1. Aim and structure of this book

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1. A LEGAL REFLECTION ON EU LEGISLATION IN THE ENVIRONMENTAL DOMAIN

EU environmental legislation can be characterised by the vast amount of rules embedded into directives, regulations and decisions, its related inaccessibility and incomprehensibility, and its broad mix of regulatory instruments ranging from traditional permits to market-based approaches and labelling. Moreover, the rise of very complex problems like nanotechnology and climate change poses challenging regulatory questions to the EU legislator. Typical characteristics of the environmental domain, like ecological varying circumstances across countries, technical complexities related to finding proper solutions for the protection of the environment, and diverging needs and preferences among EU Member States, have furthermore contributed to all kind of flexibility arrangements in EU environmental legislation in order to enable the fine-tuning of rules towards specific ecological, cultural and economic circumstances. Legislative choices in the field of the environment are primarily policy choices, resulting from the political process involving the EU Commission, European Parliament and Council. While such choices can and should be discussed by political scientists and economists, this book is aimed at developing fresh insights by allowing environmental lawyers to analyse and discuss trends and choices in the field of environmental legislation. Hence, this book puts a legal perspective on the environmental regulatory action that the EU legislator undertakes, and particular attention will be given to the consequences of EU legislative choices for Member States’ obligations. While EU environmental regulation continues to expand, national governments of EU Member States struggle with the implementation of the vast quantity of EU legislation. In that process, they naturally try to fine-tune their own national legal culture and preferences with EU environmental legislative approaches. When designing environmental legislation, it is obviously impossible for the EU
legislator to take account of all the preferences of the 28 (from 1 July 2013 onwards) national legislators. Each Member State needs to consider how to adapt its own environmental legislation and practice to the harmonised EU legislative framework. Reaching compliance with EU environmental legislation is a challenging task, given the complex and also dynamic character of EU environmental legislation. Vice versa, the EU legislator takes account of this challenging task for Member States and of the need to be able to fine-tune EU laws to local circumstances, which forms the background for governance approaches at the EU level and the practice of so-called Framework Directives. Furthermore, EU regulatory trends and regulatory instrument choices do also bear consequences for individuals and their representing Environmental Non-Governmental Organisations (ENGOs), particularly in view of the concept of direct effect. The use of Framework Directives, for instance, implies that citizens and ENGOs cannot derive much environmental protection directly from the content of the EU law, since measures for reaching substantive environmental protection are dependent on further implementing decision making by Member States.

This book aims to provide a further understanding and discussion of the ‘legal’ ecosystem of EU environmental law. Fisher and others have observed that there is ‘too much focus on identifying particular species of tree and not enough on analysing how particular identified species interact with the rest of the “legal” ecosystem’.1 Indeed, the EU has produced hundreds of environmental secondary laws, mostly directives, imposing an immense number of environmental obligations. Moreover, as we will see in this book, the nature of such obligations varies widely, leading to different legal consequences for Member States and citizens. Given the complexity and breadth of the whole environmental problem, the ideal of a clear, transparent, and easy to understand, environmental legislative package is illusionary. This also poses a huge challenge to environmental law scholars who wish to discuss EU environmental law. The structure of EU environmental law means that these discussions are often sectorial, focusing on a specific environmental item. Next to sector-wise laws, we also see the emergence of horizontal approaches such as the environmental impact assessment provision, procedural provisions and an environmental liability regime. Horizontal approaches give one common provision applicable to several environmental subdomains. An example is the Environmental Liability Directive, which provides common rules aimed at the prevention and restoration of

1 Fisher et al. (2009) 141.
environmental damage to nature, water and soil. Also these horizontal approaches get specialist discussion. To put it in another way: it is practically impossible to be an Aarhus Convention specialist, an environmental impact assessment and an environmental liability specialist all at the same time. Hence, it is our opinion that thorough discussions of EU environmental law can only be done in groups, where specialists are brought together and where on the basis of their considerations more general conclusions can be drawn. This also means that a book is needed in order to discuss EU environmental law properly, since the reach of one article in a journal is just too limited. This book concentrates on cross-cutting themes like the choice of instruments and the striving for coherency. At the same time, we, as editors, want to be modest in our promises. While this book discusses several important elements of EU environmental law brought together in one overarching final concluding chapter, much more needs to be done for an integrated and deep discussion of EU environmental law. Hence, this book is intended to serve as a building block for understanding and improving the legal ecosystem of EU environmental law.

