ESMA.[53] But the fiscal constraint remains real and is well reflected in the location of supervision over CCPs at national level under EMIR, albeit that supervision is coordinated through colleges of supervisors given the potential CCPs have for massive and destabilizing cross-border systemic risk.

The range of channels through which ESMA can influence national supervisory decisions remains, however, significant. It may accordingly be that it is in this more humdrum sphere that changes in the location of supervisory control are most likely to occur over time and where ESMA's influence may be felt most strongly.

The global financial crisis has reordered the location of regulatory and supervisory control over EU financial markets in favour of the EU. The implications of this reordering for financial market efficiency and stability are still unknown. But it is relatively clear that significant new lines of tensions between the EU and its Member States have been exposed, including with respect to the international market, the integrity of the internal market, and the location of direct supervisory powers. As the crisis-era recedes, whether these tensions increase and how they are managed is likely to have a material impact on the post-crisis development of EU financial market regulation.

Niamh Moloney*

II. SURVEYING THE STATE OF EU ENVIRONMENTAL LAW: MUCH BARK WITH LITTLE BITE?

I. INTRODUCTION

In the three years since last surveyed in the Quarterly,[1] EU environmental law has continued to justify its reputation as one of the most fast-moving fields of EU law, with a large number of highly significant legislative and jurisprudential developments. This review selects some of the most important areas of development in the field in recent years: in particular, the EU's new environmental action programme for 2013–20, EU climate and energy law, environmental governance and enforcement, and integration of environmental concerns into other EU policy areas.

II. THE EU'S NEW ENVIRONMENTAL ACTION PROGRAMME (2013–20)

Overarching all of the EU's activity in environmental law and policy is the EU's multi-annual Environmental Action Programme (EAP), setting out the key priorities and vision of the EU's environmental policy activity. Since the first EAP was drawn up by the Commission in 1973, the legal status and policy significance of EAPs has increased dramatically, helped by the formalization of their legal basis within what is now Article 192(3) TFEU. Pursuant to this provision, EAPs are adopted in the form of a

[53] See n 43.

* Professor of Law, London School of Economics, n.moloney@lse.ac.uk.

[1] S Kingston (2010) 59 ICLQ 1129.

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Decision of the European Parliament and the Council following the ordinary legislative procedure. As the sixth EAP expired in July 2012, it was incumbent on the EU institutions to come up with a successor defining the parameters of EU environmental activity over the years to come.

After some delay, the Commission finally published a proposal for the seventh EAP in November 2012, which expressly recognized that the sixth EAP had not managed to stem the 'unsustainable trends' which persisted in all four of that EAP's priority areas: climate change, biodiversity, environment and health, and sustainable use of natural resources/waste management.[2] The seventh EAP, on which political agreement was reached in June 2013,[3] identifies nine priority objectives for the EU's environmental policy up to 2020, ranging from the relatively specific (eg protecting the Union's natural capital) to the extremely general (eg turning the Union into 'a resource-efficient, green and competitive low-carbon economy'). In contrast to the 10-year lifespan of the sixth EAP, the seventh EAP will last only from the second half of 2013 to 2020, due to the delay in its adoption combined with the EU institutions' eagerness to coordinate this policy instrument with the several other high-level EU policy initiatives relevant to the field, in particular the EU's Resource Efficiency Roadmap,[4] about which more below, and the 2020 Biodiversity Strategy.[5]

While much of the language used in the seventh EAP is predictably woolly in a high-level instrument of this nature, it does contain some more useful specific elements, including agreement on extending binding EU criteria for environmental inspections to a larger number of legislative areas (discussed further below). In several controversial areas, however, (for instance, on the issue of a potential and long-awaited EU Directive on Soil) no firm political agreement could be reached on language that would commit the EU to legislative action within this period. Nonetheless, the text was broadly welcomed by the environmental community as an improvement on the Commission's original proposal.[6]

III. CLIMATE CHANGE AND ENERGY

Perhaps the most intensive flurry of activity in the EU's environmental policy within the past few years has occurred in the area of climate and energy policy. Externally, the EU has liked to see itself as leader on the climate issue.[7] In the context of the United Nations Framework Convention on Climate Change (UNFCCC), the EU has generally been a strong supporter of a robust multilateral framework, and supported the extension of the

[2] European Commission, Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020, 'Living Well, within the Limits of Our Planet' COM (2012) 710, at recital 4 to the Preamble.

[3] See Commission Press Release, MEMO/13/591 of 20 June 2013.

[4] Commission Communication, 'Roadmap to a Resource Efficient Europe' COM (2011) 571; Commission Communication, 'A Resource Efficient-Europe: Flagship Initiative under the Europe 2020 Strategy' COM (2011) 21.

[5] Commission Communication, 'Our Life Insurance, Our Natural Capital: An EU Biodiversity Strategy to 2020' COM (2011) 244.

[6] See European Environment Bureau, 'Europe Adopts a New Plan to ''Live Well, within the Limits of Our Planet''', 20 June 2013, available at <http://www.eeb.org/index.cfm/news-events/> accessed 25 July 2013.

[7] See J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) 23(2) EJIL 469.

Kyoto Protocol, as the only legally binding instrument extant under the UNFCCC, for a second commitment period at the seventeenth Conference of the Parties in Durban.[8] It has also been one of the largest contributors to the finance of climate-related projects, including through its Global Climate Change Alliance, through which €280 million was given to projects in least-developed countries and small island developing states between 2008 and 2012. In February 2010, the importance of climate policy to the EU was marked at an institutional level by the creation of a specific directorate-general of the European Commission devoted to climate issues (abbreviated as DG CLIMA). From this point onwards, it has been DG CLIMA (rather than DG Environment) which is responsible for matters such as leading the EU's climate negotiations in international fora, proposing new legislative initiatives in the climate field, and monitoring Member States' implementation of EU climate legislation.

