Brief Introduction to EU Environmental Law

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JUDICIAL TRAINING ON EU ENVIRONMENTAL LAW
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Outline

- Development of European Environmental Law
- Sources of European Environmental Law
- General Principles of European Environmental Law
- Structure of EU Environmental Law
- Implementation & Enforcement of EU Environmental Law
Development of European Environmental Law
## Overview (I)

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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</thead>
<tbody>
<tr>
<td>1957</td>
<td>Treaty of Rome European Economic Community</td>
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<td>1967</td>
<td>Directive on labelling of dangerous products</td>
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<td>1972</td>
<td>Stockholm Conf. on Human env.</td>
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<td>1973</td>
<td>First Env. Action Programme</td>
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<tr>
<td>1980</td>
<td>ECJ rules that art. 114 TFEU (ex art. 95 TEC) can be used to adopt env. Measures C-92/79 Comm. V Italy</td>
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<td>1985</td>
<td>ECJ rules that environmental protection is an ‘essential objective’ C-240/83 ADBHU</td>
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## Overview (II)

<table>
<thead>
<tr>
<th>Year</th>
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<tbody>
<tr>
<td>1987</td>
<td>Single European Act inserts environmental title into the Treaty</td>
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<td>1989</td>
<td>Environment Directorate General within the Commission</td>
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<td>1990</td>
<td>European Environment Agency agreed (starts in 1993)</td>
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<td>1993</td>
<td>Maastricht Treaty adds the precautionary principle to the Environment Title of the Treaty</td>
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<td>1997</td>
<td>Amsterdam Treaty adds sustainable development as a Community objective</td>
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<td>2005</td>
<td>Constitution rejected in France and Holland</td>
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### Overview (III)

<table>
<thead>
<tr>
<th>Year</th>
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<tr>
<td>2007</td>
<td>Lisbon Treaty signed</td>
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<td>2009</td>
<td>Lisbon Treaty comes into force and adds climate change to the Treaty objectives</td>
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Development of International and EU Environmental Law (I)

EU Environmental law has been influenced by & has developed in parallel with international environmental law

EU Environmental Law has an important impact on international environmental law
Development of International and EU Environmental Law (II)

- 1960-1970s: establishment of important environmental NGOs (WWF, Greenpeace)
- 1972: report Club of Rome “Limits to Growth”
- 1972: Establishment of the UNEP (UN Environmental Programme)
- 1970-1980s: numerous multilateral and regional environmental conventions (pollution, nature conservation)
- 1987: Brundtland report “Our common future” - concept of sustainable development
- 1990s: Several regional treaties (i.e. Aarhus Convention)
- 2002: World Summit on Sustainable Development (Rio+10)
- NEW INITIATIVE: Global Environmental Pact
Sources of European Environmental Law
Overview

- **PRIMARY SOURCES** (= Title XX of the TFEU)
  - Treaties

- **SECONDARY SOURCES** (= measures in terms of Article 288 TFEU adopted of the basis of Title XX TFEU)
  - Regulations, Directives, Decisions & Recommendations

- **INTERNATIONAL ENVIRONMENTAL LAW**
  - MEAs to which EU has become a member; customary international law

- **JUDGMENTS OF THE CJEU**
Primary EU Law: Title XX TFEU

Article 5 TEU:

The use of EU competences is governed by the principles of **subsidiarity** and **proportionality**

- In areas which do not fall within its exclusive competence, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

- The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
Article 11 TFEU:

Environmental Protection requirements must be integrated into the definition and implementation of the EU’s policies and activities, in particular with a view to promoting sustainable development.
Primary EU Law: Title XX TFEU

Article 191 TFEU:

EU policy on the environment shall contribute to pursuit of the following objectives:

- Preserving, protecting and improving the quality of the environment
- Protecting human health
- Prudent and rational utilization of natural resources
- Promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change
EU Policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the EU. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
Primary EU Law: Title XX TFEU

Article 191 TFEU:

➢ In preparing its policy on the environment, the EU shall take account of:
  ▪ Available scientific and technical data
  ▪ Environmental conditions in the various regions of the EU
  ▪ The potential benefits and costs of action or lack of action
  ▪ The economic and social developments of the EU as a whole and the balanced development of its regions

