

Harmonisation of the European legislative framework for the construction of transmission lines and environmental protection

Proposal for improving the relevant secondary legislation in the simplest and most efficient way possible

Expert opinion

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The objective

On 8 July 2010, I had a conversation in Berlin with the European Coordinator, Georg Wilhelm Adamowitsch, about planning issues surrounding the future development of the European transmission system in the light of EU secondary legislation on environmental protection. Following this discussion, he wrote on 14 July 2010 asking me to present proposals for improvements to the legislation that would give a much-needed impulse to addressing the balance between the conflicting political objectives and sets of legislation in the European context in the respective areas of nature protection and the construction or development of transmission systems.

I replied on 21 July 2010 agreeing to take on the task and promising to submit my proposals by mid-August.

The issue

The *Halle Western Bypass* case before the Federal Administrative Court (BVG)¹ is regarded by German academics as marking a watershed: it showed that nature protection and infrastructure measures were 'inevitably in competition with each other.

¹ Judgment of 17 January 2007 – 9 A 20/05 (*Halle Western Bypass*), NVwZ 2007, p. 1054 *et seq.*

Good times for infrastructure projects are bad times for nature protection and vice versa. It seems that the good times for infrastructure planning are now behind us².

In any case, we were beginning to see 'such a drastic increase in the fallibility of project assessments that infrastructure planning as a whole might be entering a crisis'.³

Some German academics have taken the opposite view, i.e. that the application of nature protection law in no way prevents 'appropriate infrastructure development' and that there is no concrete evidence that it does.⁴ On closer examination, this position is quite surprising. It is certainly not without justification that the ENTSO-E position paper on permitting procedures for electricity transmission infrastructure⁵ presents the issue (see point 2.1.5 – balancing environmental and other public interests) as follows: 'There is an inadequate balancing between environmental and other public interests in the process of determining the importance of a certain grid project. Extensive statements and surveys regarding the diverse environmental impacts have to be submitted to the permitting authorities, while the need and the benefit to the public of transmission line projects is advocated only by TSOs. The number of agencies in charge of the Environmental Impact Assessment (EIA) is very high and different agencies have different goals/interests.'

We do not wish to deny (but neither to expand any further on) the fact that the work of the nature protection associations should in no way be regarded purely as posing obstacles, but also as making very positive and helpful contributions.⁶

To come to the particular point at issue here:

Leaving aside the horizontal impact of general environmental policy measures such as environmental information, public involvement and the EIA Directive⁷, the construction or development of transmission systems can come into conflict with nature

² Vallendar (the Federal Administrative Court rapporteur in this case), *Großprojekte und Anforderungen des Europäischen Naturschutzrechts*, EurUP 2007, p. 275.

³ Vallendar, *loc. cit.*, p. 299, right-hand column.

⁴ See Wegener, *Ist die Planung noch rational? Europäisches Naturschutzrecht und nationale Infrastrukturentwicklung*, ZUR 2010, pp. 227/229, left-hand column. (final) of 26 June 2010.

⁶ Wegener specifically points this out (*loc. cit.*, p. 229 *et seq.*).

⁷ Precise reference in footnote 17 below.

protection near protection areas under the Birds Directive (see section B I 1. below), particularly those with the 'habitat types' referred to in Article 1(c) (i.e. habitats in coastal areas (set out in more detail in points 1 and 2 of the Annex) and 'forests of temperate Europe' (point 91 of the Annex)) of the Habitats Directive (see B I 2. below), but also with soil protection (see B I 4. below), as cable-laying as part of transmission line construction (currently governed by the EnLAG⁸) affect the soil disproportionately more than do above-surface transmission lines.

In all these environmental protection issues, we are dealing here only with conflicts at the level of Community law which inevitably arise when it comes to enforcing the provisions in the Member States. We will not go any further into conflict situations arising from domestic legislation in this opinion⁹.

The search for a solution

Before making any legislative proposal, we have to look at the *relationship between environment law and the construction of pipelines and transmission systems under the EU treaties (see section A below)*.

We then give an *overview of the parameters under EU law for the construction or development of transmission systems and provisions – of particular relevance here – relating to environmental protection (see section B below)*.

On the basis of this overview, we can then *seek to identify the points of intersection between these two bodies of EU regulation and areas of potential conflict (see section C below)*.

As far as we can see, conflicts have been resolved to date on a purely *ad hoc* basis by means of the granting in EU legislation of *national safeguard clauses, derogations or exemptions*, resulting inevitably in different considerations being taken into account at national level and time-consuming monitoring by the Commission, whose criteria for

⁸ Law on Accelerating the Expansion of High Voltage Networks (BGBl. I 2009, p. 2870).

⁹ See, for example, Gärditz, *Ökologische Binnenkonflikte im Klimaschutzrecht*, DVBl. 2010, p. 214 *et seq.*

striking the balance between environmental protection and the construction of pipelines and transmission systems remain a mystery (*see section D below*).

In any case, given that this conflict between nature protection and the construction of pipelines and transmission systems exists at *European level*, the *Member State bodies* entrusted with enforcement should not be left to resolve it on their own; indeed, they should not be involved at all. Solutions for harmonising these two bodies of law must be found further upstream, at the level of secondary EU legislation (*see section E below*).

Lastly, we set out *proposals for resolving the contradiction* between European provisions on nature protection and those on promoting the development of the European transmission system (*see section F below*).

A. The relationship under current Treaty provisions between environment law and the construction of pipelines and transmission systems – does protecting the environment have priority?

The Lisbon Treaty¹⁰ brought significant changes affecting the issue we are dealing with here.

1. Allocation of competence – Article 4(2) TFEU

Article 4(2) of the Treaty on the Functioning of the European Union (TFEU), on the allocation of competence, puts environment (e), consumer protection (f), trans-European networks (h) and energy (i) alongside each other on a basically equal footing, as is usual with rules on the allocation of tasks and competences. However, the

¹⁰ Signed in Lisbon on 13 December 2007; in force since 1 December 2009.

The literature includes Fastenrath/ Nowak (ed.), *Der Lissabonner Reformvertrag –Änderungsimpulse in einzelnen Rechts- und Politikbereichen*, Berlin 2009 (*Tübinger Schriften zum internationalen und europäischen Recht* Bd. 94); Schwarze/ Hatje (publ.), *Der Reformbetrag von Lissabon*, EuR 2009, Supplement 1; Geiger/Kahn/Kotzur, *Kurzkomentierung des LissabonV*, since the 5th edition Munich 2010; Fischer, *Der Vertrag von Lissabon*, Baden Baden 2010; Oppermann, *Die europäische Union von Lissabon*, DVBl 2008, pp. 473 *et seq.*; Pache/ Rösch, *Der Vertrag von Lissabon*, NVwZ 2008, p. 473 *et seq.*

trans-European networks are now included (see Article 4(2)(h)) among the main areas for which the EU has 'shared competence' to legislate.

Under the new Article 6 TFEU, on the other hand, when it comes to 'industry' (apart from the special competences we are looking at here) – as with administrative cooperation on measures with a European objective – the Community only has 'competence to carry out actions to support, coordinate or supplement the actions of the Member States'.

Under the first sentence of Article 2(2) TFEU, shared legislative competence for trans-European networks means that in principle both the Union and the Member States 'may legislate and adopt legally binding acts'. In this context, the EU follows the 'ordinary legislative procedure' in Article 294 TFEU (formerly Article 289(1) TEC, second sentence).

2. Title XX (Environment)

Article 191 (formerly Article 174 TEC) refers in paragraph 2 to a high level of protection with the possibility of granting Member States safeguard clauses in the context of harmonisation measures, subject of course to monitoring by the Commission¹¹.