The creation of DG CLIMA followed the publication of the EU's flagship climate and energy package in 2009, aimed at reaching the so-called 20-20-20 targets by 2020 (ie achieving at 20 per cent reduction in the EU's greenhouse gas (GHG) emissions compared to 1990 levels, achieving a 20 per cent share of the EU's energy consumption for renewables and achieving a 20 per cent improvement in the EU's energy efficiency).[9] In concrete terms, the 2009 climate and energy package comprised four specific legislative measures:

- A revision to the 2003 Emissions Trading Scheme (ETS) Directive,[10] which revision took the form of Directive 2009/29;[11]
- The institution of binding targets for Member States in the non-ETS sector, in the form of the so-called Effort Sharing Decision;[12]
- A renewable energy directive, including binding national targets concerning the proportion of overall energy consumption comprised by renewable energy in each Member State;[13] and

[8] See further, L Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61 ICLQ 501. The rules for the second commitment period of Kyoto were agreed upon at the subsequent COP, COP 18, at Doha in 2012.

[9] See Presidency Conclusions of the Council of the EU, 13 February 2009, 17271/1/08. The EU is generally thought to be on course for meeting these objectives. See further the Technical Report No 8/2013 of the European Environment Agency to the UNFCCC, 'Annual European Union Greenhouse Gas Inventory 1990–2011 and Inventory Report 2013', showing that, in 2011, the EU's total GHG emissions were 18.4 per cent below 1990 levels, although this excludes emissions from aviation. In 2013, the Commission published a Green Paper setting out its first thoughts on the successor to the 20-20-20 targets (and accompanying strategies), which would steer its climate and energy policies up to 2030: Commission Green Paper, 'A 2030 Framework for Climate and Energy Policies COM (2013)' 169.

[10] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC OJ 2003 L 275/23.

[11] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community OJ 2009 L 140/63.

[12] Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 OJ 2009 L 140/136.

[13] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC OJ 2009 L 140/16.

- A directive on carbon capture and storage, ie regulating the process whereby carbon emissions are captured and stored underground with the aim of reducing GHG emissions.[14]

Subsequent developments in these and other climate-related areas are considered further below.

A. The EU's Emissions Trading Scheme (ETS)

Dealing first with the revision to the EU ETS, the 2003 ETS Directive had created the world's first international ETS covering, at least in its initial incarnation, carbon dioxide emissions from around 11,000 large industrial installations (essentially, those covered by the EU's Integrated Pollution Prevention and Control (IPPC) Directive),[15] amounting to around 40 per cent of the EU's total GHG emissions. As is well known, the aim of the EU ETS is essentially to put a price on GHG emissions, thus incentivizing operators to reduce such emissions in a cost-effective way. The 2009 revision to the 2003 Directive, Directive 2009/29, amended the scheme in several significant ways for Phase III of its existence (2013–20)[16] including a shift away from free allocation of EU allowances towards auctioning,[17] the extension of the scope of the EU ETS to new industries (such as the aluminium industry) and new gases (nitrous oxide and perfluorocarbons),[18] the extension of the length of validity of allowances to eight years,[19] and the restriction of the use of certain international offset credits, ie credits obtained by reductions flowing from projects located outside the EU.[20] Crucially, the system for allocation of allowances to emit greenhouse gases is now centralized at EU level, with a cap on allowances allocated that decreases year-on-year by 1.74 per cent.[21] The 2009 revision to the ETS Directive followed on from a 2008 Directive by which aviation activities were included within the scheme,[22] to the consternation of the airline industry, as discussed further below.

At the time, the 2009 revision to the Directive was largely welcomed as a major step towards improving the effectiveness of the EU's carbon market, which had up to that point suffered what many perceived merely to be teething problems, including a persistently low carbon price due in part to over-allocation of allowances by Member States (which, under the original Directive, had been competent for allowance

[14] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 OJ 2009 L 140/114.

[15] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control OJ 2008 L 24/8 (now replaced by Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) OJ 2010 L 334/17).

[16] See further Kingston (n 1) 1132–3.

[17] See arts 10, 10a and 10c of the EU ETS Directive, as amended.

[18] See Annex I of the EU ETS Directive, as amended.

[19] See art 13 of the EU ETS Directive, as amended.

[20] See art 11a of the EU ETS Directive, as amended.

[21] See art 10(2) of the EU ETS Directive, as amended.

[22] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community OJ 2008 L 8/3.

allocation). Yet, since the 2009 Directive's publication, the ETS has continued to be plagued with difficulties, which have lasted into Phase III of the scheme thus far. Foremost among these difficulties has been the continued descent of the EU carbon price, which plummeted to under €3.00 in the early months of 2013, in circumstances where it became evident that, in the context of a serious economic recession, the supply of allowances allocated to installations far exceeded demand. The Commission's effort to restore the credibility of the market by 'backloading' the market, such that the sale of 900 million allowances would be delayed until the end of Phase III, was initially rejected by the European Parliament,[23] but was subsequently accepted subject to amendments, and is currently before the Council. The EU is also currently seeking to limit oversupply of allowances from the use of carbon offsets from the UNFCCC's flexible mechanisms (the clean development mechanism and joint implementation scheme), by placing a cap on the use of such credits in Phase III of the EU ETS.[24]

Such efforts, however, must be viewed in the context of the lengthy list of sectors which are awarded more allowances free of charge pursuant to Article 10a(12) of the ETS Directive, having been deemed to be exposed to significant risk of carbon leakage (ie significant risk to their competitiveness in circumstances where they face competition from industries in third countries not subject to comparable ETS obligations).[25] Pursuant to Article 10a(6) of the ETS Directive, Member States may also compensate the most electro-intensive industries for increases in electricity costs resulting from the ETS, as long as this is done in a manner compatible with the EU State aid rules.[26]

Aside from the pricing/oversupply issue, the ETS has also suffered from serious difficulties relating to fraud which, while not directly undermining the environmental integrity of the scheme in terms of oversupply of allowances, have raised major question marks against the credibility of the EU's carbon market more generally. In particular, the EU ETS has been used for wide-scale VAT fraud, in the form of bogus 'carousel' schemes peaking in 2009 and made possible by the divergent VAT treatment of EU allowances across Member States (estimated to have cost EU governments around €5 billion in total), giving rise to a concerted police response across the EU and internationally involving thousands of officers.[27] Separately, large volumes of ETS allowances have been stolen from the registry accounts in which they are kept, peaking

[23] See Commission Proposal to Amend Regulation 1031/2010 in particular to determine the volume of greenhouse gas emissions allowances to be auctioned in 2013–20, available at <http://ec.europa.eu/clima/policies/ets> accessed 25 July 2013.