2. STRUCTURE AND APPROACH

The book is divided into four parts and 11 chapters, the first part containing this editorial introduction. The second part, Cross-cutting Issues, discusses three important and general issues of EU environmental legislation: the proceduralisation of environmental law, the use of Framework Directives, and the need for coherency within EU environmental law. In Chapter 2, Saskia van Holten and Marleen van Rijswick discuss and review the ‘proceduralisation’ in EU environmental law, which is a governance approach that aims to leave much discretion to Member States in order to develop substantive policies that fit to specific circumstances. They examine whether this governance approach is indeed more flexible, effective and legitimate for the effectuation of environmental policies. Three different styles of directives are discussed, varying from a classical, to a governance, to an intermediate approach. Focal legal points are the level of effective legal protection, flexibility with regard to standard setting and legitimacy (both legal and political).

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Chapter 3, by Mireille Bogaart, then moves on with an in-depth discussion of the use of Framework Directives by the EU legislator, thereby seeking to clarify, also from the perspective of the principles of subsidiarity and proportionality, what exactly can be understood by the term ‘Framework Directive’. Practice shows that the Framework Directive is not a uniform concept and the diversity between various framework directives is considerable. The chapter will provide a recommendation towards a more precise use of the term Framework Directive. Chapter 4, by Barbara Beijen, discusses the short-fall in coherency of the EU legal ecosystem, especially caused by a lack of a consistent use of terminology and definitions and also the short-fall in fine-tuning of directives. These problems are illustrated by examples from several environmental directives, and potential improvements such as the use of Framework Directives and Daughter Directives, delegated legislation and the recasting of directives are discussed. The chapter comes with an interesting recommendation, which is the introduction of an overall Environmental Framework Directive, in which terms and instruments which are used in different policy areas within the field of environmental law could be clarified.

Part III, Specific Regulatory Choices, then turns to a case-based discussion of regulatory choices embedded within EU environmental legislation. The first chapter in this Part (Chapter 5 from Frans Oosterhuis and Marjan Peeters) deals with the principle of ‘internal integration’ in EU pollution prevention and control policy. ‘Internal integration’ is the simultaneous consideration of different environmental aspects in environmental policy, in this case more specifically in environmental permitting, as required under the Integrated Pollution Prevention and Control and the Industrial Emissions Directives. The authors discuss in a critical sense whether the aim of integration and the assumed ecological and economic benefits can really be achieved, and point to several unclear elements in the legal framework, including the potential role of judicial control. Chapters 6 and 7 both address the interpretation and flexibility of standards of EU-directives. Chapter 6, from Frank Groothuijsen and Rosa Uylenburg, focuses on the flexibility given to Member States in making regulatory choices to achieve the environmental quality standards laid down in EU directives. They investigate not only the possibilities of restrictions in European law, but also the possible hurdles in national law, for a programmed approach to achieve the environmental quality standards. Jasper van Kempen in his contribution (Chapter 7) discusses the environmental objectives in the Water Framework Directive as a case study. He makes a critical analysis of the differences between obligations of result and obligations of best effort and presents a methodology for
deciding whether a provision must be interpreted as an obligation of result or of best effort.