Under paragraph 2 of Article 192 TFEU (formerly Article 176 TEC), measures affecting town and country planning are adopted by the Council, by way of derogation from the decision-making procedure in paragraph 1, on the basis of unanimity. In other words, no Member State can be outvoted. Like subparagraph (b) in Article 174(2), this reflects the EU's respect for the territorial cohesion of the Member States.

¹¹ (2) 'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.'

Under Article 11 TFEU (formerly Article 6 TEC), environmental protection is the subject of a so-called horizontal clause¹², which must be integrated into all Community measures aimed at promoting sustainable development. The legal meaning of the term 'integrated' remains unclear, however: is environmental protection merely to be taken into account (i.e. in any event to be a consideration for planners) or to be strictly observed, with the potential obstacles that that inevitably implies.

Lastly, the new Article 13 TFEU requires the Union and the Member States, when 'formulating and implementing the Union's *agriculture, fisheries, transport, internal market, research and technological development and space policies*', to 'pay full regard to the welfare requirements of animals' as sentient beings.

This provision clearly does not focus on the energy sector.

3. Title XVI (Trans-European networks)

Paragraph 1 of Article 170 (formerly Article 154 TEC) gives the Union the task of 'help[ing] to achieve the objectives referred to in Articles 26 [internal market – formerly Article 14 TEC] and 174 [economic, social and territorial cohesion – formerly Article 158 TEC] and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers'. To this end, 'the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures'.

Under paragraph 1 of Article 171 (formerly Article 155 TEC), 'in order to achieve the objectives referred to in Article 170', the Union is to proceed as follows:

It is to establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines are to identify projects of common interest;

It is to implement any measures that may prove necessary to ensure the interoperability of networks.

¹² On the background to this, see Callies, *Die neue Querschnittsklausel des Art. 6 formerly 3c EGV*, DVBl 1998, p. 559 *et seq.*

The Union's activities are to 'take into account the potential economic viability of the projects'.

Environmental protection is not explicitly referred to here, although, as the subject of a horizontal clause (see above), it must of course be 'taken into account'.

Under paragraph 1 of Article 172 (formerly Article 156 TEC), 'the guidelines and other measures referred to in Article 171(1) shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure' (Article 294 – formerly Article 251 TEC)¹³. This puts beyond doubt the binding character of these particular guidelines¹⁴.

Under paragraph 2, 'guidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned'.

4. Title XXI (Energy)

Under the new Article 194 TFEU, the Community's energy policy is to pursue, '*with regard to the need to preserve and improve the environment*' (as was already the case), the following aims (our emphasis)¹⁵:

- (a) to ensure the functioning of the energy market;
- (b) to ensure security of energy supply in the Union;
- (c) to promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) to promote the interconnection of energy networks.

5. Apart from the 'horizontal clause' on environmental protection, the effect of which is not really clear, the TFEU does not openly set out the respective weight and degrees of priority to be assigned to these aims. Given the range of views among Member States, it would in any case be impossible to reach a consensus¹⁶. It is therefore left to the

¹³ ... and after consulting the Economic and Social Committee and the Committee of the Regions.

For more detail on the different degrees of 'bindingness' of other forms of guidelines, see Lecheler, *Ungereimtheiten bei den Handlungsformen des Gemeinschaftsrechts*, DVBl 2008, p. 883 *et seq.*

¹⁵ These aims correspond to those already set out in the communication adopted in March 2007 on the European Union's energy strategy COM(2007) 1 final.

¹⁶ This is quite rightly pointed out by Nettesheim, *Das Energiekapitel im Vertrag von Lissabon*, JZ 2010, 19/22 (right-hand column).

authors of the secondary legislation, when setting requirements for specific pipeline and transmission system construction projects, to establish their preferences as to the weight to be given, respectively, to protecting the environment and securing the energy supply. In doing so, they will have to take account of the enhanced status accorded to consumer protection, as reflected in the newly-formulated Article 12 TFEU (formerly Article 153(2) TEC)¹⁷. The new Article 7 TFEU¹⁸ explicitly calls on them to pay attention to the *consistency between [the Union's] policies and activities in the various areas*. The new Treaty acknowledges the need for the EU-level coordination of parallel and sometimes contradictory Community objectives by giving the Union – not the Member States – the task of ensuring coherence between divergent or conflicting goals. Article 194 TFEU, which deals with energy and is also new, indicates how this balance should be struck by requiring that energy policy aims should be pursued '*with regard to the need to preserve and improve the environment*'.

This provision ensures that energy policy takes account of the horizontal relevance of environmental protection under Article 11 TFEU (formerly Article 6 TEC). It is this provision¹⁹ that determines the direction of the harmonisation.

The applicable secondary legislation is not sufficient in this respect, as we will see.

B. Overview of key legal principles

Essentially, the relevant legal principles here are well known and we can therefore deal with them fairly briefly.

I. Nature protection as an aspect of environmental protection

Legislation on the environment has an undisputedly central place in Community law. Under Article 11 TFEU (formerly Article 6 TEC), 'environmental protection

¹⁷ 'Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.'

¹⁸ Article 7 TFEU: 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.'

¹⁹ In *Die neue europäische Energiepolitik*, NuR 2010, 464/466 (left-hand column), Frenz/Kane wrongly look for a harmonisation on the basis of Article 11 TFEU, without going into Articles 7 and 12 TFEU.

requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development²⁰.

Leaving aside the horizontal impact of general environmental policy measures²¹, the construction or development of transmission systems can above all come into conflict with nature protection.

This important component of environmental protection under Community law has been 'spectacularly upgraded'²² in the past few years. The legal provisions relevant to the

²⁰ A similar approach is reflected in Article 37 of the Charter of Fundamental Rights of the European Union (OJ C 303, 14.12.2007, p. 1), Article 37 of which states that 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. Given the broad wording of this principle, it is doubtful that the intention was to give Community citizens a corresponding legally enforceable right.

See also Explanation No 1 in Annex A to the Lisbon Treaty on the Charter of Fundamental Rights of the European Union: 'The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.'

²¹ Including, primarily, the EIA Directive 85/337/EEC (OJ L 175, 5.7.1985, p. 40), as amended by Council Directive 97/11/EC 3. (OJ L 73, 14.3.1997, p. 5), Directive 2003/35/EC of the European Parliament and of the Council (OJ L 156, 25.6.2003, p. 17), Directive 2009/31/EC of the European Parliament and of the Council 4. (OJ L 140, 5.6.2009, p. 114),

Directive 2003/4/EC of the European Parliament and of the Council 1. on public access to environmental information and repealing Council Directive 90/313 (OJ L 41, 14.2.2003, p. 26),

Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 30.4.2004, p. 56), as amended by Directive 2006/21/EC (OJ L 102, 11.4.2006, p. 15) and

Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17).

For details, see *Handbuch zum deutschen und europäischen Umweltrecht*, Rengeling (ed.), B. I (Environment law, general), 2nd edition, Cologne, etc., 2003.

²² See Wegener, *Ist die Planung noch rational? Europäisches Naturschutzrecht und nationale Infrastrukturentwicklung*, ZUR 2010, pp. 227/229, left-hand column.

construction and development of transmission systems touch on, and may in particular conflict with, the following special acts²³ on environmental protection:

1. **Council Directive 79/409/EEC on the conservation of wild birds**²⁴ (Birds Directive). This underwent several significant amendments²⁵ and was then replaced by Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds²⁶ (see Article 18).

The Directive established a high level of protection. Article 1(2) states that it applies to 'birds, their eggs, nests *and habitats*'. To protect these, Member States must above all set up protection areas (see Article 3(1)(a))²⁷, in respect of which (see Article 4(4)) they must 'take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

What this means in practice comes down in the end to specific case law²⁸.