➢ Within their respective spheres of competence, the EU and the Member States shall cooperate with third countries and with the competent international organizations.
Primary EU Law: Title XX TFEU

Article 192(1) TFEU:

General legal basis for the adoption of environmental measures by the institutions of the EU

“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.”
Secondary EU Law

**REGULATIONS**
- A binding legislative act / it must be applied in its entirety across the EU
- Very few in the environmental area

**DIRECTIVES**
- A legislative act that sets out a goal that all EU MS must achieve. However, it is up to the individual MS to decide how.
- Most commonly environmental instrument
- Examples: waste; bathing water; industrial emissions; groundwater; batteries; landfill; nitrates; waste electric and electronic equipment; freshwater fish

**DECISIONS**
- It is binding for those to whom it is addressed (an EU MS or an individual company) and is directly applicable.

**RECOMMENDATIONS & OPINIONS** (soft law)
CJEU CASE LAW

➢ Very important role of the Court of Justice of the European Union (CJEU) in the interpretation of the EU Law in general

➢ The Court relies on a purposive interpretation as well as principles of proportionality, natural justice, certainty, equality and protection of fundamental rights

➢ It has significantly contributed to the development of EU Environmental Law / many environmental cases

➢ Infringement procedures by the Commission (art. 258 TFEU) or by a Member State (art. 259 TFEU)

➢ Judgments on preliminary reference (art. 267 TFEU)
Principles of European Environmental Law
General EU law principles

➢ Integration (Article 5 TFEU)

➢ Subsidiarity (Article 11 TEU)

➢ High level of protection (Article 3 TFEU)

‘The Union shall work for [...] aiming at a high level of protection and improvement of the quality of the environment’

• Not specified what a ‘high level’ is

• Not the highest level (cf. C-233/94 on consumer protection)
Environmental Principles (I)

➢ Article 191 (2) TFEU

✓ Principle of prevention
✓ Source principle
✓ Polluter Pays Principle
✓ Precautionary Principle
✓ Sustainable Development
Principle of Prevention

Aims at environmental protection through preventive measures → prevention is “better than cure”

Traced back to the Trail Smelter arbitration (US v Canada, 1941) → Obligation to protect other states from injurious acts

Requires a due diligence/due care of states

Requires states to take appropriate measures

Enshrined in International Law:
- Principle 21 of the Stockholm Declaration 1972
- Principle 11 of Rio Declaration 1992
- International Court of Justice (ICJ) Pulp Mills case (2010): i. principle of prevention is a binding principle customary international law, ii. its origin ought to be seen “in the due diligence that is required in its territory”

EU Law
- 1st Environmental Action Programme: “best environmental policy consists in preventing...pollution and nuisance”
- Numerous EU secondary legislation (EIAD, WFD, IED)
Precautionary Principle (I)

- Historic origins are usually traced back to its codification in the German Federal Emission Control Act in 1972 (Vorsorgenprinzip) and in Swedish domestic environmental law.

- First international endorsement followed in 1982 when the United Nations (UN) General Assembly adopted the UN Charta for Nature.

- Express reference to the precautionary principle was then made in the 1987 London Declaration at the Second International Conference on the Protection of the North Sea.

- Principle 15 of the Rio Declaration 1992:
  
  *In order to protect the environment, the precautionary approach shall be widely applied by all States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

- 1993: inserted into the Treaty & numerous EU Secondary laws (REACH)

- Article 3 UNFCCC
### Precautionary vs. Prevention Principle (II)

- States should not wait to take preventive measures in case there is no clear or convincing scientific evidence of a clearly established causal link between an activity and its effects to the environment (or health) or between the input of substances and energy in the environment and their effects. Its objective is to avoid potential risks.

