

THE REGIONAL DIMENSION IN EU ENVIRONMENTAL REGULATIONS AND DIRECTIVES

Summary: The present study examines EU environmental legislation with regard to four aspects: (1) legislative provisions which differentiate between Member States or regions of Member States (2) the appointment of regional or local competent authorities (3) the provisions concerning the cooperation among such regional and local authorities and (4) the differentiated application of EU provisions within the Member States. While in a first part, these four aspects are separately examined for each sector (water, air, nature etc) of environmental law, a second part - sections VIII to XI – looks at these four aspects in a coherent way. The study ends with some short conclusions.

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I. Introduction

The present study undertakes to present the different provisions in EU legislation which contain specific provisions for the regions. The term “region” is understood as referring to sub-national political or administrative entities which were given specific rights or obligations with regard to the implementation and/or practical application of the legislation of the European Union. Thus, the presentation will not discuss the repartition of competences between the EU Member State and its regions (Communautés, Länder, Comunidades Autónomas, Regione, etc).

Where European Union legislation obliges a Member State to take certain measures, it is not clear, whether such measures are to be taken by the central Government, or whether regional entities will have to act. In some cases, the real “addressee” might be clear, for example in cases, where the EU legislation requests the designation of “competent authorities” (in the plural); here, the purpose of the legislation is understood that it assumed the designation also of regional authorities. In other cases, though, the situation is much less clear. Where EU legislation requires the elaboration of a plan or programme to fight environmental noise, such a plan normally refers to a local situation, where excessive noise levels had been found. However, it is theoretically possible - though not likely - that even such local noise plans are elaborated and monitored by some central government authority.

In other cases, the EU legislation refers to specific geographic situations such as islands, high mountain areas or river estuaries, and requests or allows derogations from the normal rules. Such cases were included in this research.

There are essentially four situations which will be covered by this study:

- (1) An EU legislation differentiates between the Member States or parts of them. Examples are provisions which might not apply in areas above 1500 meters, or less stringent requirements for some Member States;
- (2) An EU legislation provides for the designation of competent authorities in order to fulfill for certain tasks;
- (3) The EU legislation requires a cooperation and/or concertation between decentralized authorities;
- (4) The EU legislation provides for a decentralized application of its provisions.

Drawing the borders between these four situations raises considerable problems; some examples will illustrate this.

The notion of *differentiated legislation* is clear, where a specific region is named, or where a specific geographical situation (“small islands”) is described. In contrast, where EU legislation mentions “vulnerable zones” or “less sensitive zones”, it is much less obvious that this can be subsumed under differentiated legislation, as Member States benefit from a considerable margin of discretion as

regards the identification of such zones. Sometimes, though not always, the characteristics of such a zone are due to objective, geographical considerations.

For the purposes of this study, the different zones were all included in the first set of provisions.

The term "*designation of competent authorities*" is only unambiguous, where EU legislation explicitly mentions regional or local authorities which shall be designated. However, this is practically never the case. A good illustration of the difficulties involved is the designation of competent authorities under the Water Framework Directive. This Directive requires Member States to designate river basin management districts and to designate a competent authority for each district. The intention of the Directive clearly was the involvement of regional, provincial and/or local authorities in the management of the different river basin districts. However, nothing would prevent a Member State of attributing all obligations for the different river basin districts which lie on its territory, to one central water authority, which then delegates persons to the different river basin districts. This form of administration might be considered cumbersome; yet it is the privilege of Member States to decide, how they organize their administration, their water management and the participation of regional or local administrations in water management questions.

The present study normally follows the wording of the EU legislation. Cases which appear relatively clearly to refer to regions – and the Water Framework Directive appears to be such a clear case -, are included in this study, however with the indication that a designation of regional competent authorities is, legally speaking, not compelling.

The cases of "*cooperation with other authorities*" follow the same pattern. While theoretically, a centralized administration might be requested to ensure this cooperation, in practice it is probably more often a decentralized authority that ensures the cooperation at the regional level. Again, however, the study points out to the difference which might exist between the legal situation and its practical application.

With regard to the "*decentralized application*" of EU law, the study normally mentions those cases, where the EU legislation explicitly requests such a decentralized application. Indeed, it is clear that, for example, the monitoring of bathing waters – and the monitoring of water quality issues in general - , the separate collection of packaging waste, or the monitoring of landfills takes place at a decentralized level. In all these cases, EU legislation only asks for implementation, however without further specifying by whom or at which level this should occur. In very obvious cases, therefore, the study will indicate that there is hardly an alternative to a decentralized application.

In conclusion, thus, the study will not be able to present a picture which just consists of black and white answers. Borderline cases occur in all four sections.

The provisions will be presented separately for the different environmental sectors (water, air, waste etc.). Through this approach it will appear, where the legislative provisions were differentiated, where coordination was requested or a decentralized application allowed or imposed. Indeed, the degree of consideration for regions and their legislative or administrative responsibilities might be different from one sector to the other.

The directives and regulations which were examined are listed in Annex I. Only provisions which were in force on 1 January 2010 were scrutinized

Section One: The different environmental sectors

II. Horizontal provisions

II.1 Differentiated legislation

Directive 85/337 on the environment impact assessment¹ provides that for projects which come under the field of its application the direct and indirect effects of the project on the environment shall be identified, described and evaluated, before the project is authorized. According to its Article 6, the public shall be informed of the application for a project, as well as of the factual elements which allow its environmental evaluation. The “*public concerned*” has the right to give an opinion on the draft project. This “*concerned public*” is necessarily the public which lives in the neighborhood of the future project or will otherwise be affected by it. As the effects which a project might have on humans and the environment vary according to the nature, the localization and the characteristics of the project – a motorway has other effects than a normal road or an industrial plant –, the decision which is the public concerned, can practically only be taken on a case-by-case basis and needs therefore the organizational decisions by the local or regional authorities; such organizational decisions may deal with local hearings, information of the population or bill-posting within a certain radius (Article 6(3)).

A similar provision is found in Article 15 of **Directive 2008/1** on the integrated prevention and pollution control². This Directive concerns the permits for industrial and other installations of a certain size and provides in Article 15 that the public must be given the possibility to participate in the permit procedure. The organizational requirements for such participation are again normally organized at local or regional level, as they require the adaptation of the participation procedures to the specificities of each installation.

Directive 2003/35 generalized the provisions on participation of the public with regard to the drawing up of plans and programs relating to the environment³. The plans which are affected, are waste management plans, plans and programs for the separate collection of batteries and accumulators, plans concerning the protection of waters against pollution caused by nitrates from agricultural sources, plans on packaging waste, and plans concerning the assessment and management of air quality. The Directive leaves it to the Member States to identify the public which is entitled to participate in the elaboration and management of the different plans. However, as numerous of these plans are, in practice, adopted at a regional or even at a local level, this identification of the public concerned will have to be done by the regional or local authorities.

Directive 2001/42⁴ requires an environment assessment to be made for those plans and programmes which form the basis for future authorizations to be given for projects that are listed in the annexes of Directive 85/337⁵. The Directive mentions plans and programmes in the sectors of

¹ Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, OJ 1985, L 175 p.40. This Directive was amended by Directive 97/11, OJ 1997, L 73 p.5 and Directive 2003/35, OJ 2003, L 156 p. 17.

² Directive 2008/1 concerning integrated pollution prevention and control, OJ 2008, L 24 p.8.

³ Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, OJ 2003, L 156 p.17.

⁴ Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, OJ 2001, L 197 p.30.

⁵ Directive 85/337 (n.1, above).

agriculture, forestry, fisheries, energy, transport, industry, transport, waste management, water management, telecommunications, tourism, town and country planning, land use, and plans which, because of their likely effect on natural sites, had been determined to require an assessment according to Article 6 of Directive 92/43⁶ (Article 2(2)). Many of these plans are, by their very nature, to be adopted at the regional or local level of the Member States; this applies in particular to the plans on land use, on town and country planning, and plans which might affect natural habitats.

According to Article 2(3) of Directive 2001/42, Member States shall provide for an environmental assessment concerning the use *“of small areas at local level”* only, where they determine *“that they are likely to have significant environmental effects”*. In this regard, Member States may provide by legislation, what a small area is. However, the decision, whether a plan or programme which concerns such a small area is likely to have significant effects on that area can only be taken at a decentralized level and refers thus to regional or local authorities.

The environmental assessment requires the participation of the public before the adoption of the plan or programme. It is up to the Member States to identify the public which is affected or likely to be affected by or which has an interest in such a plan or programme (Article 6(4)). Where plans or programmes are elaborated at regional or local level, this obligation then lies on the regional or local authorities, including the task to organize the participation.

Another aspect of the **Directive 2008/1** on integrated prevention and pollution control⁷ is to be mentioned. This Directive requires Member States to fix, for the industrial installations which come under its field of application, the *“best available technique”* as regards emissions to air, to water and to the soil. However, the Directive does not fix itself, what, in a given case, the *“best available technique”* is. Rather, this decision is left to the national authority which authorizes the activity. The authority shall, in fixing the conditions for the construction and operation of the plant, take into consideration the technical characteristics of the installation, its geographical location, and the local environmental conditions. This means in practice that as regards one and the same type of installation, such as, for example, a cement kiln, the competent authorities may fix different conditions of emissions of pollutants into the air, the water or the soil. The EU-wide term of *“best available technique”* is thus defined in a way which leads to different provisions that apply not only in the different EU Member States, but also within one and the same Member State, and even within one and the same region. The so-called BREF-documents⁸ which are elaborated by EU bodies for the different types of installation, do not change this statement, as these are not legally binding documents.

II.2 Appointment of competent authorities

Regulation 1221/2009 revised an existing EU eco-management and audit scheme⁹. It provided for the voluntary participation of organizations, including industrial installations and private or public bodies, in an eco-management system. Participants had to comply with a number of conditions

⁶ Directive 92/43 on the protection of natural habitats and wild fauna and flora, OJ 1992, L 206 p.7.

⁷ Directive 2008/1 (n.2, above)

⁸ BREF stands for *“best reference”*. The documents are elaborated by an *“IPPC Bureau”* under the auspices of the Commission’s Joint Research Centre in Sevilla (Spain), with active participation of the industries, environmental NGOs and the Commission. See <http://eippcb.jrc.es/reference>.

⁹ Regulation 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme, OJ 2009, L 342 p.1.

which were specified in detail in the Regulation and had to be, after an auditing process, registered in a register which was held by the “*competent bodies*” within the Member States. The competent bodies were assigned a number of tasks under the Regulation, in particular with regard to the monitoring of the scheme, the supervision of the participant organizations and the auditors, and the obligations concerning the register. Article 11 of Regulation 1221/2009 explicitly specified that these competent bodies could be established at national, regional or local level.