2. **Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora**²⁹ (Habitats Directive).

A summary of European environmental provisions can be found in Storm/Lohse's 10-volume compendium *EG-Umweltrecht (EGUR)*, (July 2010 edition).

For discussion of the provisions, see *Handbuch zum deutschen und europäischen Umweltrecht*, Rengeling (publ.),

Bd. II (Environment law, specific), 2nd edition, Cologne, etc., 2003. There is a discussion of the relationship between environment and energy law in the Badura's contribution to the 2nd sub-volume (§ 82), but he does not look in depth at the problems of conflict between the two, which is what we are mainly interested in here.

²⁴ OJ L 103/6.

²⁵ See Part A of Annex VI to the successor Directive (referred to in footnote 26).

²⁶ OJ L 20, 26.1.2010, p. 7.

²⁷ See, for example, Jarass, *Auswahl und Ausweisung europäischer Vogelschutzgebiete*, UTR Bd. 58 (2001), p. 263 *et seq.*

²⁸ See, for example, the judgments of the European Court of Justice in 2. Case C-415/01 *Commission of the European Communities v Kingdom of Belgium* (protection measures), 3. Case C-209/04 *Commission of the European Communities v Republic of Austria* (selection of areas, economic requirements, overriding public interest) and 12. Case C-418/04 *Commission of the European Communities v Ireland* (delimitation of areas, protection measures, also Article 6(2) to (4) of the Habitats Directive).

Recital 3 of the Directive states that 'the main aim of this Directive [is] to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements'.

Recital 6 says that 'in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable' (Natura 2000).

According to Article 1(c) of the Directive, 'natural habitat types of Community interest' are habitats which 'within the territory mentioned in Article 2

(i) are in danger of disappearance in their natural range;

or

(ii) have a small natural range following their regression or by reason of their intrinsically restricted area;

or

(iii) present outstanding examples of typical characteristics of one or more of the nine following biogeographical regions: Alpine, Atlantic, Black Sea, Boreal, Continental, Macaronesian, Mediterranean, Pannonian and Steppic.

These habitat types are listed or may be listed in Annex I.

Apart from coastal areas (detailed further in points 1 and 2 of the Annex), *the construction of pipelines and transmission systems* might above all come into conflict with 'forests of temperate Europe' (see point 91 of the Annex).

According to Article 1(k), a '*site of Community importance*' means 'a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the

²⁹ OJ L 206, 22.7.1992, p. 7. *subsequently amended several times; for consolidated version of 1 January 2007 see [01992L0043-20070101](#).*

maintenance of biological diversity within the biogeographic region or regions concerned'.

Article 2(1) gives the aim of the Directive as contributing towards ensuring bio-diversity through the conservation of natural habitats. Under Article 2(2), measures taken pursuant to the Directive are to be designed to maintain or restore natural habitats at favourable conservation status.

Under Article 2(3), they are to take account of economic, social and cultural requirements and regional and local characteristics.

Article 3(2) obliges Member States to contribute to the creation of Natura 2000 in proportion to the representation within their territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State must designate, in accordance with Article 4³⁰, sites as special areas of conservation taking account of the objectives set out in paragraph 1. Under Article 6(1), Member States have to establish the necessary conservation measures for these special areas of conservation. Under Article 6(2), Member States are to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive. Under Article 6(3), any plan or project likely to have a *significant*³¹ effect on a site, either individually or in combination with other plans or

³⁰ Art. 4: (1) On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host.

(2) On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the nine biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of *sites of Community importance* drawn from the Member States' lists. (Our emphasis).

(4) Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

³¹ What this means when it comes to applying this provision is subject to much dispute – see Thyssen, *loc. cit.*, Wann ist erheblich „erheblich“? NuR 2010, p. 9 *et seq.* with further references.

projects, is subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

3. The legislation in the '**Climate Change Package**' adopted by the European Parliament on 17 December 2008³² deals mainly with CO₂ emissions and the new Directive to promote the use of renewable energy sources³³. We therefore do not have to concern ourselves with it here.

We should note, however, that the construction of pipelines and transmission systems and climate protection (an important aspect of environmental protection) are not as diametrically opposed as is all too often implied in public debate – on the contrary: the construction of pipelines and transmission systems makes important contributions to climate protection, Europe's ambitious plans for which cannot be realised without rapid development of the transmission networks. **Point 4 (Conclusions) of the Green Paper states rightly that:** 'As set out in the Commission's second Strategic Energy Review and elaborated here, *the EU will be unable to deliver its climate and energy goals without new and improved networks. Energy networks must take a more prominent place in energy policy development and implementation*' (p. 15; our emphasis).

Other measures taken in the operation of networks ('intelligent networks', efficiency improvements, etc.) further environment law objectives above and beyond just facilitating access to the network for new power stations and integrating new energy sources into the electricity supply.

The construction and development of energy lines are in themselves part of environment protection. We should not overlook this by taking an isolated view of climate and nature protection.

4. The EU's Sixth Environment Action Programme (July 2002)³⁴, which runs until 2012, identifies **soil protection** as one of seven thematic strategies. On 22 September 2006, the Commission presented a European soil protection strategy.

³² For more detail, see Frenz/Kane, *loc. cit.*, 472.

³³ Directive 2009/28/EC (OJ L 140, 5.6.2009, p. 16).

³⁴ Decision No 1600/2002/EC of the European Parliament and of the Council laying down the Sixth Community Environment Action Programme (OJ L 242, 10.9.2002).

Together with a Communication³⁵, this also contained a proposal for a Framework Directive³⁶ of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC³⁷. According to recital 35, 'this seeks to promote the integration into Community policies of a high level of environmental protection in accordance with the principle of sustainable development as laid down in Article 37 of the Charter of Fundamental Rights of the European Union'.

The proposal for a Directive has already been rejected once by the Council of Ministers, at the end of 2007. Since then, the Commission has repeatedly tried to put the controversial draft on the agenda. On 15 March 2010, the Environment Council discussed the proposal for an EU soil protection Directive once more, but did not adopt it. As before, the proposal did not have the support of the majority required for adoption by the Council, although it had been welcomed by a large number of Member States³⁸.

According to recitals 8 and 11, the aim of the proposal 'is to ensure the protection of soil, based on the principles of preservation of soil functions, prevention of soil

³⁵ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: *Thematic Strategy for Soil Protection*, 22 September 2006 (COM(2006)231 final; not published in the Official Journal), [SEC(2006)620] [SEC(2006)1165] and the Commission staff working document of 22 September 2006 (SEC(2006)1165) as an accompanying document.

³⁶ of 22 September 2006 – COM(2006) 232 (final); Council document 13388/06, interinstitutional file 2006/0086 (COD).

At its 829th sitting on 15 December 2006, the Bundesrat adopted a negative opinion pursuant to § 3 and § 5 of the Act on Cooperation between the Federation and the *Länder* in EU Affairs (EUZBLG) (BR-Drs. 768/07; 9.11.2007; regarding *Das europäische Naturschutzrecht evaluieren und zukunftsfähig ausgestalten*. In it, the Bundesrat underlines the need for Directive 79/409/EEC (Birds Directive) and Directive 92/43/EEC (Habitats Directive) to be refined, summarised and updated.

As well as the proposal for a Directive, the Commission Communication on a soil protection strategy of 22 September 2006 was accompanied by a summary impact assessment (SEC(2006) 1165).

³⁷ of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 26.1.2010, p. 56).

³⁸ As far as we can tell, Germany has objections above all based on the subsidiarity principle and a bureaucratic burden that would not be warranted by the end result.

degradation, mitigation of its effects, restoration of degraded soils and integration into other sectoral policies by establishing a common framework and actions'.

