the Commission's White Book on the future of the EU, the Avosetta group might wish to discuss, whether there should be more environmental protection measures being taken at EU level, whether the present approach is more or less right, or whether there should be less measures taken. Two things need to be underlined, though: the environmental sector allows already at present to advance with different speed (Article 193 TFEU). And the taking of measures goes hand in hand with the effective enforcement of measures. Indeed, nothing undermines the credibility of government more than provisions that are not applied.

(a) Doing more

In the area of water protection, the need for doing more might refer to the discharge of heavy metals and toxics into water, of agricultural residues (phosphates, nitrates), to water scarcity (perhaps more a problem of enforcement in some countries), flood protection and to the protection of marine waters. As regards air pollution, enforcement is the key problem: This might require more emission limit values for pollutants from (road and air) transport. Climate change needs the non-fossil energy sector, together with energy saving (efficiency) measures. Product regulation needs to address nanos and endocrine disruptors and become more systematic and quicker with regard to restrictions. Pesticides appear to require more a change in agricultural policy than in product regulation. In the

area of biodiversity, EU legislation did not stop the slow, progressive decline of biodiversity in Europe. Waste, noise and industrial installations are more an enforcement issue.

The biggest environmental challenges lie in the policy area: transport, agriculture, energy, trade, development policy, climate change.

(b) Doing less

Competence for most environmental issues - except product regulation - could probably be returned to Member States, without making environmental objectives unachievable. The problem is the absence of national environmental policy and environmental enforcement policy. When different national provisions apply in practice (drinking water, species protection, waste management) cooperation will not be made easier and the stricter rules will also be combated with the argument, that they are not necessary. Also relocation might, in medium term, become an argument.