<table>
<thead>
<tr>
<th>Precautionary principle</th>
<th>Prevention principle</th>
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<tbody>
<tr>
<td>✓ Ambiguous cause/effect relation</td>
<td>✓ Unambiguous cause/effect relation</td>
</tr>
<tr>
<td>✓ Risk cannot be calculated</td>
<td>✓ Risk can be calculated</td>
</tr>
<tr>
<td>✓ Acting before proof of a future damage</td>
<td>✓ Acting before occurrence of a damage</td>
</tr>
<tr>
<td>✓ Aims to avoid emergence of an uncertain damage</td>
<td>✓ Aims to avoid emergence of damage</td>
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Precautionary vs. Prevention Principle (III)

**EXAMPLE 1** - Prevention Principle → Directive 94/62 on packaging and packaging waste (reduce the overall volume of packaging) → Directive 2011/65 on the restriction of the use of certain hazardous substances in electric and electronic equipment (reduce the content of harmful substances in materials and products)

**EXAMPLE 2** - Precautionary Principle → Directive 90/219 and 2001/18 on Genetically Modified micro-organisms → Whereas the precise nature and scale of risks associated with GMOs are not yet know, the risk involved must be assessed case by case.
Precautionary Principle (IV)

2000: European Commission Communication on Precautionary Principle:
− pursues the aim to inform all interested parties how the Commission intends to apply the precautionary principle and to establish guidelines on the application of the principle
− structured approach to the analysis of risk, including risk assessment, risk management and risk communication
− recourse to the principle presupposes that a risk cannot be determined with sufficient certainty
− measures taken need to be, inter alia,
  ➢ proportional: measures have to be put into relation to the chosen level of protection
  ➢ non-discriminatory: comparable situations should not be treated differently
  ➢ consistent with similar measures already taken: comparable measures in equivalent areas with regard to which scientific data is available
  ➢ based on potential cost/benefit examination: short and long term, also including non-economic considerations
Polluter Pays Principle (I)

❖ First mentioned in the Recommendation on Guiding Principles concerning International Economic Aspects of Environmental Policies of the OECD (26 May 1972)

❖ Developed in the First Environment Action Programme 1973-76

❖ Introduced into the Treaty 1987 through SEA

❖ Features prominently in waste directives, the Industrial Emissions Directive and the Environmental Liability Directive but has less of a role to play in e.g. nature conservation

❖ Extremely careful definition provided by Principle 16 of the Rio Declaration (“should endeavour to promote the internalization of environmental costs and the use of economic instruments”, taking into account”, “in principle”, “due regard to the public interest”) indicates that the competent actors enjoy a broad scope of discretion as to how to implement the polluter pays principle.
Polluter Pays Principle (II)

Four ‘functions’

1. Economic integration principle
   - Used to avoid state aid to national enterprises in the form of anti-pollution measures

2. Cost allocation principle
   - Seeks to ‘internalise’ externalities, i.e. cost-allocation (redistribution)
   - Requires the polluter to take responsibility for pollution

3. Pollution abatement principle
   - A ‘general’ principle whereby pollution control measures are adopted to reduce pollution (preventative function)

4. Liability Principle
   - Used as a principle of liability when specific incidents of pollution occur
Polluter Pays Principle (III)

Problems of definition →

- who is the polluter?
  - Operator, director, license-holder, consumer, user?
- How much should he pay?
  - Strict sense (partial internalisation, e.g. finance of prevention)
  - Wider sense (full internalisation, e.g. social costs and ecological costs etc.)
- Wider issues of how to monetise environmental harm
  - Willingness to pay, willingness to accept, ecosystem services etc.
- Where used as base for liability
  - What type of liability? Strict or fault-based?
Sustainable Development (I)

Introduced into EU law by the Amsterdam Treaty in 1999

- Preamble TEU, Art. 3 and art. 11 TFEU (all without defining it)
- Lisbon European Council 2000:
  - ‘most competitive and dynamic knowledge-based economy ..... capable of sustainable economic growth’
- Goteborg European Council 2001:
  - ‘sustainable development ...is a fundamental objective under the Treaties.... That requires dealing with economic, social and environmental policies in mutually reinforcing ways.’