Under Article 3 (*Integration*)³⁹, this also applies to the construction of pipelines and transmission systems. Cabling-laying as part of transmission line construction (governed by the EnLAG⁴⁰) affects the soil disproportionately more than above-surface transmission lines. In principle, the specific measures set out in the proposal (Article 4 – Precautionary measures; Article 5 – Sealing) also come into consideration.

On closer examination, however, we can leave the draft to one side in the present context as it is not possible to identify a risk area within the meaning of Article 6.

II. Construction and development of transmission lines

The following legal acts are relevant to the construction and development of transmission lines:

1. **Directive 2005/89/EC** of the European Parliament and of the Council of 18 January 2006 concerning measures to **safeguard security of electricity supply and infrastructure investment**.

The Electricity Regulation adopted as part of the 2003 acceleration package was an initial response to the continuing market separation that was increasingly being recognised as an obstacle to the completion of the single market. The Commission's intention in proposing the Infrastructure Directive (Directive 2005/89/EC⁴¹) the same year was to impose far-reaching investment planning and reporting duties on systems operators. By the end of the legislative process, however, only a watered-down version was adopted.

³⁹ 'In the development of sectoral policies likely to exacerbate or reduce soil degradation processes, Member States shall identify, describe and assess the impacts of such policies on these processes, in particular in the areas of regional and urban spatial planning, transport, *energy*, agriculture, rural development, forestry, raw material extraction, trade and industry, product policy, tourism, climate change, environment, nature and landscape.'

⁴⁰ Law on Accelerating the Development of High Voltage Networks (BGBl. I 2009, p. 2870).

⁴¹ OJ L 33, 4.2.2006, p. 22.

The key objectives of the Directive are 'secure electricity supplies based on fair competition and the creation of a fully operational internal electricity market'⁴².

Environmental concerns are reflected in the efforts to integrate renewable energy sources into the grid (see Article 3(2)(e) – insofar as it relates to security of energy supply!), in the promotion of energy efficiency and the introduction of new renewable energy technologies (see Article 3(3)(c); Article 5(2)(e)).

The Directive does not have any further bearing on the issues discussed here, however.

2. The '**third package**' on the regulation of energy markets in Europe⁴³ is primarily concerned with resolving conflicts of interest in the energy supply sector. It also follows the approach taken in Directive 2005/89/EC (see section 1 above) in imposing planning duties on network operators and requirements for the construction of pipelines and transmission systems both across Member States and at national level.

a) **Regulation (EC) No 714/2009**, in establishing the ENTSO (Article 4), above all focuses on the adoption and publication of a Community-wide network development plan (see Article 8(10)), to be submitted to the newly-established Agency for its opinion (Article 9(2)), on the optimum management of the network (Article 12(2)), on network security by means of the ENTSO (Electricity) network codes (Article 8(6)(a)) and in the assessment of network access charges (Article 14(1)) on economically effective congestion management (Article 16; point 2 of the guidelines in Annex I to the Regulation).

⁴² Recital 18, Article 1(1), together with Article 2(b). Under paragraph (2) of Article 3 (General provisions), measures are to be implemented taking account of (a) the continuity of electricity supplies and (f) sufficient transmission reserve capacity (the latter is also referred to in paragraph 1(d)(2) of Article 4 (Operational network security) and paragraph 1(b) of Article 6 (Network investment) – 'maintenance and, where necessary, renewal of networks').

⁴³ For more detail, see Gundel, *Die Regulierung der europäischen Energiemärkte – Perspektiven nach dem Dritten Binnenmarktpaket*, WiVerw 2010/2 p. 127: 'From the outside, there is now a certain symmetry in the regulatory arrangements: The new package, which repeals and replaces the previous legislative acts, comprises a Directive on organising the national markets in electricity (Directive 2009/72/EC – hereinafter the Electricity Directive) and a similar one for gas (Directive 2009/73/EC – hereinafter the Gas Directive) and a Regulation for each sector dealing with cross-border trade (Regulation (EC) No 714/2009 – the Electricity Regulation; Regulation (EC) No 715/2009 – the Gas Regulation). A third, generally applicable Regulation ((EC) No 713/2009 – the Agency Regulation) sets out the statutes of the new EU Agency for the Cooperation of Energy Regulators (ACER).'

All these measures are basically geared to ensuring that Europe's energy networks reliably meet the requirements for a secure energy supply.

Links with environmental protection are visible only at the margins: in the energy efficiency that the networks are to ensure under the ENTSO (Electricity) network codes and in the general remark in recital 6 that these tasks are to be carried out 'with due regard to the environment'.

b) **Directive 2009/72/EC** also sees the *security of energy supply* as 'an essential element of public security' which can be delivered 'only through the network' (recital 25). 'Functioning electricity markets and, **in particular, the networks** ... are essential for public security, for the competitiveness of the economy and for the well-being of the citizens of the Union.'⁴⁴

In order to meet the electricity producers' public service requirements, the Directive specifies 'common minimum standards, respected by all Member States, etc. which take into account the objectives of *consumer protection, security of supply, environmental protection* and equivalent levels of competition in all Member States' (recital 46). Article 3(2) (Public service requirements) authorises Member States to impose on undertakings operating in the electricity sector in accordance with paragraph 2 of Article 106 TFEU (formerly Article 86 TEC), in the general economic interest, 'obligations which may relate to security, including *security of supply*, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and *climate protection*'.

This leaves open the relationship between environmental protection and security of supply.

Unlike Article 3(10), under which Member States are to 'implement measures to achieve the objectives of social and economic cohesion and *environmental protection*,

⁴⁴ Similarly, recital 44: 'The construction and maintenance of the necessary network infrastructure, including interconnection capacity, should contribute to ensuring a stable electricity supply. The maintenance and construction of the necessary network infrastructure, including interconnection capacity and decentralised electricity generation, are important elements in ensuring a stable electricity supply'. Recital 59: 'development of a true internal market in electricity, through a network connected across the Community, should be one of the main goals of this Directive'.

which [must] include energy efficiency/demand-side management measures and means to combat climate change, and *security of supply*, where appropriate.'

Security of supply is presented here, therefore, as *an aspect of environmental protection!*

The provision goes on as follows: 'Such measures may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools, for the maintenance and construction of the necessary network infrastructure, including interconnection capacity.'

An obligation to ensure security of supply is placed first on the Member States (see first sentence of Article 4 (Monitoring of security of supply)) and then on the transmission system operators (see Article 12):

'Each transmission system operator shall be responsible for:

ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity, operating, maintaining and developing under economic conditions secure, reliable and efficient transmission systems with due regard to the environment⁴⁵, ...

Article 36(a) charges the *national* regulatory authority with 'promoting [...] a competitive, *secure and environmentally sustainable* internal market in electricity within the Community' and 'ensuring appropriate conditions for the effective and reliable operation of electricity networks, taking into account long-term objectives'.

3. The **Green Paper** *Towards a secure, sustainable and competitive European energy network* is not legally binding but is instructive as regards the Commission's plans and views⁴⁶. These concern, above all, better coordination of the various national authorisation procedures and the removal of administrative obstacles.

⁴⁵ Under Article 22 of the Directive (Network development and powers to make investment decisions), the basis of the Community-wide network development plan provided for in Article 8 of Regulation (EC) No 14/2009 is the 10-year network development plan that the TSO has to submit to the regulatory authority each year. When elaborating the latter, 'the transmission system operator [is to] make reasonable assumptions about the evolution of the generation, supply, consumption and exchanges with other countries, taking into account investment plans for regional and Community-wide networks' (paragraph 3).

⁴⁶ of 13 November 2008 – COM(2008) 782 (final); {SEC(2008)2869}.

