

Book Review:
European Environmental Law,
by Jan H. Jans¹

Reviewed by Han Somsen*

For some considerable time now, environmental policy has occupied a role of paramount importance in the European Union (EU). The case law of the European Court of Justice (ECJ) confirms that, at present, virtually all policy areas are conditioned, to various degrees, by general principles of environmental law enshrined in the European Community (EC) Treaty, as well as by specific norms dispersed in a bewildering array of directives, regulations, international conventions and, increasingly, soft law instruments. It is important to note that this proliferation of environmental law is normatively driven. Thus, Article 6 EC holds that environmental goals *must* be pursued in the context of all Community policies. Because the implications of this 'principle of integration' extend well beyond the confines of EC environmental law, practitioners and scholars of EC law choosing to ignore EC environmental law do so at their peril.

Against this background, the value of a textbook comprehensively covering EC environmental law needs no further introduction. The author of the book under review is a recognised authority in the field of EC law, and may be credited with important pioneering work in the area of EC environmental law. In particular, Jans has been one of the initiators of a much needed debate on judicial protection, at a time when the focus of his colleagues was still firmly on issues of substantive environmental law and the appropriate legal basis for proposed environmental legislation in particular. Much of the added value of his work stems from his insights in national and EC administrative law, as well as his close familiarity with wider issues of substantive EC law.

In his opening sentence, Jans divides the development of EC environmental law into five phases, which coincide with the evolution of EC Treaty (i.e. pre-Single European Act, Single European Act, Treaty on European Union, Treaty of Amsterdam, post-Amsterdam). Depending upon one's outlook, different perceptions of the development of environmental policy are, of course, equally plausible. Gunningham, with similar conviction, asserts that: 'the history of environmental regulation involves two phases'. In Gunningham's

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1. Jan H. Jans, *European Environmental Law*, 2nd revised edition, Groningen: Europe Law Publishing, xv + 464 pages, 2000 (hardbound ISBN 90-76871-01-9).

view, the first phase began around the early 1970s, when governments introduced a wealth of environmental regulation in response to public concern over environmental decline. The second phase began in the 1980s, and was characterised by substantial deregulation. Applied to a Community context, this first phase will have started in 1972 or 1973 (first environmental action programme) and the second phase with the publication of the White Paper on the Internal Market in the mid-1980s. It may appear churlish to offer alternative views on what after all is a rather trivial issue. Yet, the example is rather intended to serve the purpose of illustrating that the book has been written from a predominantly black-letter legal perspective. In other words, *European Environmental Law* pursues a positive law approach in explaining current EC environmental law. The book is therefore not aimed at political scientists, legal economists or socio-legal scholars.

The subjects comprehensively covered in its eight chapters cover, respectively:

- legal principles of European environmental law;
- European external environmental policy;
- harmonisation of national environmental law;
- implementation of European environmental law;
- legal protection in European environmental law;
- trade and environment;
- competition policy and environmental protection, and;
- substantive European environmental law.

Consistent with the book's approach is the fact that no attempt is undertaken to conceptualise, in a general fashion, the roles played by the European institutions in the formation and subsequent implementation and enforcement of EC environmental law.

Chapter I examines over-arching principles of EC law which equally affect EC environmental law (such as the principles of attribution of powers, subsidiarity, proportionality and integration), as well as the sector-specific principles found in Article 174 EC.

In respect of the former, Jans rightly also draws attention to fundamental principles as a separate source of EC environmental law. As for Article 174 EC, the objectives, principles and 'policy aspects to be taken into account' are analysed in detail. This analysis is enriched by many imaginative examples drawn from EC practice, and useful suggestions for further reading in the footnotes.

In the same chapter, environmental decision-making is discussed. In a manner that fully exposes the staggering ambiguities that remain in deciding the appropriate procedures for large and crucially important classes of environmental issues, Article 175 EC is first analysed. This is followed by the other main legal basis for environmental acts, Article 95 EC. Inevitably, this then leads to the question how to decide which of the two provisions should serve as a legal basis for any given proposal.

Chapter II, co-authored with Leefmans and Wiers, deals with the complex issue of European external environmental policy. Attention is focused on three issues in particular:

- the external powers explicitly conferred by Articles 174(4) and 133 EC, and the powers implicitly flowing from, in particular, Article 95 EC,
- exclusive *versus* concurrent Community powers, and
- the extra-territoriality of Community powers, and their relationship to World Trade Organization (WTO) principles.