[24] See draft Commission Regulation on determining international credit entitlements pursuant to Directive 2003/87/EC of the European Parliament and of the Council, 5 June 2013, available at <http://ec.europa.eu/clima/policies/ets> accessed 25 July 2013. The draft Regulation was approved by the EU's Climate Change Committee on 10 July 2013.

[25] A list of sectors exposed to significant risk of carbon leakage was drawn up in 2009, and has been amended multiple times since, upon a proposal from the Commission and approval of the EU Climate Change Committee, and in the absence of objection from the Council and European Parliament within three months. The Commission is obliged to draw up a new list every five years: art 10a(13), ETS Directive.

[26] See the Commission Communication Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012, SWD (2012) 131.

[27] See Europol Press Release, 'Further Investigations into VAT Fraud Linked to the Carbon Emissions Trading System, 28 December 2010.

at the end of 2010 and beginning of 2011, when allowances to a value of over €30 million were stolen. This was done largely by means of cyber hacking of national registries in Austria, Poland, Greece, Estonia and the Czech Republic, forcing the European Commission to suspend carbon trading temporarily[28] and leading to damages claims against the EU before the EU courts.[29]

A further development of note in relation to the EU ETS has been the increasing role of the Court of Justice of the European Union (CJEU) in policing the legality of the scheme's regulatory framework. As already reported in the Quarterly,[30] the first generation of EU ETS cases that found their way before the CJEU comprised Member State challenges to Commission decisions on their national allocation plans proposed for Phases I and II of the EU ETS. While these cases remain interesting in demonstrating how intensively the CJEU was willing to review Commission decisions of an essentially economic nature *qua* market regulator (answer: rather surprisingly intensively),[31] they will generally be of less direct significance with regard to the post-Phase II, centralized allocation, regulatory framework.[32] However, we are already now seeing judgments on the Phase III regulatory framework starting to appear. One of the first of these has been the General Court (GC)'s March 2013 judgment in *Poland v Commission*, in which Poland sought unsuccessfully to challenge the Commission's decision as to the transitional measures for harmonized free allocation of allowances, taken pursuant to art 10a of the ETS Directive.[33] In rejecting Poland's arguments that the Commission had not sufficiently taken into account differences between Member States and regions (in particular, Polish dependency on coal) and had gone beyond what was necessary to achieve the directive's aims, the GC distinguished its Phase I and II judgments on the basis that, in these Phases, the margin of discretion left to Member States in transposing the ETS Directive was far greater.[34]

The most notable CJEU judgment on the EU ETS to date, however, is indisputably the *ATA* judgment,[35] where a challenge by the Air Transport Association of America and a number of US airlines to the inclusion of third country airlines within the scope of

[28] See eg J Chaffin, 'Cyber-Theft Halts EU Emissions Trading', *Financial Times*, 19 January 2011.

[29] Case T-317/12 *Holcim Romania*, pending.

[30] Kingston (n 1) 1133.

[31] See eg Case T-183/07 *Poland v Commission* [2009] ECR II-3395 (Commission reduction of industry emission caps by 26.7 per cent annulled—appeal to CJEU dismissed March 2012 in Case C-504/09 P); Case T-263/07 *Estonia v Commission* [2009] ECR II-3463 (Commission reduction of industry emission caps by 47.8 per cent annulled—appeal to CJEU dismissed March 2012 in Case C-505/09 P); see also cases brought in relation to Bulgaria (T-499/07 OJ 2010 C 246/39), Romania (T-484/07 OJ 2012 C 258/27), Lithuania (T-368/07 OJ 2011 C 340/32), Latvia (T-369/07 [2011] ECR II-1039), Hungary (T-221/07 OJ 2013 C 171/40).

[32] Some earlier cases are, however, clearly still relevant: see, for instance, Case C-524/09 *Ville de Lyon* [2010] ECR I-4115, where the Fourth Chamber of the CJEU rejected, on confidentiality grounds, the claim that an administrator of a national registry of ETS allowances should be obliged to give out details of ETS trading data, account holders and the like in the medium term after completion of the relevant transactions.

[33] Case T-370/11 *Poland v Commission* [2013] ECR II-0000. See also the pending cases C-566/11, 580/11, 620/11 and 640/11 (preliminary references from Spanish courts on the interpretation of art 10 of the ETS Directive); C-203/12 (Swedish reference on the circumstances in which a penalty must be imposed where the operator's failure to surrender was accidental) and T-317/12 *Holcim Romania* (non-contractual liability of the EU for theft of carbon allowances).

[34] Case T-370/11 *Poland v Commission* ibid, paras 52–53.

[35] Case C-366/10 *ATA* [2011] ECR I-0000.

the ETS failed. In a lengthy and complex judgment, the Grand Chamber of the CJEU held that the application of the EU ETS to third country airlines was compatible with international law and, in particular, with the principle of territoriality, given that the scheme only applies to commercial aircraft that arrive at or depart from a Member State airport.[36] Nor did the fact that the ETS applied to the whole of the aircraft's journey (not just that which occurred over EU territory) affect this conclusion, given the EU's objective under Article 191(2) TFEU of achieving a high level of environmental protection and its status as a party to the UNFCCC.[37] The CJEU also considered that the extension to third country operators did not infringe the more specific relevant instruments of international law, viz. the Chicago Convention (on the ground that the validity of EU law cannot be reviewed in the light of that Convention)[38] and the Open Skies Agreement between the US and EU (on the ground that the extension was compatible with the EU's obligation to exempt the fuel load from taxes, fees and charges on fuel).[39] As Gattini has noted in this Quarterly,[40] the judgment was highly controversial, and has contributed to a major dispute with the vast majority of members of the International Civil Aviation Organization (ICAO), leading to the EU's April 2013 decision temporarily to suspend the enforcement of third country aircraft operators' ETS obligations and the requirement to report carbon emissions for flights between EU airports and third countries, pending efforts to agree a deal at international level in the ICAO.[41] At the time of writing, however, it is far from clear that ICAO efforts to agree on an international market-based mechanism for aviation emissions will succeed.[42] Separately, European low-cost air carriers have declared their intention to challenge the decision to exempt third country carriers temporarily from the ETS, meaning that this issue is likely once again to end up before the CJEU.[43]