'Complying with EU environmental legislation and meeting energy policy goals *can and should* be mutually supportive.' (p.12; our emphasis).

4. The **Action Plan *An energy policy for Europe***⁴⁷ is currently undergoing revision. An EU energy infrastructure package (EIP) expected for the autumn (November?) will involve revised versions of the TEN-E Financing Regulation and the TEN-E guidelines. The regulatory package should speed up the development of the oil, electricity and gas infrastructure for the next two decades.

This should be based on the outcome of the consultations on the Green Paper *Towards a secure, sustainable and competitive European energy network* (see point 3 above) and could point the way to a better harmonisation of nature protection and the construction of pipelines and transmission systems. We have no further details as yet.

5. **Decision No 1364/2006/EC** of the European Parliament and of the Council laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC is directly relevant⁴⁸. It is based on Article 156 of the TEC, as applicable until 30 November 2009. With the entry into force of the Lisbon Treaty and thus the TFEU, the Treaty basis (Article 156, now Article 171(f) TFEU) of Decision 1364/2006/EC remained intact.

According to recital 2 of the Decision, 'the priorities for trans-European energy networks stem from the creation of a more open and competitive internal energy market' as a result of the implementation of Directives 2003/54/EC and 2003/55/EC (now replaced by the Third Package). 'Those priorities reflect the conclusions of the Stockholm European Council of 23 and 24 March 2001 concerning the development of the infrastructure needed for the operation of the energy market. A special effort should be undertaken to achieve the objective of making greater use of renewable energy sources as a contribution to further a sustainable development policy.'

Procedural steps to date: 13.11.2008: Presentation of the Communication by the Commission; 31.3.2009: Public consultation on the Green Paper; 18./19.3.2009 European Council conclusions.

⁴⁷ COM(2007) 1.

⁴⁸ OJ L 262, 22.9.2006, p. 1.

According to recital 8, 'among the projects relating to trans-European energy networks, it is necessary to highlight the priority projects, which are *very important* for the operation of the internal energy market or the security of energy supply'.

Under Article 2(1), the scope of the Decision includes, in electricity networks, all high-voltage lines, 'provided that this infrastructure is used for interregional *or* international transmission or connection' (our emphasis).

In Article 11(3), the Commission is empowered for this purpose to adopt *binding* measures.

The Decision goes on to distinguish between 'projects of common interest' (Article 6), 'priority projects' (Article 7) and 'projects of European interest' (Article 8). These project are listed in Annex I⁴⁹ (Trans-European Energy Networks – Axes for priority projects, including sites of projects of European interest, as defined in Articles 7 and 8). Under Article 8(2), such projects are to be given 'appropriate priority' in the selection under the budget for trans-European networks⁵⁰. Under Article 11, the Community is to contribute to creating a more favourable context for the development of trans-European energy networks and their interoperability, especially (see paragraph 1(b)) by facilitating implementation of the authorisation procedures in the field of trans-European energy networks, in order to reduce delays, 'especially as regards projects declared to be of European interest'.

Under Article 11(3), the measures necessary for the implementation of the activities referred to in paragraph 1(b) are to be decided upon by the Commission in accordance with the procedure referred to in Article 14(2).

⁴⁹ Annex II: Trans-European Energy Networks – Additional criteria for identifying projects of common interest, as referred to in Article 6(2);

Annex III: Trans-European Energy Networks – Projects of common interest and their specifications, currently identified according to the criteria set out in Annex II.

⁵⁰ As regards projects of common interest (Article 6), only those listed in Annex III which fulfil the criteria laid down in paragraph (i) and those set out in Annex formerly II are to be eligible for the Community financial aid provided for under Regulation (EC) No 2236/95. This does not give them priority.

C Points of intersection and possible conflicts between nature conservation law and the legislation relating to the construction of pipelines and transmission systems

The points of intersection between the provisions on the construction of pipelines and transmission systems and those on environmental or nature conservation should be set out here as examples in order to illustrate the possible conflicts.

1. **Directive 2009/72/EC** can be given as an example of the point of intersection with European environmental law; it addresses the problem in the following different ways:

- According to recital 46, this Directive specifies minimum standards 'which take into account the objectives of consumer protection, *security of supply, environmental protection, etc.*'.
- According to Article 3(10) mentioned above, the Member States shall take 'measures to achieve the objectives of social and economic cohesion *and environmental protection*'.
- Article 12(a) obliges transmission system operators 'to operate, maintain and develop under economic conditions a secure, reliable and efficient system, *with due regard to the environment.*'
- In the key Article 22 (Network development and powers to make investment decisions), environmental protection is *not* mentioned.
- Article 36(a), which has also already been mentioned, obliges the national regulatory authorities to promote a 'competitive, *secure and environmentally sustainable* internal market in electricity within the Community.'
- According to Article 37(1)(b), the national regulatory authorities shall ensure that transmission and distribution system operators and, where relevant, system owners, as well as any electricity undertakings comply 'with their obligations under this Directive *and other relevant Community legislation.*'

2. The first sentence of Article 4 of **Decision No 1364/2006/EC** states:

'The priorities for action by the Community on trans-European energy networks *shall be compatible with sustainable development* and shall be as follows':

'1. for both electricity and gas networks:

(a) *adapting and developing the energy networks* in support of the operation of the internal energy market and, in particular, solving the problems of bottlenecks, especially transfrontier bottlenecks, *congestion and missing links*, and taking account of the needs arising from the functioning of the internal market for electricity and natural gas and the enlargement of the European Union;

(b) establishing energy networks in island, isolated, peripheral and ultraperipheral regions while promoting the diversification of energy sources and the use of renewable energy sources, together with the connection of those networks, where necessary;

2. for electricity networks:

(a) adapting and developing networks to facilitate the integration and connection of renewable energy production;

(b) ensuring interoperability of electricity networks within the Community';

3. Article 2(3) of the **Habitats Directive** is in conflict with this harmonisation:

'Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

But surely energy supply, including constructing or developing pipelines and transmission systems, are 'economic' requirements within the meaning of paragraph 3.

Petitio principii or the result of a decision under EU law to balance conflicting interests in secondary legislation?

4. The **Green Paper** 'Towards a secure, sustainable and competitive European energy network' focuses on better coordination of different national administrative

authorisation procedures and removing administrative barriers. The Paper states that 'EU environmental rules *should* (!) be correctly interpreted and applied, in the light of guidelines issued by the Commission. Complying with EU environmental legislation and meeting energy policy goals *can and should* be mutually supportive.' (page 12, author's emphasis).

However, the question is whether they always can or whether they might come into conflict with each other. Even this *possibility* is consistently ignored.

5. The Commission working document '**Consultation on the future trans-European transport network policy**' is not relevant in this regard, nor is it legally binding, but it is however informative with regard to the Commission's plans in terms of the review of TREN⁵¹.

The requirements of the relevant EU environmental legislation and policies, in particular on the protection of biodiversity '*should be addressed*' (page 5). Later, on page 6, 'respecting relevant EU environmental legislation' is included in the 'general principles'.

6. However, none of this indicates that there is a clear relationship between the obligations to build new and develop existing networks and the obligations under Community law to preserve and protect the environment, which are of particular relevance here.

With regard to energy law, including the rules on the construction of pipelines and transmission systems, security of supply is clearly the priority. The development of the network is rightly seen as an '*essential element of public security*'.⁵²

Moreover, the energy law requirements are limited to various, mostly unclear references to compliance with environmental protection or they lay down rules for harmonisation which is not justified per se, which claims to resolve conflicts and contradictions using various set phrases. However, there is no room for legal fiction in this area.

⁵¹ See COM(2010) 212 final of 4.5.2010.