II.3 Cooperation among competent authorities

Article 4(3) of the Treaty on European Union establishes the principle of “*sincere cooperation*” where Member States’ authorities and the European institutions shall assist each other in carrying out the tasks which flow from the European Treaties. This mutual obligation is not limited to the central authorities of the Member States, but also concerns regional and local authorities. Whenever the implementation and application of European legal provisions is in question and cooperation among different authorities is necessary, regional authorities are obliged to cooperate with other regional or national authorities or with the EU institutions to ensure the fulfillment of the obligations of European Union law¹⁰.

It follows from these provisions in the EU Treaty itself which replaced a similar provision in Article 10 EC Treaty that normally, it is not necessary to stipulate in individual directives or regulations that national or regional authorities should cooperate and coordinate their efforts, in order to ensure the full and effective application of EU environmental legal provisions. It is for this reason that EU environmental law only in exceptional cases explicitly lays down an obligation for regional authorities to cooperate.

II.4 Differentiated application of provisions

In the horizontal environmental legislation, no cases were found, where the legislation provided for a differentiated application in Member States or in parts of Member States.

III. Water legislation

III.1 Differentiated legislation

Directive 91/271 on urban waste water¹¹ provides that urban waste waters, in principle, undergo secondary treatment before they are discharged into rivers, lakes or coastal waters. Article 4(2) of the Directive provides for a possibility to apply less stringent requirements in certain areas. This provision reads:

Urban waste water discharges to waters situated in high mountain regions (over 1500m above sea level), where it is difficult to apply an effective biological treatment due to low temperatures may be subjected to treatment less stringent than that prescribed in paragraph 1, provided that detailed studies indicate that such discharges do not adversely affect the environment.

¹⁰ Court of Justice, case C-251/89, Athanasopoulos, ECR 1991, p. I-2797; case C-42/82 Commission v. France ECR 1983, p.1013; case C-32/79 Commission v. United Kingdom, ECR 1980, p.2403.

¹¹ Directive 91/271 concerning urban waste water treatment, OJ 1991, L 135 p.40.

There must thus be three conditions fulfilled in order to only provide for primary waste water treatment:

- the region must be situated more than 1500m above sea level;
- low temperatures make it difficult to apply an effective biological treatment;
- detailed studies show that the waste water discharges do not adversely affect the environment.

Under Article 5 of the Directive, Member States shall identify sensitive area according to criteria which are laid down in the Directive. In these sensitive areas, the waste water shall have to undergo a “*more stringent*” than secondary treatment. Furthermore, Member States may identify less sensitive areas, where waste water is discharged into coastal waters or estuaries (Article 6). In such areas, waste water may undergo a treatment which is less stringent than secondary treatment, provided that the waste water undergoes at least primary treatment, that it is controlled according to specific provisions that are laid down in the Directive, and comprehensive studies indicate that the environment is not adversely affected by the waste water.

A differentiated regional treatment is also possible under **Directive 91/676** on nitrates in water¹². This Directive provides that Member States shall identify water which are affected by nitrate pollution or could be so affected if action under the Directive is not taken. All zones which drain into such waters shall be designated as vulnerable zones (Article 3). For vulnerable zones, Member States shall set up action programs which limit the “*amount of livestock manure applied to the land each year, including by the animals themselves*” to 170 kg nitrogen (N)¹³. However, the Commission may grant derogation from this requirement on the basis of objective criteria, provided the general objective of the Directive is not prejudiced¹⁴. Examples of objective criteria, given in the Directive, are long growing seasons, crops with high nitrogen uptake, high net precipitation in the vulnerable zone and soils with exceptionally high denitrification capacity.

The Commission granted a number of derogations to Member States, applying to whole regions. As regards Northern Ireland, it mentioned that the Northern Ireland climate promotes a relatively long grass-growing season (260 to 270 days) and that due to impeded drainage, the denitrification potential of the majority of soils in Northern Ireland was relatively high¹⁵. In its other decision, the Commission referred to the high nitrogen uptake of crops and long growing seasons – without further specification - in order to justify its granting of derogations for the regions of England, Scotland, Wales, Flanders and Wallonia¹⁶.

¹² Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural practices, OJ 1991, L 375 p.1.

¹³ Directive 91/676 (note 12, above), Article 5 and Annexe III no.2.

¹⁴ Ibidem.

¹⁵ Commission Decision 2007/863, OJ L 337 p.122.

¹⁶ Commission Decision 2008/64, OJ 2008, L 16 p.28 (Flanders); Decision 2008/96, OJ 2008, L 32 p.21 (Wallonia); Decision 2009/431, OJ 2009, L 141 p.28 (England, Scotland, Wales). The Commission, however, requested an individual application to the competent authority by each holding which wanted to make use of the general derogation.

Directive 98/83 on drinking water¹⁷ provides for the quality of water which is intended for human consumption. It fixes a number of maximum admissible concentrations of undesirable substances in such water.

Member States may exempt from the provisions of the Directive “*water intended for human consumption from an individual supply providing less than 10m³ a day as an average or serving fewer than 50 persons, unless the water is supplied as part of a commercial or public activity*”¹⁸

Furthermore, Member States may provide for derogations from the parametric values, provided that the derogation does not constitute a potential danger to human health “*and provided that the supply of water intended for human consumption in the area concerned cannot otherwise be maintained by any other reasonable means*”¹⁹. Derogations shall not exceed three years, but a second derogation up to the same period may be granted; the Member State then has to inform the Commission, give the grounds for its decision and the result of its review on the progress achieved during the first derogation period. In exceptional circumstances, the Commission may grant a third derogation for up to three years²⁰. It appears that while a number of Member States granted a second derogation, the Commission has not yet taken any decision to grant a third derogation.

III.2 Appointment of competent authorities

According to the **water framework Directive**²¹, Member States shall identify the individual river basins²² lying within their territory and assign them to individual river basin districts. They then have to identify the appropriate competent authority for each river basin district that lies on their territory (Article 3(2)); they shall also identify the competent authorities for those river basin districts which cover the territory of several Member States, and which concern an international river basin district lying within their territory. While regional competent authorities are not explicitly mentioned here, it follows from the context of Article 3 that the competent authorities for river basins are thought to be regional authorities, though it could not be legally excluded that a Member State identifies the central authorities as responsible for *all* river basin districts.

The **Directive on groundwater**²³ complements the provisions of the water framework directive with regard to groundwater. It does not require the identification of competent authorities; it rather assumes that the authorities, who had been identified under the water framework directive, shall also be competent authorities with regard to groundwater.

Also **Directive 2008/56** on marine water quality²⁴ is conceived as a complement to the water framework directive which applies to marine waters. Article 4 asks Member States to take “*due account*” of the fact that the EU marine waters are divided into the regions North-East Atlantic, North

¹⁷ Directive 98/83 on the quality of water intended for human consumption, OJ 1998, L 330 p.32.

¹⁸ Directive 98/83 (note 17, above), Article 3(2)(b).

¹⁹ Directive 98/83 (note 17, above), Article 9(1).

²⁰ Directive 98/83 (note 17, above), Article 9(2).

²¹ Directive 2000/60 establishing a framework for Community action in the field of water policy, JO 2000, L 327 p.1.

²² A river basin is „ *the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta*” (Directive 2000/60, Article 2, no. 13).

²³ Directive 2006/118 on the protection of groundwater against pollution and deterioration, OJ 2006, L 372 p.19

²⁴ Directive 2008/56 establishing a framework for Community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ 2008, L 164 p.19.

Sea, Baltic Sea, Mediterranean Sea and Black Sea. Member States “*may*” also take due account of the marine subregions which exist at present²⁵. For each region and subregion, the Member States shall designate competent authorities²⁶. Again, while it is theoretically imaginable that a Member State only designates one competent authority which is then responsible for all different regions and subregions – Article 4 even allows Member States to identify subdivisions within the subregions, in order to better implement the provisions of the Directive – the Directive is based on the idea that for each subregion a competent authority of its own is designated.

III.3 Cooperation among competent authorities

The requirement or invitation to cooperate at regional level in order to reach the objectives of the different legal instruments of water legislation normally follows the establishment of regional competent authorities.

The Water Framework **Directive 2000/60** asks Member States to ensure that within the river basins districts, the Directive’s objectives are achieved; and it was mentioned above, that the competent authorities for river basin districts are, in practice, regional authorities. Where a river basin district extends beyond the borders of a Member State, coordination shall take place among the different competent authorities with regard to all necessary measures and in particular all programs of measures (Article 3(4)). Member States shall also “*endeavor to establish*” such coordination, where third countries are part of an international water basin district (Article 3(5)).

This general obligation to cooperate is repeated in Article 13 with regard to river basin management plans that are larger than the territory of one Member State; indeed, within a Member State, cooperation between the different competent authorities within a river basin district is implied by Article 13(1). When a river basin district extends over several Member States, these “*shall ensure coordination*” in order to obtain one single river basin management plan for the river basin district. Only where such coordination is not successful, shall Member States elaborate a plan for their part of the river basin district (Article 13 (2)). Where the river basin district includes a third country, Member States shall “*endeavour*” to produce a single river basin management plan; if that fails, they again shall establish such a plan with regard to the part of the district which is on their territory (Article 13(3)).

Directive 2006/118 on groundwater protection²⁷ asks Member States, among others, to establish threshold values²⁸ for groundwater, either at national level, or at the level of river basin districts or for individual groundwater bodies. Where such values are fixed for a body of groundwater which extends to the territory of two or several Member States, these shall coordinate, in order to have one threshold value fixed (Article 3(3)). Where the groundwater body extends beyond the territory of the EU, the coordination shall take place with the relevant third State; in order to have one threshold value established (Article 3(4)).

²⁵ These subregions are (Directive 2008/56, Article 4): The Greater North Sea, including the Kattegat and the English Channel; the Celtic Sea, the Bay of Biscay and the Iberian Coast; the waters surrounding the Azores, Madeira and the Canary Islands (Macronesian biogeography region); the Western Mediterranean Sea; the Adriatic Sea; the Ionian Sea and the Central Mediterranean Sea, the Aegean-Levantine Sea.

²⁶ Directive 2008/56 (note 24, above), Article 7.

²⁷ Directive 2006/118 (n.23, above)

²⁸ A threshold value is a groundwater quality standard set by Member States, Directive 2006/118 (note 23, above), Article 2.

It had been mentioned above that **Directive 2008/56** on marine waters²⁹ is conceived as a Directive, where regional competent authorities are appointed for the different regions and subregions. The Directive attaches a particular importance to cooperation and coordination with regard to the EU marine waters. It explicitly invites the Member States and the appointed competent authorities to cooperate, as far as possible, with each other, in order to achieve the objectives of the Directive in the different regions or sub regions (Articles 5). This cooperation refers to the identification of the status quo of the relevant waters, the definition of a good environmental status which is to be reached, to the fixing of environmental targets, to the adoption of a monitoring program and to the elaboration of a program of measures in order to reach the good environmental status of the water. The competent authorities are to use, *as far as practical and appropriate*, existing regional or sub regional institutional structures, in particular the regional Sea Conventions³⁰ in order to coordinate their activities. They are also asked to *make every effort* to coordinate their activities with third countries which have sovereignty or jurisdiction over the waters in the region or sub region, in order to reach the best possible coordination of their actions (Article 6). Finally, the competent authorities shall coordinate their efforts also with landlocked countries of the same catchments area.