In 2005 the Commission identified

- climate change, clean energy, public health, social exclusion, demography and migration, management of natural resources, global poverty and challenges to development as requiring SD action

2006 Council Declaration laying down SD strategy while also identifying ten principles and seven main challenges

- Not legally binding
Sustainable Development (II)

Brundtland:
- ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’

Three ‘pillars’
- Economic development
- Social development
- Environmental protection
  - Thereby embracing three distinct and different areas of concern into one concept
  - The trick is of course to strike the balance (which is constantly shifting)
Sustainable Development (III)

Social development
- Equality and justice (intra-generational)
- Brundtland pointed out that many environmental problems are associated with poverty
- Int. environmental law - common but differentiated responsibility
- ‘Social cohesion’ central to EU definition (focus on job and growth creation)

Economic development
- Art. 3TEU
  - ‘sustainable development of Europe based on balanced economic growth and price stability’
- Adv. General Leger Case C-371-98 SD ‘emphasises the necessary balance between various interests which sometimes clash, but which must be reconciled’
Rectification at source

Inserted into the Treaty in 1987 through SEA →

Environmental damage should as a priority be rectified at source

Case C-422/92 Commission v Germany
  ▪ A German provision requiring the disposal of waste to take place in Germany was found to be compatible with the Treaty

Case C-2/90 Commission v Belgium
  ▪ A ban on the import of waste into the Walloon region was upheld by reference to the principle

Note specific circumstances of cases
Structure of European Environmental Law
# Structure of EU Environmental Law (II)

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<tr>
<th><strong>Vertical/Sectoral Legislation:</strong></th>
<th><strong>Horizontal legislation:</strong></th>
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<tbody>
<tr>
<td>✓ Waste Law &amp; Policy</td>
<td>✓ Environmental Impact Assessment Procedures</td>
</tr>
<tr>
<td>✓ Water Law and Policy</td>
<td>✓ Industrial Emissions</td>
</tr>
<tr>
<td>✓ EU Nature Protection Legislation</td>
<td>✓ Environmental Liability &amp; Environmental Crime</td>
</tr>
<tr>
<td>✓ Air and Noise Pollution</td>
<td>✓ Access to information, public participation in decision-making, access to justice</td>
</tr>
<tr>
<td>✓ Chemicals Regulation</td>
<td>✓ EU Emissions Trade System</td>
</tr>
<tr>
<td>✓ Climate Change</td>
<td>✓ Ecolabel</td>
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Structure of EU Environmental Law (I)

ENVIRONMENTAL PROTECTION LEGISLATION

OTHER RELEVANT POLICY AREAS:
AGRICULTURE, FISHERIES, TRANSPORT, ENERGY...
Implementation and Enforcement of European Environmental Law
Implementation and Enforcement framework

- Importance of EU law for environmental protection

- Implementation and enforcement of EU law
  - Case C-365/97 Commission v Italy: Shared responsibility between Member States and EU

- Roles and responsibilities at EU level
  - Commission
  - European Parliament
  - Citizens and other complainants
Implementation and Enforcement framework / Commission

Art. 17 (1) TEU: It is the task of the European Commission to “ensure the application of the Treaties, and of measures adopted by the EU institutions pursuant to them”

➢ Commission as “Guardian of the Treaties”

Benefits of ensuring implementation
Design of EU policy on implementation and enforcement
Better Regulation and Fitness Check: Monitoring role
Compliance promoting tools: support to implementation
Enforcement: EU Pilot & infringement procedure (258 TFEU)
Implementation and Enforcement framework / Citizens

Complaints filed by NGOs and individuals

- 2015: 3450
- 2014: 3715
- 2013: 3505
- 2012: 3141
- 2011: 3115
- 2010: 3349

Member States with higher number of complaints in 2015:
- Italy, Spain, Germany
Implementation and Enforcement / Monitoring

European Commission monitors all breaches of EU law, including individual cases, but has discretion and therefore applies certain priorities:

- Non-transposition
- Non-conformity of transposition
- EU financial interests
- Non-compliance with Court judgments
- Systemic breaches of EU law
Art. 258 to 260 TFEU: Court procedure to enforce EU law against Member States -->

- Commission notifies breach to Member States concerned, which may submit observations \(\rightarrow\) Letter of formal notice
- If breach is not remedied, Commission may issue ‘reasoned opinion’
- If breach continues after date set by COM, they may bring Member State before the Court
- Member State must comply with Court’s judgment; if it does not, Commission may bring another case and Court may impose fine
Thank you for your attention!

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