⁵² See recital 25 of Directive 2009/72.

The Community's environmental law in contrast focuses more on safeguard clauses and derogations and exemptions⁵³, which cannot however really resolve further-reaching conflicts with other subject matters. They just shift the problems to the Member State level and leave it to their respective enforcement bodies to find a proper balance. The latter have to carry out a task which European lawmakers have so far refused to undertake. This results in considerable uncertainties and wasted time (see section E below).

7. Interim conclusion

⁵⁴, is one of the 'fundamental objectives of the Community'. On the grounds that environmental protection has been upgraded to a horizontal competence in Article 6 of the TEC (now Article 11 of the TFEU)⁵⁵, in respect of which the Lisbon Treaty has changed nothing⁵⁶, there is already talk in the literature of a 'latent priority of the objective of sustainability'⁵⁷. This result however does not take account of the new Article 7 of the TFEU (see C above) in terms of the need to ensure the consistency of the various policies of the Community. Article 194(1) TFEU, which is also new, states that 'In the context of the establishment and functioning of the internal market *and with regard for the need to preserve and improve the environment*, Union policy on energy shall aim, in a spirit of solidarity between Member States, to, etc.' and thereby gives a completely different direction to the necessary harmonisation.

Attempts at finding a solution to the problem of the delimitation between environmental protection and the construction of pipelines and transmission systems which are limited to poorly defined safeguard clauses and derogation and exemption

⁵³ See D below.

⁵⁴ Established case law since the judgment of 7.2.1985, Case 240/83 [1985] ECR 531, paragraphs 13 and 15.

⁵⁵ For more, see Callies, 'Die neue Querschnittsklausel des Art. 6 ex Art. 3c EV als Instrument zur Umsetzung des Grundsatzes zur nachhaltigen Entwicklung', DVB1 1998, 559/564.

⁵⁶ For more see Ruffert, 'Vorgaben des Europarechts und nationale Gestaltungsspielräume', UTR Bd. 102, 13 ff.; Kahl, 'Die Kompetenz der EU in der Energiepolitik nach Lissabon', EuR 2009, 601 ff.; Ehrlicke/ Hackländer, 'Europäische Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrags von Lissabon', ZEuS 2008/4, 579 ff.; Nettesheim, loc. cit. page 21 I.Sp.

⁵⁷ Geden, Integration 2008, 353/354 f.

clauses (see section D below) and which leave it to the Member States to clarify the relationship between EU legal rules on the protection of nature and on the construction of pipelines and transmission systems (see section E below) are also not appropriate.

D Safeguard clauses, national derogations or exceptions for Member States

1. Safeguard clauses

Safeguard clauses are not unusual in Community law.

In Title XX (*Environment*), paragraph 2 of Article 191 (formerly Article 174 TEC) sets out a high level of protection, together with the possibility of granting safeguard clauses to Member States in the case of harmonisation measures, albeit subject to monitoring by the Commission.

The purpose of safeguard clauses is to leave room for EU legislators to take account of the particular situations of individual Member States in the case of harmonisation measures which are necessarily very general. They are also appropriate for the process of harmonising the laws of the Member States. However, in order to resolve the problem of the delimitation between two subject matters of Community law, as in the case of environmental protection and the construction of pipelines and transmission systems, a safeguard clause cannot help.

2. Derogations

a) **Directive 79/409/EC** on the conservation of wild birds allows for numerous derogations for the Member States:

Recital 12 outlines the guiding principle:

'Because of the importance which may be attached to certain specific situations, provision should be made for the possibility of derogations on certain conditions and subject to monitoring by the Commission.'

Article 9 then outlines the specific rule:

Paragraph 1: 'Member States may derogate from the provisions of Articles 5 to 8, *where there is no other satisfactory solution*, for the following reasons:

a) - in the interests of *public health and safety*,

- in the interests of air safety,'

.....

Paragraph 2: The derogations referred to in paragraph 1 must specify,

c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;

d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom,

e) the controls which will be carried out.

b) In Article 6 of the **Habitats Directive (92/43/EEC)**, which has preoccupied both European⁵⁸ and German case law⁵⁹ and literature⁶⁰, paragraph 4 is the nub of the problem: 'If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that

⁵⁸ A typical case: ECJ, judgment of 7.9.2004 – Case C-127/02 (cockle fishermen); most recently judgment of 14.1.2010 – Case C-226/08 (Stadt Papenburg v Germany), NuR 2010, 114 ff, EuZW 2010, 222 ff; and *Württemberg*, 'Schutzgebietsausweisungen vs. Rechtssicherheit und Vertrauensschutz', NuR 2010, 316 ff;

⁵⁹ See Federal Administrative Court ruling of 10.12.2009 9 A 9.08 UPR 2010, 200 with further references (Ermittlungs- und Bewertungsdefizite); judgment of 17.1.2007 – 9 A 20/05 (Halle Western bypass) NVwZ 2007, 1054f; from the wealth of literature on this subject see *Stüer*, 'Westumfahrung Halle: 'Rote Ampeln vor Habitat- und Vogelschutz-Gebieten?' NVwZ 2007, 1147ff.; judgment of 9.7.2008 – 9 A -14.07 (Bad Oeynhausen), Federal Administrative Court Bd. 131, 274 ff.

⁶⁰ *Thyssen*, 'Maßstäbe für die erhebliche Beeinträchtigung des Gebiets- und Artenschutzes nach der FFH-RL bei der Anlagenzulassung', EuRUP 2009, 172 ff.; *same author*, 'Wann ist erheblich 'erheblich?' NuR 2010, 9 ff.; *Lau*, 'Fachliche Beurteilungsspielräume in der FFH-Verträglichkeitsprüfung', UPR 2010, 169 ff. with further references; on comparative law, *Gammenthaler*, 'Umsetzung und Auslegung des Art. 6 der FFH-RL in Großbritannien', EuRUP 2010, 72ff.

the overall coherence of Natura 2000 is protected⁶¹. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or *public safety, to beneficial consequences of primary importance for the environment* or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

3. Exceptions

a) For investments in new large infrastructures, **Regulation 714/2009/EC** makes a notable exception in this context even from the unbundling rules, which are one of the main aims of the Directive or perhaps *the* main aim of the Directive.

Recital 23: 'Investments in major new infrastructure should be promoted strongly while ensuring the proper functioning of the internal market in electricity. Where direct current interconnectors are located in the territory of more than one Member State, the Agency should handle as a last resort *the exemption request* in order to take better account of its cross-border implications and to facilitate its administrative handling. Moreover, given the exceptional risk profile of constructing those exempt major infrastructure projects, undertakings with supply and production interests should be able to benefit from a temporary derogation from the full unbundling rules for the projects concerned. Exemptions granted under Regulation (EC) No 1228/2003 continue to apply until the scheduled expiry date as decided in the granted exemption decision.'

This is then regulated in Article 17 in a very complicated procedure⁶².

⁶¹ See. Federal Administrative Court ruling of 10.12.2009 9 A 9.08 UPR 2010, 200 with further references.

⁶² (4) first paragraph: 'The decision on the exemption under paragraphs 1, 2 and 3 shall be taken on a case-by-case basis by the regulatory authorities of the Member States concerned.'

Fifth paragraph: 'Where all the regulatory authorities concerned have reached agreement on the exemption decision within six months, they shall inform the Agency of that decision.'

(5) The decisions referred to in paragraph 4 shall be taken by the Agency:

- where all the regulatory authorities concerned have not been able to reach an agreement within six months from the date the exemption was requested before the last of those regulatory authorities; or

b) Paragraph nine of the *recitals of the Habitats Directive* refers to a *reverse exception*: sites eligible for designation as special areas of conservation are proposed by the Member States *but a procedure must nevertheless be laid down to allow the designation in exceptional cases of a site* which has not been proposed by a Member State but which the Community considers essential for either the maintenance or the survival of a priority natural habitat type or a priority species;

4. Interim conclusion

Derogations for particularly important reasons are not unusual in Community law – on the contrary: This has been shown by the examples of safeguard clauses, exceptions and derogations given.