Where bathing waters within a river basin give rise to transboundary impacts on the waters' quality, the Member States involved shall coordinate their action in order to allow the quality standards of the **bathing water Directive**³¹ to be respected. As within the water basin districts, the regional authorities are asked to monitor the waters; this task with regard to bathing waters requires their cooperation with authorities from other Member States.

III.4 Differentiated application of provisions

It is obvious that the majority of the EU water legislation needs to be implemented and applied at regional and/or local level. This refers for example to the monitoring of the water quality, the establishment of water clean-up or management plans, the inspections, administrative day-to-day cooperation in river basin districts, the establishment of flood risk maps, the coordination with other regional authorities, with the water authorities on other Member States or of third countries etc. Indeed, implementation and application of water legislation is normally a process which consists of numerous specific and individual measures and decisions taken which a centralized administration can hardly adequately fulfill.

Despite these facts, EU water legislation practically never explicitly suggests or requests a decentralized (regional) application of the EU law provisions. It rather leaves it to the Member States, how they organize the application of EU water law in practice. Even the **Directive on marine waters**³² does not deviate from this rule. This Directive provides in Article 22(2) that Member States without marine waters only need comply with the requirements of appointing competent authorities and ensure regional cooperation and coordination in the context of that Directive. However, the provision only applies to land-locked countries, but not to Member States with land-locked regions.

²⁹ Directive 2008/56 (n.24, above)

³⁰ The Directive refers in Recital 19 in the following terms to the Regional Sea Conventions: *"This Directive should contribute to the fulfillment of the obligations and important commitments of the Community and the Member States under several relevant international agreements relating to the protection of the marine environment from pollution: [follows an enumeration of the different Sea Conventions on the North-East Atlantic, the Baltic Sea, the Mediterranean Sea and the Black Sea]"*.

³¹ Directive 2006/7 concerning the management of bathing water quality, JO 2006, L 64 p.37, Article 10.

³² Directive 2008/56 (note 24,above)

Under the **Water Framework Directive**³³ Member States are obliged to establish a programme of measures to be taken for each river basin district (Article 11) which contains “*basic*” and “*supplementary*” measures, such as the permits for discharges, the prohibition to discharge pollutants in the groundwater or the taking of surface water. The Directive does not specify which authority should establish the programme. According to the system of the Directive, however, the river basin authorities are those that would normally be the authorities which adopt such programmes. It is obvious that, where several river basin districts exist on the territory of a Member State, the programmes of measures vary from one basin to the other, as it is precisely the objective of the river basin management to take into consideration the specificities of each river basin.

A similar obligation is laid down in Article 13 of **Directive 2000/60**. According to this Article, Member States shall establish, for each river basin district, a river basin management plan, review and update it at least every six years, and ensure the application of these plans. Again, Article 13 does not prescribe which authority shall elaborate the river management district plan and monitor its application. Implicitly, though, this obligation is on the river basin bodies and authorities which are only capable to take into consideration the sources of contamination within the river basin, the different uses of the water, the existence of natural sites and of numerous other specificities of the specific river basin.

IV. Air pollution and noise

IV.1 Differentiated legislation

The relevant framework directive on air pollution is **Directive 2008/50**³⁴, which replaced an earlier directive of 1996³⁵. Article 4 of Directive 2008/50 stipulates: “*Member States shall establish zones and agglomerations throughout their territory. Air quality assessment and air quality management shall be carried out in all zones and agglomerations*”. This means that the field of application of the Directive, at least as regards chapters II (assessment) and III (management)³⁶, is limited to those zones and agglomerations which the Member States have established. This interpretation is confirmed by Article 13(1) which provides that Member States “*shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM10, lead, and carbon monoxide in ambient air do not exceed the limit values*” laid down in the Directive; the same obligation applies to the levels of nitrogen dioxide and benzene (Article 13(2)).

The Directive does not contain any requirement as to the number of zones and agglomeration, their representatively, their size or their location. Member States may thus, by not designating certain zones or agglomerations, declare the Directive’s provisions to be inapplicable in these regions; as long as they establish such zones “*throughout their territory*”, this is not a breach of the Directive’s provisions.

The location of sampling points for the measurement of the air pollutants which are covered by the Directive shall be determined by the Member States, according to criteria which are laid down in the

³³ Directive 2000/60 (n.21, above)

³⁴ Directive 2008/50 on ambient air quality and cleaner air for Europe, OJ 2008, L 152 p.1.

³⁵ Directive 96/62 on ambient air quality assessment and management, OJ 1996, L 296 p.55.

³⁶ Directive 2008/50 (note 34, above), chapter IV, articles 23 to 25, deals with plans, but also refers to “zones and agglomerations” only. Chapters V (information and reporting) and VI (Committee, transitional and final provisions) do not contain a territorial limitation.

Directive. The application of the criteria for the selection of sampling points shall be monitored by the Commission (Article 7(4)), except for measuring ground-level ozone: in that case, the Commission has no monitoring function. Thus, also the location of sampling points gives Member States a certain margin of discretion as regards the differentiated application.

In order to eliminate the adverse effects of acidification and reducing exposure to ground-level ozone, the World Health Organization (WHO) fixed guideline values. The EU recognized that it will not be able to respect these guidelines and, therefore, fixed itself interim environmental objectives for the emissions of sulphur dioxide (SO²), nitrogen oxides (NO_x), volatile organic compounds (VOC) and ammonia (NH₃) which had to be reached by 2010³⁷. Emissions from the territory of the Member States and their exclusive economic zones were covered, and for each Member State, national emission ceilings were laid down. However, emissions in the Canary Islands (Spain), in the overseas departments of France and emissions in Madeira and the Azores (Portugal) were not covered (Article 2).

As regards point sources, a **Directive on large combustion plants** limited the emissions of sulphur dioxide, nitrogen oxides and dust³⁸. Annex III to that Directive provided for some derogations in the SO² emission limit values for solid fuels used in new plants between 100 and 300 MWh in the “*Outermost Regions*”; these are defined in Article 2 as “*the French Overseas Departments with regard to France, the Azores and Madeira with regard to Portugal, and the Canary Islands with regard to Spain*”. The same derogation is granted in Annex IV for liquid fuels. Furthermore, two plants of 250 MWh “*on Crete and Rhodos*” obtained a derogation for an exceptionally high emission limit value of 1700 mg/Nm³³⁹ (annex IV B).

A derogation for the emission limit values for NO_x of plants which used solid, liquid or gaseous fuels was again given to the outermost regions (annex VI). And the two plants on Crete and Rhodos had a further derogation fixed for their emissions of dust (annex VII B).

Another attempt to limit air emissions of VOCs, a ground-level ozone precursor, was undertaken by **Directive 94/63**⁴⁰. This Directive was based on Article 100a EC (now Article 114 TFUE), but allowed Member States to “*maintain or require*” more stringent measures throughout their territory “*or in geographical areas where it is established that such measures are necessary for the protection of human health or the environment owing to specific conditions*” (Article 3(1)).

The Directive applied to terminals⁴¹, but exempted new terminals with a throughput of less than 5000 tones/year *located in small remote islands* (Article 4(4.d)). Furthermore, Member States were allowed to grant a derogation to small (less than 500 m³/year throughput) service stations which were “*located in a geographical area or on a site where vapor emissions are unlikely to contribute significantly to environmental or health problems*” (Article 6(4)).

³⁷ Directive 2001/81 on national emission ceilings for certain atmospheric pollutants, OJ 2001, L 309 p.22.

³⁸ Directive 2001/80 on the limitation of emissions of certain pollutants into the air from large combustion plants, OJ 2001, L 309 p.1.

³⁹ The general emission limit value for such plants was fixed at “*400 to 200 (linear decrease)*”

⁴⁰ Directive 94/63 on the control of volatile organic compounds (VOC) emissions resulting from the storage of petrol and its distribution from terminals to service stations, OJ 1004, L 365 p.24.

⁴¹ A terminal was defined as „ *any facility which is used for the storage and loading of petrol onto road tankers, or vessels, including all storage installations on the site of the facility*” , Directive 94/63 (note 40, above), Article 2(d).

Directive 98/70 concerned the quality of petrol and diesel fuels⁴²; it provided, in particular, for the introduction of lead-free petrol in the European Union. All temporary and geographical derogations which were originally foreseen in the Directive expired in the meantime.

After several amendments of Directive 98/70, **Directive 2009/30** amended Directive 98/70 by incorporating previous amendments in a new, revised text⁴³. Petrol and diesel fuels had to comply with the requirements laid down in the revised annexes I and II of Directive 98/70. However, Member States were allowed to make provisions for the introduction of petrol or diesel with a maximum sulphur content of 10 mg/kg in the outermost regions – the French Overseas Departments, the Canary Islands (Spain), Madeira and the Azores (Portugal) (Article 3(3) and Article 4(3)). Furthermore, Member States with *low ambient summer temperatures* – these were defined as Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Sweden and the United Kingdom (Article 2 no.5) – were allowed to permit the placing on the market during the summer period of petrol with a maximum vapor pressure of 70 kPa, instead of the generally allowed 60 kPa; the possibility was subject to an agreement by the Commission (Article 2 no.5)⁴⁴. For Member States with *severe winter weather* - this notion was not defined -, the maximum distillation point for diesel fuels was allowed to be fixed at 10% at 180°C, instead of the generally applicable 65% at 250°C (Article 4(4)).

Directive 2009/30 also introduced requirements as to the reduction of greenhouse gas emissions from fuels. As this might lead to the supply of biofuels, Article 7b of Directive 98/70, as amended, laid down criteria for the use of biofuels. Biofuels are not to be taken from land with high biodiversity value or land with high carbon stock or peatland; criteria are laid down for these categories, but exceptions are admitted in each case.

As regards EU noise legislation, only few provisions for a differentiated legislation are to be mentioned. **Directives 89/629**⁴⁵ and **2006/93**⁴⁶ which both concern airplane noise, exempt from their field of application the French Overseas Departments. And **Directive 2002/30**⁴⁷ introduced specific provisions for reducing restrictions for “marginally compliant aircraft”⁴⁸ which have to be taken at the level of the individual airport. This airport-by-airport approach, introduced at EU level under pressure from the United States, gives a greater amount of discretion to the regional and local authorities to decide on operating restrictions, but also confronts them with the risk that noise restrictions constitute a competitive disadvantage with regard to competing airports.