B. Renewable Energy, Energy Efficiency and Energy Taxation

As noted above, the EU's 2009 renewable energy (RES) directive formed a key plank of the 2009 climate and energy package, setting mandatory individual national targets for Member States with the aim of reaching a 20 per cent EU-wide share of energy from renewable sources by 2020 overall, and a mandatory 10 per cent target for each Member State in the transport sector.[44] This is to be done, *inter alia*, via the adoption of national renewable energy action plans to cover the period to 2020, which were to be notified to the Commission by June 2010. In contrast to the position in relation to ETS national

[36] ibid, para 127.
[37] ibid, para 128.
[38] ibid, para 72.
[39] ibid, para 145.
[40] A Gattini, 'Between Splendid Isolation and Tentative Imperialism: The EU's Extension of Its Emission Trading Scheme to International Aviation and the ECJ's Judgment in the ATA Case' (2012) 61 ICLQ 977.
[41] See Council Press Release of 22 April 2013 8621/13.
[42] See the resolution of the International Air Transport Association at its sixty-ninth annual general meeting, backing a single carbon offsetting scheme (but not a cap-and-trade scheme) for its emissions from 2021, available at <http://www.iata.org> accessed 25 July 2013.
[43] See ENDS Europe, 'EU Low-Lost Airlines to Challenge ETS Exemption', 20 February 2013.
[44] RES directive (n 13) art 3. See also art 7d(6) of the Fuel Quality Directive, Directive 2009/30/EC OJ 2009 L 140/88, which introduced the mandatory target of achieving by 2020 a 6 per cent reduction in the greenhouse gas intensity of fuels used in road transport and non-road mobile machinery.

allocation plans in Phases I/II, however, the Commission was only granted the power to issue a recommendation on foot of an evaluation of national renewable energy action plans—and not the power of approval per se.[45] The RES directive also contained various innovative methods of encouraging cooperation between Member States in meeting their targets, via statistical transfers of renewable energy between Member States,[46] joint projects between Member States and between Member States and third countries,[47] and joint national (financial) support schemes.[48] These methods must be viewed in the context of the broader efforts to achieve an EU internal market in electricity, in line with the EU's three successive legislative packages to achieve a single market for gas and electricity in the EU.[49] In its 2011 Communication on 'Progressing towards the 2020 Target in renewable energy', the Commission reported that, on the basis of the national renewable energy action plans submitted at that date, the EU should surpass the 20 per cent target of the overall share of renewable energy set by the 2009 climate and energy package by 2020, performing particularly strongly in relation to electricity (renewable energy is predicted to constitute 37 per cent of Europe's electricity mix by 2020).[50]

The extent to which biofuels can be used to satisfy Member States' renewables targets has been a sensitive topic. Article 17 of the RES Directive established a range of sustainability criteria that must be satisfied in this regard,[51] including minimum GHG saving thresholds, but did not deal with GHG emissions stemming from indirect changes in land use caused by switching to biofuel production (eg the clearance of land with high carbon content, such as forests, in order to plant biofuel crops). This issue is now the subject of a 2012 Commission Proposal, which seeks to include emissions from indirect land-use change in the reporting requirements in relation to biofuels and, from 2020, to ensure that only biofuels that lead to substantial GHG savings when emissions from indirect land-use change are included, and are not produced from crops used for food and feed, should be subsidized.[52]

Overall, the relationship between national efforts to achieve renewable energy goals, and the EU internal market for electricity, remains at times a tense one, in circumstances where Member States may attempt to give preference to domestically produced renewable energy over energy produced in other Member States. Ultimately, this can lead to a clash between national renewable energy laws and EU internal market law, as illustrated by the pending case on the validity of Belgian renewable energy rules before the CJEU, *Essent Belgium*.[53] The May 2013 Opinion of Advocate General Bot concludes that the Belgian rules at issue, whereby only Belgian-produced renewable energy could be taken into account in determining whether Belgian electricity producers had satisfied their renewable obligations, breached EU internal market law. This was so,

[45] RES Directive, art 3(5).
[46] ibid, art 6.
[47] ibid, arts 7–10.
[48] ibid, art 11.
[49] See, in relation to electricity, the most recent Directive, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC OJ 2009 L 211/55.
[50] COM (2011) 31, 5.
[51] See S Switzer and J McMahon, 'EU Biofuels Policy: Raising the Question of WTO Compatibility (2011) 60(3) ICLQ 713.
[52] Proposal for a Directive of the European Parliament and the Council amending Directive 98/70/EC and Directive 2009/28/EC, COM (2012) 595.
[53] Joined Cases C-204/12 to 208/12, pending.

he reasoned, particularly as the EU internal electricity market has now developed far enough to make it possible to verify whether electricity produced in other Member States comes from renewable sources.[54] In so holding, the Advocate General observed that what had previously been the leading judgment on the compatibility of national renewable energy legislation with EU internal market rules, *PreussenElektra*,[55] was no longer good law given the evolution in the electricity internal market in the interim.[56]

Two months later, Advocate General Jääskinen handed down an important opinion in a further case concerning the renewable energy/internal market interface, *Vent de Colère*.[57] This case concerns the question whether French legislation obliging electricity distributors to purchase wind energy at a higher price than the normal market price constitutes State aid within the meaning of Article 107(1) TFEU, where the costs ensuing from this purchase obligation are compensated by a public fund to which electricity producers, suppliers and distributors contribute, and are passed on to consumers via a uniform and generally applicable charge. In finding that the French law constituted State aid, the Advocate General once again distinguished the German feed-in tariff at issue in *PreussenElektra*, this time on the ground that all French electricity consumers were obliged to pay the charge financing the purchase obligation at issue—irrespective of whether they actually chose to purchase renewable energy.[58] If the Court follows this Opinion, it would mean that the French wind energy promotion scheme, in operation since 2000, constitutes illegal aid within the meaning of the CJEU's jurisprudence, meaning that it may (depending on the approach taken by the referring Court, the Conseil d'État) need to be repaid along with interest on the amounts due.[59]