The problem of the delimitation between nature conservation and the law on the construction of pipelines and transmission systems cannot however be solved in this way,

- not only because the requirements are too unclear and the time required for the procedure would lead to huge problems,
- and also not just because the decision about the conflict under Community law is passed on to the Member States, whose responsible bodies are overwhelmed by trying to solve it,
- but above all because they only concern individual cases on the same issue and not – as in this case – different legal issues of Community law.

This is one task the Community cannot pass on to the Member States.

- upon a joint request from the regulatory authorities concerned.

(7) second sentence: The decision shall be notified, without delay, by the regulatory authorities concerned or by the Agency (notifying bodies), to the Commission, together with all the relevant information with respect to the decision.'

(8) Within a period of two months from the day following receipt of notification under paragraph 7, the Commission may take a decision requesting the notifying bodies to amend or withdraw the decision to grant an exemption.'

The specialist responsibility for the application for exemption however remains with the regulatory authorities of the Member States concerned, which cannot anticipate the final outcome of an examination by the Community bodies but which can predict the amount of time required.

Certainly, no 'European' networks will be installed in this way.

E The role of the Member States

1. The task facing the Member States as a result of secondary law

In resolving the conflict arising under Community law between legislation on the environment and legislation on pipeline and transmission systems, the Member States face a task which has not been addressed by the Community legislator to date. This results in considerable uncertainties, contradictions and time being lost unnecessarily in the execution of major projects⁶³. Finding this balance is now the focus of considerable attention in national case law and academic writing. European law comes into play here where uncertainties arise in terms of the interpretation of specific provisions⁶⁴ of Community law or in terms of the scope of the protection afforded⁶⁵. The case law of the European Court of Justice in this area relates exclusively to references for preliminary rulings or Treaty infringement cases in which – focusing exclusively on the interpretation of environmental law – it advocates a strict interpretation on convincing grounds (interpretation with regard to the effectiveness of Community law)⁶⁶.

⁶³ A convincing demonstration is set out in *Vallendar*, *Großprojekte und Anforderungen des Europäischen Naturschutzrechts*, EurUP 2007, 275/279 with reference to the Halle Western Bypass.

⁶⁴ See, for example, judgment of the European Court of Justice of 14.1.2010 Case C-226/08 (Papenburg), NuR 2010, p. 114 *et seq.* = EuZW 2010, p. 222 *et seq.* on Article 6 of the Habitats Directive with numerous further references, Federal Administrative Court Ruling of 17.1.2007 – 9 A 20/05 (Halle Eastern Bypass), NVwZ 2007, p. 1054 *et seq.* (paragraph 30 *et seq.*) and Ruling of 9.7.2009 – 4 C 12.07 (Start- und Landebahn Verkehrsflughafen Münster/Osnabrück) ZUR 2010, p.193 *et seq.*

⁶⁵ Federal Constitutional Court 131, p. 275/290 *et seq.* (Bad Oeynhausen) on the separation of habitat protection from general species protection under German nature protection law.

⁶⁶ Cf. *Iglesias/Riechenberg*, *Der Beitrag des Europäischen Gerichtshofs zum Schutz der Umwelt*, in: FS für Zuleeg, 225, p. 624/628; judgments of the European Court of 11.1.2007 Case C 183/05 – [2007], I-137, paragraph 28 *et seq.*, and of 7.9.2004 Case C 127/02 [2004] I- 7405, paragraph 58.

This is something that it is able to do, and indeed must do, for as long as it is not obliged to intervene directly in the resolution of the conflict of obligations arising under secondary law in a specific legal dispute.

Consequently, the real resolution of the conflicting European protection objectives occurs during the national planning approval procedure and not, therefore, at the appropriate legal level, that of Community law.

2. Standard practice for the enforcement of European legislation

The enforcement of directives, the prime area in which conflicting provisions arise, is entirely incumbent on the Member States. This is primarily – but not exclusively⁶⁷ – a result of the legal nature of directives.

It therefore follows – within the limits of the national legal framework – that the provisions set out in directives are often, and it is particularly the case here, 'essentially a declaration of political intent' and 'are only indirectly legal instructions for the Member States'⁶⁸ for transposition into national law. Accordingly, protection areas are designated by the *Member States*, for example. Responsibility is also conferred on *them* to decide whether, when and to what extent derogations or exemptions from nature-protection requirements may be applied for, with the final decision being taken by the Agency and/or the Commission, with all the uncertainty that this may entail.

3. Exceeding the enforcement competence of the Member States

In the case of this conflict, however, the problems which arise in the application of the secondary law in force go beyond what is usual, and indeed permissible, on account of a fundamental difficulty:

⁶⁷ Regulations and decisions* (Article 288(4) TFEU) are also to be enforced. [*Translator's note: the author refers in the original text to the two German terms used previously to render the English term 'decision' within the meaning of Community law. He indicates that only one of the German terms is now used following the entry into force of the TFEU.]

⁶⁸ Vallendar, *loc. cit.*, p. 279, right-hand column also applies here.

The decisions to be taken in connection with the enforcement of the legal provisions set out in the legislation on nature protection and pipeline and transmission systems require the Member States to reconcile conflicting value judgements embedded in European law, as can be seen in the conflict between pipeline and transmission system projects 'of European interest' (in accordance with Decision No 1364/2006/EC) and the protection of 'projects of common interest', 'priority projects' and 'projects of European interest' (in accordance with the Habitats Directive). Since this constitutes a conflict of values at *European* level, the Member State bodies entrusted with enforcement should not be left to resolve it on their own; this task cannot be delegated to them, which, moreover, they almost necessarily perform in different ways⁶⁹.

Not least for this reason, the Council (in accordance with point 3.2.3 (*A new approach to planning*) of the Green Paper) has also called on the Commission to 'table proposals aiming at streamlining approval procedures' for network projects. As regards the more difficult task of developing a 'more harmonised approach' (*loc.sit.*) a long-standing and difficult problem remains, which has not been resolved effectively to date and has repeatedly required the intervention of European coordinators to reach solutions in individual cases.

The Green Paper goes on: 'With this in mind, European priority projects could be included in national strategic plans, as well as the future priorities of regulators and TSOs'.

This is insufficient, however, since, even if their strategic plans are legally binding, this matter should not be subject to the discretion of the Member States. Rather, European

⁶⁹ This is referred to in the Green Paper '*Towards a secure, sustainable and competitive European energy network*'. Point 2.3 reads as follows: (Administrative and Regulatory barriers to energy network projects) under 2.3.1 Planning and administrative authorisation procedures: 'Planning and administrative authorisation procedures are a common cause of delays to energy projects due to differences in local and national planning rules.

It is likely that approvals and permits for large infrastructure projects would benefit from a more harmonised approach. However, the EU has no competence in land use planning.' Following the entry into force of the TFEU, this is no longer the case to the same extent (cf. Article 192(2)(b) in Title XX on the environment).

However, the former basis did not rule out European provisions for national land use planning. This is demonstrated - by no means exclusively - by Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks.

priority projects should be an obligation incumbent on Member States. The Green Paper suggests no solution in this regard. One will have to be found in future.

F Proposals for resolving conflicts between the construction of pipeline and transmission systems and environmental law

1. Recognition of the need to resolve the conflicts

The need to coordinate coexisting and, in some cases, conflicting Community objectives has been fully recognised by the European Union⁷⁰.