⁴² Directive 98/70 relating to the quality of petrol and diesel fuels, OJ 1998, L 350 p.58.

⁴³ Directive 2009/30, introducing a mechanism to monitor and reduce greenhouse gas emissions, OJ 2009, L 140 p.88.

⁴⁴ See also the specification in Annex I note 5 to Directive 98/70 (note 42, above), as amended by Directive 2009/30 (note 43, above).

⁴⁵ Directive 89/629 on the limitation of noise emission from civil subsonic jet aeroplanes, OJ 1989, L 363 p.27.

⁴⁶ Directive 2006/93 on the regulation of the operation of aeroplanes covered by Part II, Chapter 3, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988) (codified version), OJ 2006, L 374 p.1.

⁴⁷ Directive 2002/30 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports, OJ 2002, L 85 p.40.

⁴⁸ “Marginally compliant aircrafts” are aircrafts which had been retrofitted in order to comply with the noise requirements of Chapter 16 of the International Civil Aviation. As these so-called “hush-kitted” aeroplanes mainly concerned Boeing machines, this had raised controversies with regard to the question, whether operating restrictions by the EU were, in practice, mainly protectionist measures.

IV.2 Appointment of competent authorities

EU legislation on air quality and atmospheric pollution first asks Member States to assess air quality and then to take measures in order to maintain or, where necessary, improve it. There is extensive legislation how to measure air pollution by the fixing of sampling point or modeling techniques. The legislation never indicates which authority shall select and determine the sampling points. As the legislation is addressed to Member States - practically no regulations were adopted with regard to atmospheric pollution –, it is left to the Member States to take decisions in this regard. In practice, it is hardly imaginable that the sampling points are fixed without close cooperation of local or regional authorities, though the directives do not refer to that.

Directive 2008/50 asks Member States to “*designate at the appropriate levels the competent authorities and bodies*” (Article 3). Such competent authorities could be regional authorities, though this is not required. Other legislation on atmospheric pollution does not contain specifications as to the appointment of competent authorities.

As regards noise, Article 4(1) of **Directive 2002/49** on environmental noise⁴⁹ reads as follows : « *Member States shall designate at the appropriate levels the competent authorities and bodies responsible for implementing this directive, including the authorities responsible for: (a) making and, where relevant, approving noise maps and action plans for agglomerations, major roads, major railways and major airports; (b) collecting noise maps and action plans*”. The noise maps to which this provision refers have to be made for agglomerations with more than 250.000 persons, and for roads, railways and airports of a specific size. They must be presented to the citizens who might be affected by noise and serve to prepare action plans for reducing the noise. From this sketchy description, it becomes clear that the noise maps and the subsequent action plans cannot be elaborated at the central level of Member States, but that regional and local authorities have to be active for assessing the existing noise, elaborate noise maps and, subsequently, action plans.

IV.3 Cooperation among competent authorities

As EU legislation on the appointment of regional authorities with regard to air pollution is scarce, there is not either provision on the cooperation among regional authorities. **Directive 2008/50** assigns to the competent authorities or bodies the responsibility to ensure “*cooperation with the other Member States and with the Commission*” (Article 3(f)). Article 6(5.b) of that Directive allows to set up, by agreement with adjoining Member States, one or several common measuring stations “*covering the relevant neighbouring zones*”. Again, such cooperation is best organized at regional level, though the wording of the provision only mentions Member States.

IV.4 Differentiated application of provisions

Where the pollution levels in ambient air are exceeded in certain zones or agglomerations, Member States shall “*ensure that air quality plans are established for those zones and agglomerations*” (Directive 2008/50, Article 23). Here, it is obvious that the Directive itself does not assume that such plans would be established at the central level of the Member State in question, but that such air quality plans are elaborated by regional or local authorities.

⁴⁹ Directive 2002/49 relating to the assessment and management of environmental noise, OJ 2002, L 189 p.12.

Article 24 of **Directive 2008/50** provides that short-term action plans shall be drawn up, where there is a risk in a given zone or agglomeration that alerts thresholds of the Directive will be exceeded. Such short-term action plans may, according to Article 23(2), include “*measures in relation to motor-vehicle traffic, construction works, ships at berth, and the use of industrial plants or products and domestic heating*”. Obviously, such short-term measures which may seriously interfere with citizens’ daily life, cannot be taken at central national level alone, but need the active participation of local and regional authorities. Yet, the Directive does not mention such participation.

For large combustion plants, Article 7(2) and (3) of **Directive 2001/80** provides that the competent authority may grant temporary derogations from compliance with the emission limit values, where there is a sudden interruption in the supply of low-sulphur fuel or of gas. This treatment of an emergency situation is typically the matter of local or regional authorities which are capable of assessing whether there was indeed a sudden interruption in the supply of energy.

V. Nature and biodiversity

V.1 Differentiated legislation

EU legislation on nature and biodiversity does not differentiate in its field of application between different Member States or different regions. It is true that **Directive 92/43** on natural habitats and wild fauna and flora⁵⁰ divides the territory of the Union into bio-geographical regions. However, this repartition was made only in order to determine more easily the necessities of designating areas for those fauna and flora species which are characteristic for each bio-geographic region. The obligations which flow out of the provisions of **Directive 92/43** and also of **Directive 2009/147** on birds⁵¹, remain the same for all the bio-geographic regions.

V.2 Appointment of competent authorities

Regulation 708/2007 on the use of alien and locally absent species in aquaculture⁵² asks Member States to designate “*the competent authority or authorities responsible for ensuring compliance with the requirements of this Regulation*”, obviously on the assumption that the monitoring of that Regulation, such as the granting of a permit, the monitoring of the environmental risk assessment, and the keeping of a register, cannot be successfully done but with the active support of regional or local authorities.

Directive 2009/147⁵³ provides for the granting of derogations from the legislative system for protected birds and requests Member States to indicate the *authority empowered to declare that the required conditions obtain*. As these conditions include “*circumstances of time and place*”, the empowered authority is typically a regional or local authority.

An equivalent provision is also found in Article 16 (3)(d) of **Directive 92/43**. This Directive generally mentions the existence of competent authorities, but does not explicitly assign them any specific duties.

⁵⁰ Directive 92/43 on the conservation of natural habitats and of wild fauna and flora, OJ 1992, L 206 p.7.

⁵¹ Directive 2009/147 on the conservation of wild birds, OJ 2010, L 20 p.7; this Directive replaced Directive 79/409, OJ 1979, L 103 p.1.

⁵² Regulation 708/2007 concerning use of alien and locally absent species in aquaculture, JO 2007, L 168 p.1.

⁵³ Directive 2009/147 (n.51, above), Article 9(2)(d).

Competent authorities are also mentioned in **Regulation 338/97** on trade in endangered species⁵⁴, where they are called “*management authorities*” (Article 13). Member States were asked to designate “*a management authority*”, but were allowed to “*designate additional management authorities*” to assist in implementation. The lists of management authorities were published, and it is interesting to note that France designated 27 additional management authorities, the Czech Republic 121 and Germany 266 additional management authorities⁵⁵. Clearly, these are mainly regional, provincial and local authorities.

V.3 Cooperation among competent authorities

EU legislation on nature and biodiversity does not contain explicit provisions concerning the cooperation among regional or local authorities. Such cooperation is, though, necessary and also quite normal, for example with the monitoring of transboundary habitats and other areas, or the monitoring of the conservation of migratory species.

The Alpine Convention to which the EU adhered⁵⁶ and which is therefore part of EU law⁵⁷, provides in Article 2(1) that “(T)*ransboundary cooperation in the Alpine region shall be intensified and extended*”. It does not specify, whether this cooperation shall take place at the central level of the Contracting Parties or at regional level.

Close cooperation between regional and local authorities is also necessary in the case of imports of endangered species into the EU under **Regulation 338/97**, though this Regulation does not mention it explicitly.

V.4 Differentiated application of legislation

The provisions of **Directives 2009/147** and **92/43** mentioned above, under the heading for competent regional authorities, also lead to a differentiated application of these two Directives in different parts of the European Union. This concerns first of all the hunting of birds, but may also apply, according to the circumstances, to the granting of derogations.

In order to be in compliance with Article 7 (4) of **Directive 2009/147**, the hunting legislation of Member States must ensure a complete system of protection, and cannot be confined to protecting the majority of birds of a given species that migrate or are in a period of reproduction⁵⁸. “*National legislation, which declares the hunting of certain species open in principle, without prejudice to provisions to the contrary laid down by the regional authorities, does not satisfy the requirements of protection laid down by the Directive*”⁵⁹. However, this statement by the Court does not mean that the Member State itself or its regions only can fix one single date for the opening or the closing of hunting. Indeed, “[O]n condition that complete protection of the species is guaranteed, the fixing of closing dates which vary between the different parts of the territory of a Member State is compatible

⁵⁴ Regulation 338/97 on the protection of species of wild fauna and flora by regulating trade therein, OJ 1997, L 61p.1.

⁵⁵ Names and addresses of the Management and Scientific Authorities designated by the Member States, http://ec.europa.eu/environment/cites/pdf/list_authorities.pdf

⁵⁶ Convention on the protection of the Alps (Alpine Convention), OJ 1996, L 61 p.32; the EU adhered to this Convention by Decision 96/191, OJ 1996, L 61 p.31.

⁵⁷ See Article 216(2) TFEU.

⁵⁸ Court of Justice, case C-157/89 Commission v. Italy, ECR 1991, p.I-57; case C-38/99, Commission v. France, ECR 2000, p.I-10941.

⁵⁹ Court of Justice, case C-157/89 (n.57, above)

*with the Directive. If the power to fix the closing date for the hunting of migratory birds is delegated to subordinate authorities, the provisions which confer that power must ensure that the closing date can be fixed only in such a way as to make possible complete protection of the birds during pre-mating migration*⁶⁰.

The derogation provisions of Article 9 of **Directive 2009/147** and 16 of **Directive 92/43** were already mentioned. As each derogation has to indicate the *circumstances of time and place* where it is granted, the normal derogation leads to a differentiated application of the provisions of both Directives. A rather typical use of these derogations possibilities was thus the decision by regions to allow the spring hunting of birds⁶¹.

VI. Products

As one of the main objectives of the European Union is the establishment and functioning of an internal market, where products and services circulate freely, there is a growing tendency to have harmonized product standards throughout the European Union, marked by the transition from optional to total harmonization, from directives to regulations, from the mutual recognition of national permits to the issuing of European permits. This tendency leads to product-related legislation which is uniform and does not leave much room for regional differentiations and regional applications.

VI.1 Differentiated legislation

Regulation 1107/2009 on agricultural pesticides⁶² provides for a system of authorizing the active substances which are used in agricultural pesticides by a European system. The active substances are placed in a EU-wide positive list. The authorization of agricultural pesticides is granted by the Member States which may authorize products that contain one or several of the active substances of the EU positive list, and no other active substances.