The judgments of the Court in *Essent Belgium* and *Vent de Colère* will, therefore, be vital in marking the continuing evolution of the renewables/internal market interface in EU law. Despite the strong pressure from the EU to promote national climate and renewable action, it is clear that Member States will have to tread very carefully to ensure they remain within the limits of EU internal market, including State aid, law. A striking illustration of this is the CJEU's judgment in the Dutch nitrous oxide emissions trading case,[60] where the CJEU overturned the General Court's judgment finding the Dutch nitrous oxide emissions trading scheme, applicable prior to the inclusion of nitrous oxide within the EU ETS, not to constitute State aid. In particular, the CJEU held that, as only the largest polluters came within the scope of the scheme, the fact that they had been assigned tradable emissions rights free of charge for the purpose of participating in the scheme constituted an advantage for these polluters which had not been awarded to smaller polluters, and such advantage amounted to State aid within the meaning of Article 107(1) TFEU. The judgment means that it will be almost impossible for a Member State to design a workable national emissions trading scheme on the basis of (initial) free allocation of allowances, and this despite the fact that the Dutch scheme was aimed at implementing an EU Directive setting a cap on national nitrous oxide emissions.[61]

[54] Opinion, para 103.
[55] Case C-379/98 [2001] ECR I-2099.
[56] Opinion, para 102.
[57] Case C-252/12, Opinion of 11 July 2013.
[58] ibid, para 50.
[59] ibid, para 67.
[60] Case C-279/08 *Commission v Netherlands* [2011] ECR I-7671.
[61] Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants OJ 2001 L 309/22. See further - S Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011) ch 12.

Aside from these important CJEU developments, the Commission, which is tasked with taking the initial decision on whether a national measure is compatible with EU State aid law, is currently consulting on the revision of its Guidelines on the application of the EU State aid rules to national measures promoting environmental protection. The last version of these Guidelines appeared in 2008, and announced how the Commission would approach a wide variety of national environmental protection measures, including measures promoting climate action and renewable energy.[62]

Further important elements of the EU's drive to achieve the 20-20-20 targets have been its 2011 Energy Efficiency Plan[63] and the 2012 Energy Efficiency Directive,[64] although these are not formally part of the 2009 Climate and Energy Package discussed above. While the Energy Efficiency Directive does not itself include specific national binding targets for energy efficiency improvement, it obliges Member States to set 'indicative' national targets taking into account, *inter alia*, the EU's target of improving efficiency by 20 per cent by 2020.[65] It also obliges Member States to draw up a national long-term strategy for renovating buildings to improve energy efficiency, and requires Member States to ensure that, from 1 January 2014, 3 per cent of public bodies' buildings is renovated annually to meet the minimum energy performance requirements set out in the EU's 2010 Directive on the energy performance of buildings.[66] In a further confirmation of the central role that the EU sees for market-based environmental policy instruments in Europe, the Directive contains an innovative provision obliging Member States to create national energy efficiency obligation schemes, but expressly allowing them to employ a variety of market-based measures (such as transferable certified energy savings, energy and carbon taxes, and voluntary environmental agreements) in implementation of, or as an alternative to, such schemes.[67] However, in spite of this support for national energy taxes, the EU continues to have difficulty in progressing proposals in relation to a harmonized EU-level energy tax, due to the need for unanimity within the Council in order for such a measure to pass. Following an unsuccessful 1992 Commission proposal on the matter,[68] and a 2003 Directive leaving much leeway to Member States in the field,[69] the Commission's newest (2011) Proposal[70] is currently stalled in the Council.[71]

[62] OJ 2008 C 82/1.

[63] COM (2011) 109. The Plan takes its place alongside a raft of rather aspirational policy documents, looking beyond 2020 targets, released by the Commission in 2011: see Commission Communication, 'Roadmap to a Resource Efficient Europe' COM (2011) 571, a policy document outlining plans how the EU economy can be made sustainable by 2050, and Commission Communication, 'Roadmap for Moving to a Competitive Low Carbon Economy in 2050' COM (2011) 112.

[64] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC OJ 2012 L 315/1.

[65] Art 3.

[66] Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings OJ 2010 L 153/13.

[67] Art 7.

[68] COM (1992) 226.

[69] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity OJ 2003 L 283/51.

[70] COM (2011) 169.

[71] See Council of the EU, Irish Presidency Note, 'Energy Taxation Directive: State of Play', 12 June 2013, 10825/13.

C. Other EU Climate Initiatives

A variety of other important developments in EU climate law have taken place in the past three years. In April 2013, the Commission adopted the EU's first strategy on adaptation to climate change, which recognizes that the primary locus for action in relation to adaptation will generally be Member States, with the exception of a number of climate-vulnerable sectors of EU competence, namely agriculture, fisheries and cohesion policy.[72] The strategy encourages all Member States to draw up adaptation strategies (at the time of its publication, only 15 had such strategies) and strengthens the availability of information on national adaptation regulation via the EU's adaptation platform, Climate-ADAPT. Separately, the EU has also strengthened its legal framework for monitoring GHG emissions, via the adoption of a new 2013 Monitoring Mechanism Regulation aimed at improving the quality of data reported via the UNFCCC process, as well as extending the scope of reporting obligations (for instance, to encompass national use of revenues from EU ETS auctioning).[73] Further, Member States are, from 2013, for the first time obliged to report GHG emissions and removals resulting from land use, land-use change and forestry (LULUCF), in implementation of a decision taken at COP-17 of the UNFCCC at Durban.[74] The Commission has also proposed that, for the first time, the maritime transport sector (in particular, large vessels) should be subject to GHG emissions reporting obligations.[75]

A final development of note is the Commission's 2013 Consultative Communication on carbon capture and storage (CCS).[76] Despite the fact that the EU has been first mover internationally in promulgating CCS legislation with the aim of promoting the use of CCS technology as a potentially important limb of the EU's climate policy,[77] these efforts have thus far fallen rather flat. Not a single CCS project was funded under the first round of the EU's low-carbon funding facility NER300 in 2012, which is financed by funds generated by sales of EU ETS allowances, and under which €1.5 billion was available in total.[78] Only one CCS project has been put forward under the second round of NER300 funding, the results of which are due to be announced in

[72] COM (2013) 216. See also, Conclusions of the Council of the EU of 18 June 2013, 11151/13, emphasizing the importance of private sector initiatives such as insurance to deal with adaptation, and the importance of mainstreaming climate objectives within the EU budget.

[73] Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC OJ 2013 L 165/13.