These issues are dealt with clearly, and in a way which mirrors the approach adopted in Chapter I, so that emphasis is placed on the predominantly technical problem of determining the appropriate legal basis for external action. Some other important issues, notably the respective roles of the EU and its Member States in international environmental negotiations, are not explored, however. Arguably, this is unfortunate, given the topicality of the issue in the light of the climate change negotiations.

Perhaps reference also should have been made to the relevant provisions of title V of the Treaty on the European Union (TEU), which imply that, for example, the meetings of the Governing Council of the United Nations Environment Programme, or the Conference of the Parties established by various international environmental treaties, will fall within the scope of the Common Foreign and Security Policy (CFSP). Thus, according to Article 19 TEU, 'Member States shall co-ordinate their action in international organizations and at international conferences. They shall uphold the common positions in such fora.'

Chapter III, co-authored with Sevenster, explores the implications of EC harmonisation for Member State autonomy to regulate any given environmental problem. Although by far the most frequently asked question, it is still one surrounded by puzzlement and confusion. A major source of this ambiguity is that the *scope* of harmonisation (which can always be circumscribed), is often confused with the *degree* of harmonisation (which, in the case of environmental directives, occasionally may be total, but more often will be minimum). The distinction is vital, however, for, as *Compassion in World Farming* shows, it is perfectly possible for a directive which pursues minimum harmonisation to regulate a given problem exhaustively (and hence to preclude certain types of more stringent Member State action), and *vice versa*.

Jans and Sevenster, who have both written extensively on these issues, obviously do not make this mistake, and explain the complex interplay between primary and secondary Community environmental law with admirable clarity and force. So as to pre-empt any confusion of the kind described above, it could conceivably be further suggested that the generic section 2 ('The scope of harmonisation') might be more suitably followed by a generic section 3 bearing the title 'The degree of harmonisation', rather than the present specific 'Total harmonisation'.

Also related to the issue of residual Member State autonomy after har-

monisation, is the correct interpretation of Article 95 EC. Sevenster, who has written extensively on the subject, shows that, whilst the amendments brought about by the Treaty of Amsterdam have removed some of the many ambiguities surrounding this curious provision, at the same time it has introduced new ones.

Chapter IV, co-authored with Veltkamp, focuses on the thorny issue of the implementation of European environmental law. It implicitly appears that the authors view 'implementation' of EC law as synonymous to 'transposition' of EC provisions into national legal orders. Although this is perfectly acceptable, in view of the many different meanings sometimes afforded to the concept (incorporation, transposition, formal implementation, practical implementation, enforcement, compliance, etcetera) it would have been useful to introduce the chapter by briefly explaining such key concepts.

Various components of the obligation to 'transpose' EC environmental law are systematically discussed. Rightly, attention is drawn to the significance in this regard of provisions 'intended to create rights and obligations for individuals' (at 137), although the key concept of 'rights' is not further elaborated upon.

Different modes of implementation are summarily discussed in the light of the case law of the ECJ. These vary from legally binding rules, to transposition through reference in national legislation, administrative circulars and environmental agreements.

The section entitled 'implementation by local or regional authorities' does not concern the duty of the latter to comply with directly effective EC law, but rather serves to explain how decentralisation of implementing powers should be assessed in the light of the case law of the ECJ.

Also, attention is afforded to minimum standards developed by the ECJ as regards national enforcement of EC environmental law.

The Chapter concludes with a brief exposé of the infringement procedure pursuant to Article 226 EC, including the associated informal complaints procedure to the Commission.

Chapter V is devoted to the vitally important issue of legal protection of individuals in EC environmental law. First, the doctrine of direct effect is explored in great detail, which is tied to an examination of the doctrine of effective legal remedies, which the ECJ has developed in a long line of cases revolving around Article 10 EC. Second, the significance of the *Francovich* judgment (non-contractual Member State liability) for EC environmental law is discussed and, finally, the extent to which individuals may seek review of acts of the Council and the Commission under Article 230 EC explored.