Agricultural pesticides which are authorized by one Member State may not be used everywhere in the Union. Rather, Regulation 1107/2009 divides the Union territory into three zones, north, centre and south⁶³. A mutual recognition of an agricultural pesticide – this means, in simplified terms, an authorization without repetition of the whole authorization procedure - may, in principle, only take place in a Member State which belongs to the same zone as the Member State which originally authorized the product. In a Member State which does not belong to the same zone, a full new authorization procedure is required (Article 40ss).

⁶⁰ Court of Justice, C-435/92 Association pour la Protection des Animaux Sauvages and others, ECR 1994, p.I-69.

⁶¹ See, for example, Court of Justice, case C-135/04, Commission v. Spain, ECR 2005, p.I-5261; case C-503/06, Commission v. Italy, judgment of 15 August 2008.

⁶² Regulation 1107/2009 concerning the placing of plant protection products on the market OJ 2009, L 309 p.1.

⁶³ See Regulation 1107/2009 (n.62, above), annex I. To the north zone belong Denmark, Estonia, Latvia, Lithuania, Finland and Sweden; the centre zone consists of Belgium the Czech Republic, Germany, Ireland, Luxemburg, Hungary, Netherlands, Austria, Poland, Romania, Slovenia, Slovakia, and United Kingdom; the south zone consists of Bulgaria, Greece, Spain, France, Italy, Cyprus, Malta, and Portugal.

VI.2 Appointment of competent authorities

Directive 2004/9 on good laboratory practices asks Member States to designate authorities which are responsible for the inspection of laboratories within their territories⁶⁴. The Directive obviously starts from the assumption that such inspections need to be made by regional authorities.

Regulation 1107/2009⁶⁵ on pesticides asks Member States to appoint “*a competent authority or authorities*” in order to carry out the obligations of the Member States under that Regulation. This provision obviously refers to regional authorities.

Directive 2009/128 aims at the sustainable use of pesticides⁶⁶. Among other issues, the Directive provides that the pesticide application equipment is inspected at regular intervals (Article 8), and that aerial spraying of pesticides is prohibited (Article 9). Of this prohibition, derogations may be granted under certain conditions. Member States “*shall designate the authorities competent*” for examining, whether the conditions for a derogation exist (Article 9(3)). In view of the circumstances - local weather conditions, wind situation, residential areas etc – these authorities can only be regional or local authorities. The same applies for the inspection obligations mentioned above.

VI.3 Cooperation among competent authorities

Regulation 1107/2009 on pesticides requires Member States to “*designate a coordinating national authority to coordinate and ensure all the necessary contacts with the applicants, other Member States, the Commission and the Authority*” (Article 75(2)). This provision implies the necessity of cooperation among regional authorities and with national or European authorities.

VI.4 Differentiated application of provisions

The different application of provisions in the product-related sector mainly refer to inspections and, occasionally, to the elaboration of plans.

Directive 96/82 concerns the prevention of serious industrial accidents⁶⁷. It obliges industrial plants which process dangerous substances to take measures in order to prevent major accidents; among others, the plants must elaborate an internal (on-site) emergency plan. For the area outside the plants, the competent authorities are obliged to make an external (off-site) emergency plan for the case of an accident. The plans shall be regularly updated, reviewed and adapted to changing circumstances. As such plans necessarily are specific for each plant, according to its location, the surrounding area; the population living around the plant etc, the elaboration of the off-site emergency plans must necessarily be in the hands of local or regional authorities.

Directive 2009/41 concerns the contained use of genetically modified micro-organisms⁶⁸. Such a contained use has to be authorized by the public authorities. Article 13 requires emergency plans to be drawn up, before the contained use actually starts, though it does not specify, whether it is the user or the public authorities shall draw up this plan. Article 16 requests competent authorities to

⁶⁴ Directive 2004/9 on the inspection and verification of good laboratory practice (GLP), OJ 2004, L 50 p.28.

⁶⁵ Regulation 1107/2009 (n.62, above), Article 75.

⁶⁶ Directive 2009/128 establishing a framework for Community action to achieve the sustainable use of pesticides, OJ 2009, L 309 p.71.

⁶⁷ Directive 96/82 on the control of major-accident hazards involving dangerous substances, OJ 1997, L 10 p.13.

⁶⁸ Directive 2009/41 on the contained use of genetically modified micro-organisms, OJ 2009, L 125 p.75.

organize “*inspections and other control measures*” in order to ensure that the user complies with the requirements under the Directive; such inspections and control measures are to be made locally and come thus under the responsibility of the regional or local competent authorities.

A similar provision is inserted in Article 4(5) of **Directive 2001/18** on the release of genetically modified organisms⁶⁹ which asks the competent authorities to organize “*inspections and other control measures, as appropriate*” in order to ensure that the provisions of the directive are complied with. And **Regulation 1830/2003** on genetically modified food and feed⁷⁰ contains the same formula in Article 3; once more, such control measures fall into the responsibility of regional or local authorities.

A more general provision of this kind is finally laid down in Article 3 of **Directive 2004/9** which asks Member States to designate competent authorities “*responsible for the inspection of laboratories*” in order to ensure that the requirements of the Directive are complied with⁷¹. In view of the hundreds or thousands of laboratories which come under this Directive, the application of the Directive, i.e. the inspections and the audit of studies, the Directive is complied with at regional or even at local level.

Article 9 of **Directive 2009/128**⁷² prohibits in principle the aerial spraying of pesticides. Exceptions are only possible in specifically enumerated cases. Such exceptions shall have to be approved by designated competent authorities. An exemption may not be given, where the area to be sprayed is close to residential areas. Where the area is open to the public, specific risk assessment measures shall have to be fixed in the authorization. Such assessment on the specific situation of the area which is to be sprayed can only be made at local or regional level – which leads to a differentiated application of the Directive.

VII. Waste

VII.1 Differentiated legislation

Directive 1999/31 on the landfill of waste⁷³ provides in Article 3(4.b) that Member States may declare several provisions of the Directive to be not applicable to landfill sites for non-hazardous or inert waste

- (a) “*serving islands, where this is the only landfill on the island and where this is exclusively destined for the disposal of waste generated on that island*”. The landfill must have a capacity not exceeding 15.000 tones or have an annual intake not exceeding 1000 tones;
- (b) “*in isolated settlements*”⁷⁴. The landfill site must be destined for the disposal of waste generated only by that isolated settlement.

⁶⁹ Directive 2001/18 on the deliberate release of genetically modified organisms, OJ 2001, L 106 p.1.

⁷⁰ Regulation 1829/2003 on genetically modified food and feed, OJ 2003, L 268 p.1

⁷¹ Directive 2004/9 (n.64, above).

⁷² Directive 2009/128 (note 66, above).

⁷³ Directive 1999/31 on the landfill of waste, OJ 1999, L 182 p.1.

⁷⁴ An isolated settlement is defined as a settlement “*with no more than 500 inhabitants per municipality or settlement and no more than five inhabitants per km² and where the distance to the nearest urban agglomeration with at least 250 inhabitants per km² is not less than 50 km, or with difficult access by road to those nearest agglomerations, due to harsh meteorological conditions during a significant part of the year*” (Article 2(r)).

While the derogation for isolated settlements is permanent, the derogation for islands shall end, once the capacity of the landfill is used and a new landfill site is established.

Member States had to inform the Commission of cases, where they made use of this derogation. According to the Commission⁷⁵, Spain informed the Commission of 1005 isolated settlements⁷⁶; Greece informed the Commission of 199 islands and of 155 isolated settlements. Nothing is known about the question, whether on any island, the derogation has ceased to be applied.

No other Member State appears to have made use of those derogation possibilities.

Directive 94/62 on packaging and packaging waste as amended by Directive 2004/12⁷⁷ allowed Greece, Ireland and Portugal to postpone the attainment of certain recycling and recovery targets⁷⁸ until the end of 2011 at the latest. This derogation was explained “*because of their specific situation namely respectively the large number of small islands, the presence of rural and mountain areas and the current low level of packaging consumption*” (Article 6(7)).

A similar derogation was given to Greece and Ireland in **Directive 2002/96** on waste electrical and electronic equipment⁷⁹, “*because of their overall – recycling infrastructure deficit, - geographical circumstances such as the large amounts of small islands and the presence of rural and mountain areas, - low population density, and – low level of EEE consumption*” (Article 17(4)). The derogation referred to the quantity of collection of WEEE (Article 5(5)) and to the attaining of recovery and recycling targets (Article 7(2)). The derogation was limited till the end of 2008.

In 2004, the Council also granted temporary derogations for the same reasons –except the presence of mountain areas - to the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovenia and Slovakia⁸⁰. In another decision, it granted a temporary derogation to Cyprus, Poland and Malta⁸¹. Cyprus had argued that it had a deficit in recycling infrastructure and a low population density. Poland had raised the same reasons and had also invoked the presence of rural areas. Malta had argued that it had “*a high population density with attendant land-use problems*”, that it had a deficit in recycling infrastructure, that there were only low quantities of electrical and electronic products available, that it was a net importer of such products and that it was a small and geographically isolated country.

All these temporary derogations for accession Member States and for Greece and Ireland have, in the meantime, expired. Directive 2002/96 is thus fully applicable all over the EU.

⁷⁵ http://ec.europa.eu/environment/waste/landfill_index.htm.

⁷⁶ 276 of these isolated settlements were in Aragon, 669 in Castilla-La Mancha, and 60 in Rioja.

⁷⁷ Directive 94/62 on packaging and packaging waste, OJ 1994, L 365 p.10. This Directive was amended by Directive 2004/12, OJ 2004, L 47 p.26.

⁷⁸ These targets are: (1) 60% by weight of packaging waste will be recovered or incinerated at waste incineration plants with energy recovery; (2) between 55 and 80% by weight of packaging waste will be recycled; (3) the following recycling targets are attained: 60% by weight for glass; 60% by weight for paper and board; 50% by weight for metals; 22,5% by weight for plastics; 14% by weight for wood (Article 6 (1.b, 1.d and 1.e))

⁷⁹ Directive 2002/96 on waste electrical and electronic equipment (WEEE), OJ 2003, L 37 p.24

⁸⁰ Decision 2004/312, OJ 2004, L 100 p.33.

⁸¹ Decision 2004/486, OJ 2004, L 162 p.114.

Regulation 1013/2006 on shipments of waste⁸² provides in Article 63 derogations from several provisions for Latvia (until end 2011), Poland (until end 2012), Slovakia (until end 2011), Bulgaria (until end 2014) and Romania (until end 2015).

VII.2 Appointment of competent authorities

EU waste legislation hardly mentions decentralized or regional competent authorities. **Directive 2008/98** on waste⁸³ asks Member States to ensure that their competent authorities establish one or more waste management plans (Article 28); the Directive obviously started from the idea that such plans could also be established at the level of regions, provinces or even at local level.