[74] Decision No 529/2013/EU of the European Parliament and of the Council of 21 May 2013 on accounting rules on greenhouse gas emissions and removals resulting from activities relating to land use, land-use change and forestry and on information concerning actions relating to those activities OJ 2013 L 165/80.

[75] COM (2013) 480.

[76] COM (2013) 180.

[77] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 OJ 2009 L 1410/114.

[78] See Commission Decision 2010/67/EU OJ 2010 L 290/39, establishing the NER300 programme. While 10 CCS projects were put forward in the first round, none was finally funded due largely to insufficient co-funding put forward by the Member States at issue. In one case, a CCS project was approved by the Commission/European Investment Bank, but was withdrawn at the last minute by its backers (relating to the Ultra Low CO_2 Steelmaking CCS project in Florange, France).

2014.[79] The 2013 Communication seeks to examine possible reasons for the failure of the EU's CCS strategy to date, with a view to strengthening the role of CCS in the EU's 2030 climate framework.

IV. GOVERNANCE AND ENFORCEMENT

Aside from the tremendous activity in the climate and energy field, a further major theme within EU environmental law and policy in recent years has been the need to improve governance and enforcement. This has focused on efforts to improve the rather poor record of under-enforcement of EU environmental law, and the associated lack of practical effectiveness of many of the EU's environmental policies,[80] and efforts to improve environmental governance by bringing the EU's laws, and those of its Member States, into line with the 1998 Aarhus Convention.[81]

As flagged above, tackling the persistent under-enforcement of many areas of the EU's environmental laws forms one of the key cross-cutting areas of priority action identified in the EU's new EAP, aimed at guiding the EU's environmental policy activities up to 2020. In the run-up to the negotiation of the EAP, the Commission released a number of soft-law documents aimed at examining this issue, culminating in a 2012 Communication entitled 'Improving the delivery of benefits from EU environment measures',[82] in which the Commission specifies the principal ways in which it intends to deal with the under-enforcement issue in the years to come.

To begin, this includes improving knowledge of what is going on 'on the ground', by putting more effective information systems in place at EU and national levels, via *inter alia* improving the Access to Environmental Information Directive and increasing the use of earth observation techniques.[83] A further focus for the Commission is improving national inspections and surveillance carried out of enforcement of EU environmental law. Traditionally, inspections have remained within the competence of Member States, subject to a 2001 Recommendation establishing minimum inspection criteria, ie a non-binding measure.[84] This is due to the long-held resistance of (certain) Member States to the idea of an EU-level inspection capacity, as witnessed by the controversy that arose around the issue at the time of creation of the European Environment Agency in 1992.[85] In part, this is linked to subsidiarity concerns, and a dislike of the notion of an EU environmental 'police' arriving on a Member State's territory in a manner similar,

[79] Namely, a project being put forward by the UK (the White Rose project in Yorkshire, run by Drax).

[80] For an overview of the current state of the environment within Europe, see the European Environment Agency, *The European Environment: State and Outlook 2010* (EEA 2010) Synthesis Report.

[81] UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

[82] COM (2012) 95 (the '2012 Communication'). See also the 2008 Communication on improving implementation of EU environmental law, COM (2008) 773.

[83] See similarly priority objective 5 of the Seventh EAP.

[84] Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in Member States OJ L 118/41.

[85] See further S Kingston, 'Mind the Gap: Difficulties in Enforcement and the Continuing Unfulfilled Promise of EU Environmental Law in S Kingston (ed), *European Perspectives on Environmental Law and Governance* (Routledge 2012).

for instance, to the practice in competition law. However, exceptionally, harmonized binding inspection requirements have been included in specific sectoral pieces of legislation. An important recent example is that of the 2010 Industrial Emissions Directive, which replaced the Integrated Pollution Prevention and Control Directive as the EU's primary legislative scheme covering large industrial polluters.[86] The 2012 Communication reopens this sensitive issue, stating the Commission's aim of 'assessing options for complementing national inspections and surveillance in a targeted way at EU level', including potentially by creating an 'EU-level inspection and surveillance capacity' or extending to the Commission a 'limited inspection role' while respecting national administrative autonomy.[87] While the Seventh EAP does not go this far, it does envisage greater use of binding inspection requirements, moving beyond the 2001 Recommendation's purely soft-law approach. This is to be welcomed as a chance to move beyond the considerable variations in inspection levels and approaches across Member States to date (despite the existence of networks of national inspectors, which help in exchanging best practice).[88]

A further issue targeted by the Commission is the mechanism used by Member States for handling complaints made at national level. At EU level, large changes have occurred in recent years in complaint handling via the institution of the EU Pilot scheme, which has been in operation since 2008 (and is not confined to environmental law).[89] Essentially, the idea of the Pilot scheme is, once a complaint at EU level has been registered, it is transferred to the relevant Member State for their input—whether in the form of clarification, information or potential solutions to the problem. The Member State may communicate directly with the complainant to this end. In the absence of (what the Commission deems to be) a satisfactory solution, the Commission retains the power to commence infringement proceedings in the normal fashion. The 2012 Communication reaffirms the Commission's intentions to further 'delegate' complaint-handling responsibilities to national authorities in this manner, especially in those fields of environmental enforcement which are not of strategic importance to the Commission.[90]

While efforts to encourage Member States to be more responsive are in principle positive developments, it is vital that the Commission retains a real, effective oversight of Member States' responses across the Pilot scheme—particularly in the environmental policy area, where the number of complaints remains relatively high compared to other

[86] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on Industrial Emissions (integrated pollution prevention and control) OJ 2010 L 334/17 (see art 16). See also, the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1013/2006 on shipments of waste COM (2013) 516, proposing harmonized inspection criteria in the field of waste shipments.

[87] 2012 Communication, 8. See also, the CJEU's line of case law reversing the burden of proof in cases of systemic breach of EU environmental law, on the basis, *inter alia*, that the Commission has no investigative powers of its own and therefore relies largely on national authorities to provide it with information on what is happening on the ground: Case C-301/10 *Commission v UK* [2012] ECR I-0000.

[88] In particular, the IMPEL network <http://impel.eu/> accessed 25 July 2013.

[89] See Commission Communication 'A Europe of Results: Applying Community Law COM (2007) 502.