Jans has published widely on the issue of direct effect of EC environmental law, and this Chapter updates earlier published work with more recent case law. The detailed sections exploring the conditions for direct effect and various manifestations of direct effect (product standards, minimum

harmonisation, Special Protection Areas, derogation clauses, enforcement measures, procedural rules) clearly reflect Jans' affinity with the subject.

Because of the doctrinal rigour employed by the author, it would be all too easy to lose sight of the significance of direct effect for the purpose of judicial protection. And, although one might query the aesthetics of section-headings entitled 'horizontal side-effects of vertical direct effect', the sections devoted to the *consequences* of direct effect therefore represent the welcome core of Chapter V. The Dutch examples cited, in particular, are instructive and intellectually stimulating. Of course, it should be borne in mind that, despite the emergence of minimum standards from the case law of the ECJ, the consequences of direct effect to no small measure depend on the national legal contexts within which they manifest themselves. It is therefore possible that, for example, English readers may experience surprise about the way in which Dutch courts have employed the doctrine of direct effect.

The scope of the *Francovich* doctrine in the sphere of the environment is summarily discussed. Interesting is Jans' suggestion to extend the remedies available to injunctions and court orders.

Finally, the thorny issue of legal protection against acts of, above all, the Commission is subject to a brief but critical analysis. Consistent with most commentators, Jans objects to the ECJ case law epitomised in *Greenpeace* as a matter of principle as well as on technical legal grounds. The ECJ, in effect, has established an insurmountable obstacle for any individual wishing to challenge the use of Commission discretion in the framework of the Structural Funds which adversely affects the environment.

Chapter VI, entitled 'trade and environment', focuses on the interplay between the provisions in the EC Treaty aiming to secure the free movement of goods, and environmental protection. The section devoted to tariff restrictions provides a clear summary of general EC law in this area, but arguably also should have reflected on the implications of the increased emphasis placed on the use of fiscal and economic instruments by the Community institutions (see the 1997 Communication on Environmental Taxes and Charges in the Internal Market).

The section concerned with physical barriers to trade (so-called 'quantitative restrictions and measures having equivalent effect') follows the tried format of establishing the scopes of the prohibition and the exceptions respectively, and does so clearly and comprehensively. Particularly stimulating and important is the section where the principle of proportionality is explored in some detail. Again, the reviewer is no great fan of the use of what at times appears rather strained terminology, (such as 'diagonal proportionality'), but this is perhaps a matter of personal taste.

Chapter VII, with H. Vedder, focuses on the interplay between competition law and environmental protection. Because of its technical nature and the amount of case law that is involved, competition law represents a formidable challenge for outsiders, with the reviewer forming no exception.

Whereas environmental lawyers perhaps could afford to ignore competition issues in the past, more recently this has changed. In part, this is as a result of the acceptance by the Commission of more flexible implementation instruments, including private contracts. Privatisation gives also rise to increased importance of competition law.

Jans and Vedder deserve credit for the systematic and transparent fashion with which they introduce readers to this specialised field of law. Following a brief introduction, they first deal with multi-lateral settings in the context of Article 81(1) EC, and the extent to which agreements which limit competition with a view to satisfying environmental imperatives may be justified pursuant to Article 81(3) EC.

They then turn briefly their attention to Article 86 EC, a provision which for many years has remained dormant, but which is acquiring an increasingly important role as a result of privatisation.

This important chapter concludes with a more elaborate examination of the application of state aid rules to environmental policy.

Chapter VIII (with contributions by N. Dhondt and A. van Rossem) is by far the most substantial (pp. 313–426), and provides a thorough overview of substantive European environmental law. It deals with the environmental action programmes, horizontal legislation (environmental impact assessment, the post-Seveso Directive), the Directive on Integrated Pollution Prevention and Control (IPPC), Access to Information, Eco labelling and auditing, and the European Environment Agency (EEA). This overview is thorough, and benefits from useful references to the case law.

With *European Environmental Law* Jans has succeeded in producing an excellent resource that will answer the needs of a wide category of people. The book is suitable for students engaged in undergraduate or postgraduate courses on EC environmental law. At the same time, it is sufficiently detailed and scholarly to be of use for more advanced scholars in the field. Policy-makers, too, will find it of great help in order to solve more practical questions. It is a book that deserves a place on the shelves of every legal library.