Regulation 1013/2006 on shipments of waste⁸⁴ is based on the principle of prior written notification and consent: shipments which take place between Member States must, in principle, obtain the consent of the competent authorities of the Member State of dispatch, of the Member State of destination and of the Member State of transit; the grounds for objections are specified in detail in Articles 11 and 12 of the Regulation. In order not to unduly impede shipments, the Regulation fixes delays for the competent authorities which are often quite short (three days). The Regulation provides for cooperation among competent authorities in the administration of planned shipments, in resolving possible diverging opinions⁸⁵ and in sorting out possible objections raised by one authority. Nevertheless, Regulation 1013/2006 only mentions “competent authorities of dispatch”, “competent authorities of destination” and “competent authorities of transit”; thus, once more it is left to the EU Member States, which authorities are designated as competent authorities.

Directive 2006/21 on waste from the mining industry⁸⁶ contains a considerable number of provisions which can only refer to regional or local authorities. The Directive was adopted after a number of major accidents of mining industries, in particular those in Aznalcollar (Spain) in 1998 and in Baja Mare (Romania) in 2002. Article 5 provides that the operator of an extracting installation shall establish a waste management plan for his plant; the plan shall enable the competent authority to evaluate the operator’s ability to meet his obligations under directive 2006/21 and under his waste management plan. The operator also has to take a number of measures in order to prevent major accidents; the competent authority then has to draw up an external emergency plan which specifies the measures to be taken off-site in the event of an Accident (Article 6(3)). In the event of a major accident, the operator shall immediately provide the competent authority with all the information required to minimize the consequences of the accident (Article 6(4)); in such a case, the operator also shall communicate the necessary information “*to the relevant services or authorities in the area*” (Article 6(4)).

Permits for the operation of a plant must be periodically reconsidered and updated (Article 7(4)). The competent authority shall satisfy itself that the waste facility for the plant is suitably located, constructed, managed and maintained (Article 11). The operator shall inform without delay the competent authority of any events that are likely to affect the stability of the waste facility, and follow the instructions from the competent authorities as to corrective measures to be taken (Article 11). The competent authority shall, prior to the commencement of deposit operations and at regular

⁸² Regulation 1013/2006 on the shipment of waste, OJ 2006, L 190 p.1.

⁸³ Directive 2008/98 on waste, JO 2008, L 312 p.3

⁸⁴ Regulation 1013/2006 (n.82, above)

⁸⁵ See for example Regulation 1013/2006 (note 82, above), Article 11(3), Article 12(4)

⁸⁶ Directive 2006/21 on the management of waste from extractive industries, OJ 2006, L 102 p.15.

intervals thereafter, inspect the waste facilities (Article 17). It shall also ensure that the operator has taken adequate measures to prevent or reduce dust and gas emissions from the waste facility (Article 13). Before a final closure of a waste facility may take place, the competent authority shall carry out a final on-site inspection (Article 12(3)).

As mentioned, all these provisions on the function and tasks of the competent authority only make sense, if the competent authority is close to the extracting activity; this is particularly obvious with regard to the prevention of accidents and the minimizations of the consequences of such accidents.

In contrast to that, regional competent authorities are not even mentioned, where Member States are requested, in EU legislation, to establish (separate) collection schemes, such as for packaging, batteries, electrical and electronic equipment, or cars. In those areas, it is left at the discretion of each Member State, how it wants to organize such collection schemes, though it is evident that a separate collection scheme needs a considerable number of decisions that are taken at local, provincial or regional level; examples are the placement of containers for collection, the frequency of collecting the material, or the installation of centers for the deposit of materials (cars, electrical and electronic items, etc).

Directive 2009/31 deals with the geological storage of carbon dioxide⁸⁷. It asks Member States to establish or designate the competent authority or authorities responsible for fulfilling the duties established under the Directive; these duties include the issuing of a storage permit (Article 8), the verification that the applicant for a permit complies with all obligations under the Directive (Article 11), the approval of a monitoring plan (Article 13), the acceptance of the monitoring results (Article 14), the organization of a system of routine and non-routine inspections (article 15), the request for corrective measures (Article 16), the approval of a corrective measures plan (Article 16), the eventual taking of corrective measures (Article 16(4)), the approval of a post-closure plan (Article 17), the assumption of full responsibility after the closure of a storage site (Article 18), and the establishment and maintenance of a register of storage permits and closed storage sites (Article 25). In view of the local nature of the storage of carbon dioxide, these duties can, in practice, only be assumed by a regional or local authority.

VII.3 Cooperation among competent authorities

Regulation 1013/2006 provides, as mentioned above, for forms of concerted cooperation among competent authorities, before a shipment of waste takes place. Such cooperation also takes place, when a shipment of waste cannot be completed as intended (Article 22). In such a case, the shipment normally returns to the Member State of dispatch, unless *“the competent authorities of dispatch, transit and destination involved in disposing of or recovering the waste are satisfied that the waste can be recovered or disposed of in an alternative way in the country of destination or elsewhere”* (Article 22(3)). This means that pragmatic alternative ways for disposing of or recovering the waste will have to be explored by the different competent authorities. And this will normally imply the involvement of regional or local authorities. Such an interpretation is confirmed by the provision of Article 22(9): when waste from a shipment which cannot be completed, is discovered within a Member State, *“the competent authority with jurisdiction over the area where the waste was discovered shall be responsible for ensuring.. the safe storage of the waste..”*. The underlying idea of this provision is the concern that waste should not be stored without due care; and in the

⁸⁷ Directive 2009/31 on the geological storage of carbon dioxide, OJ 2009, L 140 p.114.

case of a failed shipment, the regional authorities is normally in a better position to ensure a safe storage in such urgency cases.

Similar provisions as in Article 22 also apply to illegal shipments among Member States (Article 24).

Directive 2009/31 on the geological storage of carbon dioxide provides that, where more than one competent authority were designated, Member States shall *“establish arrangements for the coordination of the work of those authorities”*⁸⁸

VII.4 Differentiated application of provisions

Directive 2008/98 on waste which replaces Directive 2006/12 on waste⁸⁹, requires Member States to set up an *“integrated and adequate network”* of waste disposal installations and installations for the recovery of mixed municipal waste collected from private households (Article 16). This network shall enable waste to be disposed of or mixed municipal waste collected from private households to be recovered in one of the nearest appropriate installations (Article 16(3)).

In case C-297/08, the Court of Justice had to decide, whether Member States were obliged to provide for an appropriate network of disposal and recovery installations also at regional level⁹⁰. The Court ruled that the installation of a network of waste installations which allows the waste to be disposed of in one of the nearest appropriate installations was *“one of the most important measures”* for Member States to take. Where a Member State opted to have waste management plans on a regional basis, *“it should be inferred from this that each region with a regional plan must, as a rule, ensure the treatment and disposal of its waste as close as possible to the place where it is produced.. if one region lacks, in telling measure and for a significant length of time, infrastructure sufficient to meet its waste disposal needs,.. such serious deficiencies at regional level are likely to compromise the national network of waste disposal installations which will then no longer be integrated and adequate”*⁹¹. The Court found thus, that Italy had not complied with its obligations under Directive 2006/12, because the Italian region of Campania did not have sufficient waste treatment and disposal installations.

It can be deduced from this judgment that Member States are obliged to set up, at regional level, an adequate number of waste treatment and disposal installations, whenever they organize their waste management system in a decentralized way. This obligation which follows in the last resort from the principles of proximity and self-sufficiency that are mentioned in Article 16 of Directive 2008/98, does not exclude cooperation between different regions or between different EU Member States, in particular with regard to specific types of waste, such as hazardous waste.

Article 16(1), 2nd subparagraph of **Directive 2008/98** allows to opposing shipments of waste for recovery to waste incinerators, if as a consequence of such shipments, the own waste would have to be disposed of or would have to be treated in a way that is not consistent with the (national) waste management plan. This provision does not mention regional waste management plans. However, following the judgment in case C-297/08, it is clear that Article 16(1), second subparagraph also refers to regional incinerators and regional waste management plans. In other words: where regions

⁸⁸ Directive 2009/31 (n.87, above), Article 23.

⁸⁹ Directive 2008/98 (n.83, above); Directive 2006/12 on waste, JO 2006, L 114 p.9.

⁹⁰ Court of Justice, case C-297/08, Commission v. Italy, judgment of 4 March 2010, not yet reported. The judgment discussed the application of Directive 2006/12 on waste, JO 2006 L 114 p.9.

⁹¹ Case C-297/08 (n.90), paragraphs 66 to 68.

are entitled to elaborate and monitor regional waste management plans, they are also entitled to provide that the incinerators for the recovery of waste in their region only accept waste which was generated in that region⁹². This had already generally been accepted, under waste legislation prior to the adoption of **Directive 2009/98**, with regard to waste incinerators which were disposal installations. The new provision enlarged this possibility to waste incinerators which are recovery installations.

Directive 2009/31 deals with the geological storage of carbon dioxide⁹³. Though such a storage obviously intends to temporarily or definitely eliminate carbon dioxide and would thus normally be considered to be a waste management operation, the Directive explicitly declares the application of EU waste legislation not applicable to such storage (Article 35). As regards the application of the Directive, Article 4 provides: *“Member States shall retain the right to determine the areas from which storage sites may be selected pursuant to the requirement of this Directive. This includes the right of Member States not to allow for any storage in parts of in the whole of their territory”*. Thus, Member States may decide that the Directive is not applied in parts of their territory. They need not give reasons for any such decision. Thus, geological difficulties, but also objections from farmers or other parts of the population may determine any such decision.

Section Two. The regional dimension of environmental legislation

VIII. Differentiated legislation

Several directives on air pollution deal with the specific status of the outermost regions of the European Union, i.e. the French Overseas departments, the Azores and Madeira (Portugal) and the Canary Islands (Spain). Directive 2001/80 on large combustion plants officially applies derogations to them⁹⁴. Directive 98/70 in its version of Directive 2009/30⁹⁵ allows the Member States in question to provide, in those regions, for “specific provisions” as regards the sulphur content of petrol or diesel; such specific provisions refer to the later introduction of the maximum level of 10 mg/kg of petrol or diesel fuel.

Some directives allow Member States not to apply certain environmental provisions on islands⁹⁶ or small remote islands⁹⁷, isolated settlements⁹⁸, high mountain regions⁹⁹ or in an area where emissions were unlikely to contribute significantly to environmental or health problems¹⁰⁰. The different provisions normally put some conditions on such possibility.

Directive 94/62 on packaging and packaging waste fixes some mandatory recycling and recovery targets for packaging waste. Greece, Ireland and Portugal obtained the possibility to reach lower

⁹² It depends on national law of Member States, whether in such a case, waste from other regions of that Member State shall have to be accepted. As a rule, this would not be the case.