Chapter 8 (written by Marjan Peeters) turns to a cross-cutting discussion of EU climate and energy legislation, thereby questioning whether the mix of instruments can be simplified not only with a view to reducing complexity and implementation burdens for Member States, but also in view of reaching an equal treatment among greenhouse gas emitters across the EU. The next chapter by Andrea Keessen (Chapter 9) complements the previous chapter discussing the legislative approach to mitigation of climate change, with a discussion on the legislative strategy for adaptation to climate change. Many European countries have already developed national and regional adaptation strategies, and there are only a few binding EU rules in this field. From a legal perspective, it is interesting to understand to what extent the EU has the competence to plan for adaptation and how the EU would embed adaptation in the current legal framework. This chapter discusses whether an Adaptation Framework Directive should be preferred. Elizabeth Vogelezang-Stoute (in Chapter 10) analyses three different approaches for the EU to regulate a new technology: nanomaterials. She investigates the ‘incremental approach’, the ‘product-specific approach’ and the ‘precautionary approach’. An incremental approach implies that existing legislative structures are used to regulate the new technology. A product-specific approach means that provisions are made for specific product categories. The ‘precautionary approach’ means a comprehensive and in-depth balancing of the opportunities and risks of the new technology.

Part IV, the concluding part, wraps up the findings of the book and will bring the several chapters together in three core themes: (1) law as an instrument; (2) coherency; and (3) rights and effectiveness.

The chapters can also be presented in a different way, depending on whether they discuss current law or potential law. The following chapters will discuss regulatory choices that have been adopted at the EU level, particularly by the use of a proceduralised approach (Chapter 2); by Framework Directives (Chapter 3); but also by introducing integrated permits (Chapter 5); the use of obligations of best efforts and obligations of result (Chapter 7); and the use of a mix of instruments (Chapter 8). Other chapters explore regulatory choices that could be made, thereby discussing the option of an Environmental Framework Directive (Chapter 4); a programmed approach at the national level (Chapter 6); the option of an Adaptation Framework Directive (Chapter 9); and the option to have an effective and comprehensive regulation of nanomaterials (Chapter 10).
3. IUS COMMUNE CONTRIBUTORS AND WORDS OF THANKS

This book represents the research activities of a large group of environmental law academics who co-operate under the umbrella of the Transboundary Environmental Law Research Group of the Ius Commune research school. This research group consists of more than 40 researchers from several countries, mostly from the Netherlands and Belgium, but increasingly from other countries, which meets at least once every year in order to discuss research results and research plans. A core focus is the education and guidance of PhD-students in the field of environmental law. While environmental law research has come increasingly under pressure in some EU countries because of budget problems, this group has so far survived the financial crisis that has also particularly faced academic institutions in the Netherlands. Two meetings of this group have been dedicated to deepening thought on the quality and complexity of EU environmental law. The first one was organised at the Catholic University in Leuven in 2011, and the second at Utrecht University in 2012. This book represents the outcomes and views of this research process. The research for most of the contributions was concluded in 2012.

All the researchers that have contributed to this book are connected to institutes that are members of the IUCN Academy of Environmental Law. It is certainly our intention to discuss the experiences of EU environmental law with other parts of the world, particularly in emerging countries where environmental laws are developing quickly. Hence, we hope that this book will not only be valuable for inside discussions on the legal quality of EU environmental legislation, but also support discussion of how to develop or improve environmental laws in countries outside the EU. Of course, vice versa, we hope to learn from high level legal approaches in these countries as well. We look forward to receiving comments on our work.

Finally, the editors want to sincerely thank the participants in the Ius Commune conferences for their critical questions and comments on the presented research papers. Much appreciation goes to the contributors for their efforts and for being both patient and supportive during the intensive editorial process. Many thanks go to Yuan Gao, PhD student at

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4 See also Van Rijswick (2012).
Maastricht University for practical work regarding the list of abbreviations. Finally, we are most grateful to our publisher Edward Elgar for kind, professional and efficient support in the publication of this book.

BIBLIOGRAPHY