[90] 2012 Communication, 8; 2008 Commission Communication on Implementing Environmental Law COM (2008) 773.

areas.[91] Clearly, passing on a complaint to the very national authorities who have failed to come up with the goods in the first place may raise serious concerns in terms of independence of analysis, transparency and fullness of response. Combined with the Commission's decision to prioritize only certain types of complaints in environmental enforcement, this could result in a real threat to the rule of law in environmental matters in the EU.[92]

Linked to this initiative to increase Member States' role in dealing with complaints is the Commission's idea of creating what it calls 'partnership implementation agreements' with Member States, the aim of which would be delivering 'improved environmental outcomes'.[93] These agreements, in the Commission's vision, would commit Member States to preventative or remedial action, direct EU assistance to 'improved implementation structures' at national level and 'endorse, on a case-by-case basis, Member States remedial plans to resolve specific problems' through work programmes.[94] The concept of implementation agreements has been emphasized by Commissioner Potočnik as a solution to the under-enforcement issue,[95] and are also included in the EU's Seventh EAP. Yet the precise legal implications and form of such agreements are, to say the least, ambiguous, and raise a variety of important questions. For instance: which EU institution will be empowered to enter into such agreements? If this is to be the Commission (as might appear natural, given its role as guardian of the Treaties), will other institutions, such as the European Parliament, have a role in designing the content of, and overseeing, such agreements? Perhaps even more crucially, what legal force will such agreements have? In particular, if the EU agrees to specific remedial work programmes for individual enforcement issues, will it be estopped or restricted from pursuing such Member States via the normal infringement process? Even if not, will such agreements simply lead to further delays in practice before the commencement of infringement actions? Such issues, which have not been (publicly) broached by the Commission to date, go to the core of any assessment of this proposal.

A final major issue on the Commission's enforcement agenda at present is improving access to justice in environmental matters across the EU. This resonates with one of the three pillars of the UN Economic Commission for Europe's 1998 Aarhus Convention, which has over the years, and in conjunction with the activity of its Compliance Committee, established itself as a vital instrument of environmental governance within Europe. Along with obligations in relation to access to environmental information and participation in environmental matters, the Aarhus Convention contains a number of provisions obliging contracting States to ensure adequate access to justice in environmental cases, whether in the context of appeals of refusal of access to environmental information (Article 9(1)), public participation requirements (Article 9(2)), and more generally as regards national law 'relating to the environment' (Article 9(3)). Such access must provide 'adequate and effective remedies' and be 'fair, equitable, timely and not prohibitively expensive' (Article 9(4)) and the public must be informed of the applicable national rules on access to justice (Article 9(5)).

All EU Member States have now ratified the Aarhus Convention,[96] and the EU has also ratified the Convention in its own right. As a result, it is no surprise that access to

[91] See the Commission's Second Evaluation Report on the EU Pilot Scheme SEC (2011) 1629/2. [92] See similarly Kingston (n 85). [93] 2012 Communication, 10.
[94] ibid. [95] See eg his speech of 24 September 2012, SPEECH/12/635.
[96] Ireland was the last EU Member State to ratify, on 20 June 2012.

justice is one of the focus areas in terms of enforcement for the Commission and the EU, as emphasized in the 2012 Communication[97] and in the Seventh EAP. However, unlike access to information and public participation (where specific harmonizing legislation was passed at EU level back in 2003)[98] a 2003 proposal to harmonize national access to justice provisions in environmental matters stalled in the Council[99] in the face of national sensitivities about EU incursion into what is still largely a Member State competence, ie national remedies and procedure.

Nonetheless, the issue has recently been revived, prompted by a number of far-reaching judgments from the CJEU which go some way to fill the gap left by the lack of express harmonizing legislation in the field, and some of the most significant of which have been delivered in the past few years. One of the most important to date has been the 2011 *Slovak Brown Bear* judgment,[100] which concerned the entitlement of a Slovakian environmental association to challenge a ministerial derogation, made for hunting purposes, from the species protection provisions of the Habitats Directive. While the Grand Chamber declined to find Article 9(3) of the Aarhus Convention to be directly effective, it held that, despite the fact that the Habitats Directive does not include any access to justice provisions, it was incumbent on Member States to ensure that the rights provided therein are 'effectively protected in each case'.[101] In practical terms, this meant that the national court had a duty to interpret national law 'in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention' and the objective of effective judicial protection of the relevant EU law rights 'so as to enable' an environmental association such as that at issue to challenge the disputed measure.[102] This strong version of the duty of consistent interpretation effectively obliges national courts, therefore, to achieve via interpretative means the aims of Article 9(3) of the Aarhus Convention in the absence of applicable EU legislation on access to justice, unless this would require a *contra legem* interpretation of national law.

This judgment has been complemented by a number of other judgments giving a robust interpretation of those few individual EU measures—namely, the IPPC Directive and Environmental Impact Assessment (EIA) Directive—which do include express access to justice provisions. This has included conditions of access to justice relating to standing,[103] costs of legal proceedings,[104] level of competent tribunal,[105]

[97] 2012 Communication, 11.

[98] Namely, Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC OJ 2003 L 41/26 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 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 2003 L 156/17.

[99] COM (2003) 624.

[100] Case C-240/09 *Lesoochranárske zoskupenie* [2011] ECR I-1255.

[101] ibid, para 47.

[102] ibid, paras 50–51.

[103] Namely, Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel)* [2011] ECR I-3673 (German law restricting standing in EIA and IPPC matters to those environmental associations who can demonstrate impairment of rights is contrary to EIA/IPPC access to justice provisions).

[104] Case C-260/11 *Edwards* [2013] ECR I-0000.