⁹³ Directive 2009/31 (note 87, above).

⁹⁴ Directive 2001/80 (n.38, above), Annex III. This Annex also provides for derogations for two specific installations in Rhodos and Crete (Greece).

⁹⁵ Directive 98/70 as amended by Directive 2009/30 (n.43, above)

⁹⁶ Directive 1999/31 on landfills (n.73, above)

⁹⁷ Directive 94/63 on VOC emissions (n.40, above)

⁹⁸ Directive 1999/31 on landfills (n.73, above).

⁹⁹ Directive 91/271 on urban waste water (n.11, above), Article 4(2).

¹⁰⁰ Directive 94/63 on VOC emissions (n.40, above).

targets and to delay their attainment, because of “*respectively the large number of small islands, the presence of rural and mountainous areas and the current low level of packaging consumption*”¹⁰¹.

Directive 98/70 on the quality of petrol and diesel fuel allowed Member States with low ambient summer temperatures –these Member States were defined as Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Sweden and the United Kingdom – to fix slightly different quality provisions for petrol¹⁰²; Member States with severe winter weather – these Member States were not defined – obtained a similar permission.¹⁰³ Derogations from the obligation to collect specific quantities of waste from electrical and electronic products and to reach the recycling and recovery targets of Directive 2002/96¹⁰⁴, given to Greece, Ireland and to some Member States which joined the European Union in 2004, have in the meantime all expired, so that Directive 2002/96 is now fully applicable.

A number of directives allow Member States to provide for differentiated rules in specific situations. Examples for this kind of provisions is Article 3 of Directive 98/83 on drinking water¹⁰⁵ with regard to small individual supplies, and Article 5 together with Annex III of Directive 91/676 on water pollution by nitrates from agricultural sources¹⁰⁶ which foresees the possibility for a higher amount of livestock manure applied to the land than the amount fixed by the Directive. In this case, though, the authorization has to be given by the Commission which appears to be generous with regard to the interpretation of “*objective criteria*” which shall have to apply¹⁰⁷. Furthermore, there is a possibility for Member States to determine plans and programs for small areas at local level which are likely to have significant effects on the environment and therefore require an environmental assessment¹⁰⁸. Finally, the regulation of noise at airports (Directive 2002/30)¹⁰⁹ which follows the “airport-by-airport” approach is susceptible to lead to differentiated legislation with regard to airport noise.

The clearest form of differentiated EU environmental legislation is found in Directive 2008/50 on ambient air quality¹¹⁰. This Directive does not apply to the whole territory of the Member States, but only to those zones and agglomerations which Member States “establish”. The Directive only mentions that such zones or agglomerations shall be established throughout the territory of the Member States, but does not give any criterion as regards the selection of zones or agglomerations – such as size, location, representatives, density of population –; thus, Member States may, at their discretion, not apply the Directive in certain regions by not establishing zones or agglomerations in those regions. However, this possibility is available to Member States; the Directive itself does not provide that it is inapplicable in certain areas or regions.

More generally, it is to be noted that practically all the above-mentioned legislation *allows* Member States to provide for some differentiation in the legislation and its territorial coverage, but does not *impose* itself a differentiated legislation. The only exception is Directive 2001/80 on large combustion plants; however, it has to be born in mind that this Directive is an almost complete literal

¹⁰¹ Directive 94/62 (n.77, above), Article 6(5) and Directive 2004/12 (n.77, above), Article 6(7).

¹⁰² Directive 98/70 (n.42, above), Article 2 no.5.

¹⁰³ Directive 98/70 (n.42, above), Article 4(4).

¹⁰⁴ Directive 2002/96 (n.79, above).

¹⁰⁵ Directive 98/83 (n.17, above).

¹⁰⁶ Directive 91/676 (n.12, above).

¹⁰⁷ See section III-1, above.

¹⁰⁸ Directive 2001/42 (n.4, above), Article 2(3).

¹⁰⁹ Directive 2002/30 (n.47, above).

¹¹⁰ Directive 2008/50 (n. 34, above).

transcription of Directive 88/609 on large combustion plants¹¹¹ which was adopted at an early stage of EU environmental legislation.

IX. Appointment of competent authorities

The environmental legislation of the Union does not explicitly mention regional authorities. Normally, it requests the EU Member states to designate the competent authority and, in a number of cases, mentions “*competent authority or authorities*”. Regulation 1221/2009 on an environment management and audit scheme¹¹² states that Member States shall decide, whether the competent bodies be best established at national, regional or local level. Directives 2008/50 on air quality¹¹³ and Directive 2002/49 on ambient noise¹¹⁴ both require that the competent authorities be set up “*at the appropriate level*”.

A large number of directives, while not referring to regional competent authorities, provide for obligations of Member States that can, in practice, only be complied with by regional or local authorities. It is true that theoretically, some of such tasks could also be given to a central national authority which then would have to travel around in the respective Member States and comply with the different duties that had been imposed on the Member State in question.

To this group of directives and regulations belong Directive 2000/60 on water¹¹⁵ which require the appointment of a competent authority for each national and for each international river basin district; Directive 2006/118 on groundwater which follows the same pattern¹¹⁶; and Directive 2008/56 on marine waters which requires the setting up of a competent authority for each region and sub-region¹¹⁷. In the sector of air pollution, the competent authority shall set up, within a zone or an agglomeration, sampling points for measuring air pollution and, when necessary, elaborate local clean up plans for areas, where this is necessary¹¹⁸. Regulation 708/2007 on alien species in aquaculture¹¹⁹ requires the appointment of competent authorities which are responsible for “*ensuring compliance*” with the requirements of the Regulation. Directive 2009/129 on pesticides¹²⁰ wants to see the equipment for spraying of pesticides to be inspected at regular intervals; in view of the numerous farmers involved, this inspection must be organized at the local or regional level. Directive 2008/98 on waste¹²¹ requires the elaboration of “*one or more*” waste management plans, Directive 2006/21 on mining waste¹²² even the elaboration of a waste management plan at the level of the individual plant; the authorities shall examine such plans with regard to the compliance with EU and national legal requirements. Furthermore, public authorities shall take measures to prevent

¹¹¹ Directive 88/609 on large combustion plants, OJ 1988, L 336 p.1.

¹¹² Regulation 1221/2009 (n.9, above)

¹¹³ Directive 2008/50 (n.34, above)

¹¹⁴ Directive 2002/49 (n.49, above)

¹¹⁵ Directive 2000/60 (n.21, above)

¹¹⁶ Directive 2006/118 (n.23, above)

¹¹⁷ Directive 2008/56 (n.24, above)

¹¹⁸ Directive 2008/50 (n.34, above)

¹¹⁹ Regulation 708/2007 concerning use of alien and locally absent species in aquaculture, JO 2007, L 168 p.1.

¹²⁰ Directive 2009/29, JO 2009, L 140 p.63.

¹²¹ Directive 2008/98 (n.83, above)

¹²² Directive 2006/21 (n.86, above)

major accidents – and this requires the taking into consideration of the landscape, the residential areas, of roads and other local circumstances.

EU legislation omits mentioning local or regional competent authorities, where the waste legislation requires the establishment of separate waste collection schemes¹²³, though it is practically not possible to ignore decisions taken by those authorities. Indeed, the modalities of the collection, the placement of containers on public areas, the collection and transporting of separate collected waste – cannot properly be fixed at the central level of a Member State. In contrast to this approach, regional and local competent authorities are taken into consideration, when solutions for a failed shipment of waste or the take-back of illegally transported waste are looked for¹²⁴. Finally, Directive 2009/31 on the geological storage of CO₂¹²⁵ asks the competent authorities to comply with a considerable number of obligations, among them the issuing of a permit, the approval of a monitoring plan, the organizing of inspections, the taking or approval of corrective measures and post-closure planning and controlling; such measures could, in theory, be undertaken by a central authority; in practice, though, vicinity to the actual storage site is required.

X. Cooperation among competent authorities

The Treaty on the European Union contains, in Article 4(3), a general clause on “*sincere cooperation*” among the Member States and between the Member States and the institutions of the European Union¹²⁶. A similar provision also existed in the EC Treaty, prior to the Lisbon Treaty. It is probably due to this provision that secondary environmental EU legislation does not frequently refer to the necessity of cooperation between national and regional competent authorities.

Where the river basin districts under Directive 2000/60¹²⁷ extend over the borders of a Member State, the competent authority in charge of the river basin district shall coordinate with the competent authorities of the other State(s). It had already been mentioned that in reality, the competent authorities for the river basin district will normally be regional authorities. The provision of Directive 2000/60 implies thus an obligation for cooperation among regional authorities. The same obligation exists, where the river basin district extends to non EU Member States.

With regard to groundwater in a river basin district that extends beyond the territory of a Member State, the competent authorities shall cooperate in order to fix, if any possible, one single threshold for groundwater.

The requirements for cooperation among competent authorities are particularly specific in Directive 2008/56 on marine waters¹²⁸; the reason is that there exist regional conventions for the EU waters,

¹²³ Directives 94/62 on packaging (n.77, above), 2000/53 on end-of life vehicles, JO 2000, L 269 p.34; 2002/96 on waste electrical and electronic goods (n.79, above), and 2006/66 on batteries and accumulators and waste batteries and accumulators, JO 2006, L 266 p.1.

¹²⁴ See Regulation 1013/2006 (n.82, above)

¹²⁵ Directive 2009/31 (n.73, above)

¹²⁶ Treaty on European Union, Article 4(3): “*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from this Treaty. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which would jeopardize the attainment of the Union’s objectives*”.

¹²⁷ Directive 2000/60 (n.21, above)

¹²⁸ Directive 2008/56 (n.24, above)

and cooperation at regional and even subregional level with the authorities of these existing institutions is highly desirable. Also Directive 2006/7 on bathing waters¹²⁹ requires cooperation among the competent (regional) authorities, where the quality of bathing waters risks to be impaired by a transboundary event.

Directive 2008/50 on air pollution¹³⁰ calls for a general cooperation among competent authorities. It allows the fixing of one measuring station for two or more Member States – which necessarily implies a strong cooperation among the local or regional authorities affected.

Regulation 1013/2006 on the shipment of waste¹³¹ is based on the principle of prior informed consent. Before a shipment takes place, the involved public authorities of dispatch, of transit and of destination shall concert themselves as to the principle of shipment as well to its modalities. In view of the numerous shipments which take place, a decentralization of competent authorities appears to be the only reasonable decision. As mentioned above, cooperation is also required among the authorities, when a shipment could not be completed as intended or when an illegal shipment took place.

Directive 1999/31 on the geological storage of CO₂¹³² asks that, where in a Member State several competent authorities were appointed, the necessary measures be taken to ensure cooperation between these authorities.