Article 7 TFEU now expressly calls on the Union to ensure consistency between its policies and activities in the different areas. And consistency means nothing other than avoiding or resolving conflicts at the same legal level.

In its Communication 'A Europe of Results – Applying Community Law'⁷¹, the Commission has already declared its readiness to evaluate European nature-protection law in future and to engage in a dialogue with the Member States and the regions⁷².

On the 'other side', concerning legislation on the construction of pipelines and transmission systems, recital 25 of Directive 2009/72 rightly regards energy provision as '*an essential element of public security*' (our italics)', which 'can reach the citizens of the Union only through the network'. 'Functioning electricity markets and, in particular, the networks [...] are *essential for public security*, for the competitiveness of the economy and for the well-being of the citizens of the Union.'⁷³ Consequently, the

⁷⁰ See, for example, the Commission's March 2007 Communication on an energy policy for Europe, COM (2007) 1 final.

⁷¹ COM(2007) 502 final.

⁷² The need to amend, re-work and modernise Directive 79/409/EEC (Birds Directive) and Directive 92/43/EEC (Habitats Directive) has also been underscored by the German Bundesrat in its enforcement process (Bundesrat document 768/07 of .9.11.2007; Appendix: '*Das europäische Naturschutzrecht evaluieren und zukunftsfähig ausgestalten*').

⁷³ Similarly, recital 44 ('The construction and maintenance of the necessary network infrastructure, including interconnection capacity, should contribute to ensuring a stable electricity supply. The maintenance and construction of the necessary network infrastructure, including interconnection capacity and decentralised electricity generation, are important elements in ensuring a stable

construction and development of energy transmission systems is an indispensable part of public security.

However, conclusions must also be drawn from the recognition of this situation. The author is not aware of any specific proposals at European level to this end. The direction for such proposals is reflected in the interactions between these two policy areas referred to in Article 194(1) TFEU, which are examined in more detail here: 'In the context of the establishment and functioning of the internal market and *with regard for the need to preserve and improve the environment*, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: [...]

2. Proposals to be discounted

a) No specific provisions are required in Directive 85/337/EEC (on the assessment of the effects of public and private projects on the environment) as amended by Directive 97/11/EC, the Environment Information Directive 90/313/EEC and the Environmental Liability Directive, if the relationship between physical environmental protection and the construction of pipeline and transmission systems is clarified once and for all. Extensive information and early consultation of the public are in fact more beneficial for pipeline and transmission system construction projects than they are hindrances⁷⁴.

b) 'Revising the status' of pipeline and transmission system construction to make it a *horizontal clause* – comparable to that for environmental protection and consumer protection – does not seem appropriate for the nature of the subject matter in question and would not be helpful in any case, since the legal effect would be much too uncertain.

This would also require an amendment to the TFEU and would not therefore be of practical use for the construction of pipeline and transmission systems in the foreseeable future.

c) An amendment to one of the legal texts in the 'third energy package' is not considered appropriate either, not least since it is unlikely that an independent

electricity supply.') and 59 ('The development of a true internal market in electricity, through a network connected across the Community, should be one of the main goals of this Directive ,').

⁷⁴ For more on this, see Lecheler, *Planungsbeschleunigung bei verstärkter Öffentlichkeitsbeteiligung und Ausweitung des Rechtsschutzes?* DVBl 2007, p. 713 *et seq.*

amendment relating to this area specifically could be introduced in the foreseeable future.

3. Proposal to incorporate restrictive criteria as part of the current revision of the TREN-E guidelines

The first step is to incorporate a provision clarifying the relationship with Community environmental law (as contained in Decision No 1364/2006/EC which is still in force at present, and which is cited in support of this proposal) in the future guidelines as part of the current TREN-E reforms.

Article 171(1), first and second clauses (former Article 155 TEC) and Article 194(1) and (2) TFEU provide the basis for a measure of this kind.

This can be done by means of the decision on the TREN-E guidelines, since decisions are on an equal footing with directives in the hierarchy of Community law; simply, decisions are generally more detailed. As a result of the impact of conflicts at the same legal level, the decision is indeed only binding on the addressee. For the decision in question, however, the addressee is always the 'Member States' in accordance with Article 18 (of Decision 1364/2006).

a) The question arises here of an addition to Article 5 of the decision in the form of a point (c):

Article 5 (Lines of action)

'The broad lines of action by the Community on trans-European energy networks shall be:

(a) the identification of projects of common interest and priority projects, including those of European interest;

(b) the creation of a more favourable context for development of those networks.'

New '(c) For projects under Articles 6 – 8, compatibility with the provisions of European environmental law shall be regarded as a prerequisite for the axes for priority projects set out in Annex I and for the projects of common interest listed in Annex III.'

From the development stage onwards, a cost-benefit analysis should be drawn up for projects of common interest 'which takes account of all costs and benefits, including those in the medium and/or long term, in connection with environmental aspects, security of supply, etc.' (Article 6(1), third sub-paragraph)⁷⁵.

b) In the interests of clarity, an additional clause should be added to Article 11(1)(b):

Article 11 (More favourable context)

'1. In order to contribute to creating a more favourable context for the development of trans-European energy networks and their interoperability, the Community shall take account of Member States' efforts made in line with that objective, and shall attach the greatest importance to and promote as necessary the following measures:

(a) technical cooperation between the entities responsible for the trans-European energy networks, in particular for the proper functioning of the connections mentioned in points 1, 2 and 7 of Annex II;

(b) facilitating implementation of the authorisation procedures for projects on trans-European energy networks in order to reduce delays, especially as regards projects declared to be of European interest;

following on from this: 'Article 5(c) shall apply to projects of common interest, priority projects and projects of European interest;'

Projects under *Article 11(3)* ('the measures necessary for the implementation of the activities referred to in points (a) and (b) of paragraph 1 shall be decided upon by the Commission in accordance with the procedure referred to in Article 14(2).') would thus be brought within the realm of implementing measures in the committee procedure referred to under Article 14 of the Decision, in the interests of ensuring the consistency of the projects listed in the most straightforward and rapid manner possible.

4. In addition to the proposal under 3, the Habitats Directive and the Birds Directive should also be amended. While it is true that the provisions of the Directive must be transposed by the Member States, where provisions are sufficiently precisely worded

⁷⁵ As a form of European-level project justification, along similar lines to the Federal Administrative Court's ruling in the Halle Western Bypass case (paragraph 23).

they give rise to indirect effects from entry into force onwards, which are heeded by the national courts.

a) Article 2(3) of the Habitats Directive

'Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

is extended to include a second sentence: 'Compatibility with the provisions of this Directive shall be regarded as a prerequisite for construction and development projects relating to energy transmission systems which are explicitly recognised under European law as projects of common, priority or European interest.'

b) A second sentence should be added to Article 3(2) of the Birds Directive:

'1. Member States shall take the requisite measures, taking account of the requirements laid down under Article 2'(i.e. ecological, scientific and cultural requirements, 'while taking account of economic and recreational requirements.')

'to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures: (a) creation of protected areas; (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones; (c) re-establishment of destroyed biotopes; (d) creation of biotopes.'

New second sentence: 'Construction and development projects relating to energy transmission systems which are explicitly recognised under European law as projects of common, priority or European interest shall be exempt from the protection provisions set out in this Directive.'

As a corollary to this provision, a third indent would have to be added to Article 9(1)(a) after aviation: *'in the interests of the security of energy supply and of the construction of the energy transmission system'*:

1. Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution, for the following reasons:

(a) - in the interests of public health and safety,

- in the interests of air safety,

- in the interests of the security of energy supply and the construction of the energy transmission system.

The Member States would then be in a position to assume their role.

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