[105] Case C-416/00 *Križan* [2013] ECR I-0000 (access to justice provisions of IPPC directive allow Member State discretion as to level of tribunal competent to regularize breach of access to

availability of compensatory damages,[106] and the scope of application of these access to justice provisions.[107] Particularly notable in this regard is the Fourth Chamber's 2013 judgment in *Edwards*, concerning the meaning of the obligation to ensure that judicial proceedings should not be 'prohibitively expensive' under the IPPC and EIA Directives.[108] In clarifying that these provisions meant that persons covered by the access to justice provisions 'should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result',[109] the CJEU indicated that, in assessing whether this threshold was met, both subjective factors (ie the particular claimant's financial position) and objective factors (eg the complexity of the case, the importance of the case, etc) were relevant.[110] A number of important additional cases on related issues are currently pending before the CJEU.[111]

In the light of, *inter alia*, these significant developments in the case law, the Commission, Council and European Parliament have revived the access to environmental justice debate at political level.[112] In 2013, a public consultation on the issue was opened by the Commission, on the topic of whether the EU's access to justice obligations should best be dealt with by publicizing and clarifying the CJEU's case law, or alternatively by promulgating an access to justice directive at EU level.[113]

Alongside these developments, which concern conditions of access to justice for review of national decisions, the debate on whether the existing access to justice provisions for review of EU decisions continues to rage. Following the 2011 Findings of the Aarhus Convention Compliance Committee that the EU's access to justice provisions, including the highly restrictive *locus standi* test in Article 263 TFEU actions before the CJEU, would not, if the CJEU's jurisprudence remained the same, be compatible with the Convention,[114] the General Court ruled in its 2012 judgment in *Stichting Natuur en Milieu* that the Commission had been wrong to refuse a request for internal review, pursuant to the 2006 Regulation implementing the Aarhus Convention access to justice provisions in relation to EU decisions,[115] on the basis that such review

information provisions, as long as principles of effectiveness and equivalence of remedies are respected).

[106] Case C-420/11 *Leth* [2013] ECR I-0000 (failure to carry out EIA does not in principle in itself confer right to compensation on individual for pecuniary damage caused by decrease in value of property due to negative environmental effects).

[107] Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus* [2011] ECR I-0000 and Case C-182/10 *Solvay* [2012] ECR I-0000 (fact that approval for a project that would otherwise be subject to EIA was given by legislative measure cannot exclude EIA access to justice provisions).

[108] Case C-260/11 *Edwards* [2013] ECR I-0000.

[109] ibid, para 35.

[110] ibid, para 46.

[111] See eg Case C-72/12 *Altrip* OJ 2012 C 133/15 (whether EIA access to justice provisions require substantive and procedural review); Case C-530/11 *Commission v UK* OJ 2012 C 39/7.

[112] See the 3173rd Environment Council conclusions of 11 June 2012; European Parliament resolution of 20 April 2012 2011/2194 (INI); 2012 Commission Communication (n 82).

[113] See the Explanatory Memorandum of 28 June 2013, available at <http://ec.europa.eu/environment/consultations/access_justice_en.htm> accessed 25 July 2013.

[114] See Case ACCC/C/2008/32, Findings and recommendations adopted on 14 April 2011.

[115] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies OJ 2006 L 264/13.

only applied to measures of individual scope.[116] The Commission has, however, appealed the matter to the CJEU.[117]

V. INTEGRATION

A final issue deserving mention is the state of play in relation to the obligation to integrate environmental concerns with the EU's other policy areas, as is required by Article 11 TFEU. It is certainly the case that much integration has taken place over the past years of non-environmental concerns, particularly economic concerns, into the EU's environmental policy. As mentioned above, economic instruments have become *de rigueur* in a large portion of the EU's environmental policies,[118] in what Commissioner Potočnik has hailed as the 'new environmentalism'—meaning, in his vision, achieving environmental protection while not placing limits on economic prosperity.[119] In fields as diverse as habitats protection to enforcement, the need for increased EU activity is argued for on the basis of the economic benefits that such activity can bring, quantified in cash terms, with the intrinsic environmental value of the action typically relegated to a secondary line of argument.[120] Yet, unfortunately, there is little evidence to date that the integration imperative has worked as effectively in the other direction. While we see continued definite efforts on the part of the CJEU to interpret EU economic law in a manner consistent with the EU's environmental aims,[121] the same level of integration is far from evident on the part of the other institutions, even in fields where the environmental implications of the policy at issue are glaring. Perhaps the most obvious recent example is the June 2013 political agreement on reform of the EU's Common Agricultural Policy,[122] in which the pro-environment features of the Commission's proposals were watered down considerably,[123] leading to heavy criticism from environmental groups.

VI. CONCLUSIONS: GOOD MARKS FOR EFFORT, BUT . . .

It will be clear from this (necessarily selective) account that the level of activity and development in EU environmental law in the past few years has been remarkable. Of particular interest, from an institutional perspective, has been the continued strong role played by the EU Courts in promoting the EU's environmental objectives by striving to interpret applicable EU and international law, where possible, in a notably 'green'

[116] Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission* [2012] ECR II-0000.
[117] Case C-405/12 P.
[118] See further Kingston (n 1).
[119] Speech of 20 June 2013, Edinburgh, SPEECH/13/554.
[120] See, for instance, the Seventh EAP.
[121] See Case C-28/09 *Commission v Austria (Inn Valley)* [2011] ECR I-0000.
[122] See Commission Press Release, 26 June 2013, IP/13/613, and Press Release of the Irish Presidency, 26 June 2013, 'Historical Day for the Common Agricultural Policy as Irish Presidency Steers European Institutions to Landmark Reform Deal'.
[123] For instance, the principle that 30 per cent of direct payments to farmers under the first pillar should be granted only where certain environmental conditions (such as the creation of ecological focus areas) are satisfied is now subject to broad and numerous exceptions, and cross-compliance rules have been weakened (excluding, for instance, the requirement of compliance with the water framework directive and pesticides rules).

manner. Yet, despite these laudable levels of activity, the practical results of the now large volume of EU environmental law remain, in many respects, rather underwhelming. As the European Environment Agency's latest multi-annual Report on the state of the European environment demonstrates, in the ten years between 2000 and 2010, the EU was meeting its environmental targets in only three of the 16 discrete environmental policy areas identified by the Report (namely, the objectives in relation to reduction of greenhouse gas emissions, recycling of waste, and water pollution).[124] Clearly, therefore, the disconnect between the (large body of) laws on the EU's statute books, and the practical reality of the EU's environmental quality on the ground, is considerable. In this sense, the issue of enforcement and implementation of the EU's environmental laws, highlighted above, represents perhaps the greatest challenge to the effectiveness of EU environmental policy over the coming years.

SUZANNE KINGSTON*

[124] European Environment Agency, *The European Environment: State and Outlook 2010* (EEA 2010) Synthesis Report, 18, Table 1.2.

* Senior Lecturer in Law, University College, Dublin, suzanne.kingston@ucd.ie.

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