XI. Differentiated application of provisions

Under the EU Treaty, the Member States “shall adopt all measures of national law necessary to implement legally binding Union acts” (Article 291 TFEU), and shall apply these provisions; the Commission shall “ensure” and “oversee” the application of Union law (Article 17 TEU). Whether a Member State adopts national or decentralized legislation, in order to comply with its obligations, is a matter that each Member State has to decide by itself.

Where European legislation only gives a general indication about the objective to be achieved, the application of this general term within the 27 Member States will inevitably lead to different application; it is clear that this differentiated application is intentional. Examples of this kind of legislation are Directive 2008/1¹³³ which provides for the application of “best available techniques” for larger industrial installations. However, the Directive is so drafted that for the same type of plant, different conditions in the permits may be issued which lead to a different application of the directive from one plant to the other.

A second example is Directive 2000/60¹³⁴ which provides that surface and groundwater within the Union shall be of good ecological quality. However, the authorities shall fix themselves, for the different river basin districts, what discharges in what quantities shall be permitted and what other measures are to be taken, in order to reach a good ecological status of the water. Therefore, the water quality will inevitably be different from one river basin district to the other.

¹²⁹ Directive 2006/7 (n.31, above)

¹³⁰ Directive 2008/50 (n.34, above)

¹³¹ Regulation 1013/2006 (n.82, above)

¹³² Directive 2009/31 (n.87, above)

¹³³ Directive 2008/1 (n.2, above)

¹³⁴ Directive 2000/60 (n.21, above)

The same approach was taken with regard to marine waters: Directive 2008/56¹³⁵ fixes as the objective that a “*good environmental status*” shall be achieved by 2020, but only fixes general criteria as to such a quality. The measures to reach this status shall be taken by Member States, at regional or subregional international level or by the different regional sea conventions. This will inevitably lead to different application of the Directive in different parts of the European Union.

As regards air pollution, the provisions of Directive 2008/50¹³⁶ only apply, as mentioned, within those zones and agglomerations that had been designated by Member States. It needs no further explanation that this approach will lead to a differentiated application by Member States and within Member States.

In few cases, the Union law itself provides for a differentiated application of EU law. This applies in particular in those cases, where Member States are obliged to adopt “programmes of measures”¹³⁷, water¹³⁸ management plans, air quality plans or short-term action plans¹³⁹. All these plans shall take account of the specific local or regional situation and are therefore normally prepared, adopted and implemented by local or regional authorities. This leads to a different content of the plans and hence to a differentiated application. The same observation is to be made to the elaboration of off-site emergency plans with regard to accidents¹⁴⁰.

With regard to waste management plans, the Court of Justice decided that as soon as a Member State has decided to provide for more than one (national) waste management plan that Member State is also obliged to ensure that a network of waste disposal and recovery installations exists at the level of its decentralized structures¹⁴¹.

The (regional or local) waste management plans also allow to objecting to certain shipments of waste for recovery to waste incinerators, where such shipments would contradict the waste management plan or lead to “indigenous” waste having to go to disposal installations¹⁴².

The inspection of industrial installations, laboratories etc. is typically organized at regional or local level, already for reasons of the number of sites to be inspected. In practice, thus, this leads to a differentiated application of inspection and other control provisions, according to the administrative planning of such activities¹⁴³. Also, where exemptions from aerial spraying of pesticides may be granted, the necessary taking into consideration of local and regional specificities such as residential areas or of nature protection sites leads to a different application of the EU provisions¹⁴⁴.

Directive 2009/31 on the geological storage of CO₂¹⁴⁵ allows Member States not to authorize such storage in parts of their territory, and this to differentiate the application of that Directive. And Member States may adapt the opening and closing of the hunting season for birds according to the

¹³⁵ Directive 2008/56 (n.24, above)

¹³⁶ Directive 2008/50 (n.34, above)

¹³⁷ Directive 2000/60 (n.21, above), Article 9.

¹³⁸ Directive 2000/60 (n.21, above), Article 13.

¹³⁹ Directive 2008/50 (n.34), Articles 23 and 24.

¹⁴⁰ Directive 96/82 (n.67, above), Article 11; Directive 2009/41 (n.68, above), Article 13.

¹⁴¹ Court of Justice, case C-297/08 (n.90, above)

¹⁴² Directive 2008/98 (n.83, above); Article 16.

¹⁴³ Directive 96/82 (n.67, above); Directive 2009/41 (n.68, above); Directive 2001/18 (n.69, above); Directive 2004/9 (n.64, above);

¹⁴⁴ Directive 2009/128 (n.66, above)

¹⁴⁵ Directive 2009/31 (n.87, above).

different migration periods on their territory¹⁴⁶. In this case, uniform dates would even normally disregard the Directive's objective, unless the uniform dates are fixed in a way which ensures that the migration period has completely ended all over the national territory.

XII. Conclusions

Article 191(2) TFEU provides that the Union's environmental policy shall take into account the diversity of situations in the various regions of the Union. Article 193 TFEU, too, favors the existence of different legislation in the Union, by allowing Member States to maintain or introduce more stringent protective measures, once an EU act of law was adopted. Therefore, it does not come as a surprise that EU environmental legislation contains some few provisions which differentiate between Member States. The majority of these provisions refer to parts of the Member States, such as small islands, mountainous areas, isolated settlements, or the outermost regions of France, Spain, and Portugal.

Though in a considerable number of Member States the responsibility for adopting environmental legislation and measures is devolved to decentralized levels – Communautés, Länder, Regione, Comunidades Autónomas, etc –, EU legislation practically never refers to the adoption of legislation or the taking of measures by regions or local authorities (which will be called "regions" hereafter). As regards legislation, the EU Treaties only know of Member States; the mere existence of Committee of the Regions rather confirms this assessment, because the Committee of the Region is classified, in Article 300 TFEU, as an advisory body which has no way of influencing EU's decision-making on directives and regulations other than by giving advice.

A stronger participation of the regions in the legislative process of the EU is politically not realistic and constitutionally hardly desirable. As the regions do not directly participate in the legislative process in the majority of the Member States, such an approach would seriously affect the existing constitutional balance in numerous countries; for sure, it would further complicate and slow down the legislative decision-making process of the European Union, without generating obvious benefits. The present way of proceeding, which consists of either giving some Member States a differentiated treatment or, more frequent, allow them to provide for temporary or permanent derogations from EU environmental legislation for specific parts of their territory, seems more flexible and more promising from an environmental point of view. Indeed, it should not be forgotten, that too lax a legislation for the protection of the environment brings, for the affected region (islands, mountain areas) itself, disadvantages such as the diminution of the quality of life, local contamination etc.

The examination of the regional dimension in EU environmental legislation reveals another picture as regards the appointment of competent authorities and the cooperation among such authorities. Indeed, environmental impairment is most frequently occurring at local or regional level. It is therefore up to the authorities at that level to provide for measures that halt the impairment, prevent environmental pollution, clean up the water or the soil, adopt action plans, or take other measures. EU legislation hardly ever takes notice of this task of regional and local authorities. It addresses Member States and requests the designation of a "competent authority"; it is already a remarkable feature, where the EU text mentions that "authorities" should be designated. A similar observation is to be made with regard to the cooperation between competent authorities. In numerous cases of water and air pollution, waste shipment and treatment, infrastructure planning

¹⁴⁶ Directive 2009/147 (n.51, above), Article 7.

and accident prevention measures, such cooperation among regional and local competent authorities is necessary; however, it is only exceptionally mentioned in EU environmental legislation.

The far-spread omission to mention regional and local authorities is also found in the area of application of EU legislative provisions. EU legislation does sometimes provide or at least allow a differentiated application of its provisions within the Member States; such a differentiation typically refers to local or regional situations, and is frequently accompanied by the requirement to establish plans, action programs or other measures with a local or regional dimension. And even, where EU legislation does not mention regional or local application, it follows from the general context of the legislation that in reality, the application is a matter of regional or local concern.

The reservation of the EU legislature with regard to the regional or local application of its provisions is understandable, as all too easily a more specific wording of the legislation which directly addresses the regions, could be perceived as an interference with the Member States' right to organise the relationship with their regions in their own way. This right of Member States is not and should not be put into question.

Regions might have other ways of making their voice (better) heard at European Union level, as regards application of European Union environmental law. The existence of the Committee of the Regions allows them already at present to discuss specificities of the application of environmental provisions – which includes the questions of appointment of competent authorities and their cooperation. In this regard, the Committee of the Region's White Paper on Multilevel Governance of 17 and 18 June 2009 contains a wealth of ideas, suggestions and concrete proposals to associate the local and regional bodies and authorities in the activities of the European Union. The proposals made hereafter should only be seen as a complementary contribution to the ongoing discussion of this White Paper.

Under Article 307 (4) TFEU, the Committee of the Regions may issue an opinion on its own initiative. Consequently, the Committees "Commission for the environment, Climate Change and Energy (ENVE)" could prepare an opinion on the specific regional and local problems of the application of EU environmental law. It could, for this purpose, call on the services of experts¹⁴⁷, and/or organize public hearings and submit its conclusions to the Plenary of the Committee of the Regions for adoption as an own initiative opinion. Such opinions could be issued at regular intervals, address specific environmental sectors, such as water or noise, air or waste. They would have the immense merit of informing the EU institutions as well as the Member States, if and where regional and local aspects limit the full and effective application of EU environmental legislation and where, in future cases, the EU legislature might better take into consideration the regional and local dimension of environmental law.

The Committee of the regions could take care that the correct and complete application of (EU) environmental legislation is one of the eligibility criteria for rewarding a region with the title "entrepreneurial region". Indeed, it cannot make sense to consider the economic and social vision of a region alone, without considering, whether the economic development is projected at the expense of the environment. The full application of EU environmental legislation should be a condition for the reward of this prestigious title.

¹⁴⁷ See Committee of the Regions, rules of procedure (of 9 January 2010); OJ 2010, L 6 p.14, Rule 58.

While “better lawmaking” rightly constitutes one of the core requests of the White Paper, it should not be forgotten that the effective application of (EU) environmental law is the greatest problem which environmental legislation faces: indeed, nothing undermines the credibility of public authorities – Parliaments, governments, and administrations – more than legislation which is not properly applied. As this application is, in all EU Member States, principally done at regional and local level, the challenge for the European regional and local authorities to find new answers is considerable. It is hoped that this study contributes to further exploring such answers.

Annex

List of EU regulations and directives which were examined

Horizontal legislation

Directive 85/337 on the assessment of the effects of certain public and private objects on the environment, OJ 1985, L 175 p.40;

Directive 96/82 on the control of major-accident hazards involving hazardous substances, OJ 1997, L 10 p.13;

Directive 2001/42 on the assessment of the effects of certain plans and programs on the environment, OJ 2001, L 197 p.1;

Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment, OJ 2003, L 156 p.17;

Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004, L 143 p.56;

Regulation 614/2007 concerning the Financial Instrument for the Environment (LIFE+), OJ 2007, L 149 p.1;

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