SRU

German Advisory Council
on the Environment

The future of European environmental policy

ENVIRONMENTAL REPORT 2020
CHAPTER 8

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The future of European environmental policy

The European Green Deal put forward by the European Commission represents a new departure for environmental and climate protection policy. Environmental protection and sustainability are to be the guiding principles of European policy-making in the future. Ambitious goals will be set in order to initiate far-reaching environmental change. At the same time, many of the challenges that have emerged in recent years will persist. Above all, the fact that existing European environmental legislation is often inadequately implemented and enforced at member state level. Moreover, environmental and climate protection are still not sufficiently integrated into other policy areas, such as agricultural and transport policy. The ecological transition should therefore incorporate and further develop elements of the preceding reform debate. The German Advisory Council on the Environment (SRU) welcomes the fact that environmental and climate protection are to be given high priority in future and recommends that the opportunity presented by the European Green Deal should be seized. The 8th Environmental Action Programme (EAP) should be formulated in such a way as to serve as a benchmark for the necessary environmental improvements. The EU should strengthen sustainability on an institutional level by transforming the European Economic and Social Committee into a Sustainability Committee.

8.1 A new era for European environmental policy

692. In the second half of 2020, Germany will take over the EU Council Presidency. This comes at a time when the course of European environmental policy is being re-set against the background of the wider debate on the future of the EU. In June 2019, the European Council emphasised in its Strategic Agenda for 2019 to 2024 the need for a green transition. The shift to a green economy was declared a main priority (European Council 2019a). Just eleven days after taking office, the new Commission President Ursula von der Leyen proposed a European Green Deal (European Commission 2019g), in line with her announcement in the Political Guidelines (von der LEYEN 2019), which among other things aims to make Europe greenhouse gas neutral by 2050. Sustainable development is to be given a higher priority than before.

This represents a great opportunity for environmental protection, as the European level is an important driver for the development of environmental law in Germany and other member states. The SRU welcomes the planned prioritisation of environmental and climate protection policy. It is all the more important that more attention should be paid to environmental protection as the EU has been going through a poly-crisis since 2008 which has to some extent pushed environmental protection off the political agenda. In particular, the financial crisis, the crisis in asylum policy and the withdrawal of Great Britain from the EU ("Brexit") have dominated day-to-day business in Brussels (CALLIESS 2019, p. 1). At the political level, the euro crisis in the years following 2008 has led to greater priority being given to economic growth and job creation.

A fundamental orientation towards sustainability has not yet been satisfactorily established at European level. The European Environment Agency (EEA) notes that more than half of the European sustainability targets for 2020 are unlikely to be achieved. For 2050, the prospects of achieving the targets in all the policy areas for which forecasts can be made are not good (EEA 2019, p. 8). Today's environmental problems require fundamental changes in many areas of society – energy, mobility, urban development, agriculture, food and material flows.

In the course of the European polycrisis, a debate has emerged about the future shape of the EU. This concerns both the EU's ability to function and its credibility in terms of achieving its goals. There is also a debate over whether "more" or "less" Europe is the right way forward. This debate could potentially have a significant impact on European environmental policy. The political guidelines set out by the new Commission President von der Leyen include a conference on the future of Europe. This is planned to start in 2020 with the direct participation of the public (von der LEYEN 2019, p. 24). It is envisaged that it will address the question of the future shape of the EU.

There is currently a strong desire for change among EU citizens: in a special Eurobarometer survey for the European Commission in April 2019, more than 90 % of respondents believed that the EU economy should become carbon neutral by 2050 (European Commission 2019k). The vast majority of people across Europe (over 90 %) believed that climate change is a serious problem (European Commission 2019k). In 2019, respondents across the EU identified environmental protection as the EU's top priority for the future (de VRIES and HOFFMANN 2019). Due to the climate protests by young people (the Fridays for Future movement) in Europe and the importance attached to environmental and climate protection in the elections to the European Parliament, the issue has risen up the political agenda. In addition, digitalisation and globalisation necessitate fundamental changes which should be used to achieve a green transition. In this sense, the polycrisis also represents an opportunity to ensure that the EU is economically and technologically equipped for an ecologically sustainable future (SRU 2019)

At the same time, Eurosceptic and anti-European currents are growing in almost all member states and are becoming increasingly visible in the European Parliament. These political forces want to severely curtail the influence of the EU on the policies of the member states in general. They have not yet adopted a unified position with regard to environmental and climate policy, but there is a latent risk that environmental and climate policy will be discredited and excluded as an instrument used by the liberal elites to raise their own profile and to pursue their own reform agenda.

Against this background, the SRU wishes to examine the role played in environmental protection policy by the EU within the European multi-level system and to illustrate this with regard to current developments at European level, in particular the European Green Deal. We will identify challenges for the European regulation of environmental and climate protection and formulate recom-

mendations accordingly. In view of the German Council Presidency in 2020, there is a particular onus on the German government to work for effective environmental and climate protection at European level, something that has not always been done in the past. Germany should use the momentum created by the declarations by the European Council and the European Commission that environmental and climate policy are priority areas to further develop European environmental and climate protection and to return the country to its former position as pioneer and standard-setter in European environmental policy.

8.1.1 The historical development of European environmental policy

693. European environmental policy has developed markedly over the decades. The EU's environmental policy competences have been strengthened and the EU has expanded its activities. Due to the high level of regulation and the wide range of European environmental law, the member states are obliged to adapt both national regulatory content and national policy instruments to European requirements or to adopt them from the EU level. About 70 to 90 % of all German environmental legislation has its roots in EU law (KLOEPFER 2016, § 9 para. 1). The EU has become the most important source of environmental policy regulation in the member states and thus ensures a level playing field between the member states in many areas.

This development was unexpected, since economic integration was initially the principal focus at the European level. The main aim was to prevent unfair competition and barriers to trade (CALLIESS 2018; KNILL 2003, p. 19). The environment was only a subsidiary issue. Differing standards and specifications, however, hampered the free exchange of goods. The first environment-related regulations therefore applied to areas such as the control of chemicals. Even before the development of environmental law proper, the then European Economic Community (EEC) issued its first regulations on dangerous substances in 1967, thus laying the foundation for the further development of European law in this area (PACHE in: KOCH 2010, § 12 para. 27 et seqq.). European environmental policy was therefore primarily designed to support the creation of the common market.

694. Another factor contributing to the emergence of European environmental law was the growing awareness that environmental problems often have a regional, cross-border or even global dimension. Initially, the focus was on transboundary air pollution, because acid rain in some member states was triggered by emissions from distant sources (CASPAR in: KOCH 2010, § 2 para. 3 et seqq.; CALLIESS 2018). The aim of harmonising living conditions (such as air and water quality) is also regarded as having been important for the development of European environmental policy, because from the 1970s on, a divergence in living conditions in the member states was no longer considered politically acceptable (KNILL 2003, p. 20 et seq.). Nevertheless, it was only in the 1980s, with the Single European Act, that environmental protection was enshrined in the Treaties as a formal responsibility of the European Community. This put environmental policy on a new footing and opened up further possibilities for action.

The various areas of environmental policy developed at different speeds, sometimes by leaps and bounds. However, environmental regulation as a whole picked up considerable momentum, especially through the 1980s and 1990s. This applied, among other things, to the laws on waste (DIECKMANN and REESE in: KOCH 2010, § 6), to water conservation (KLOEPFER 2016, § 9 para. 118), to immissions control law (KOCH and HOFMANN in: KOCH 2010, § 4) and to nature conservation (KLOEPFER 2016, § 9). Law on environmental energy and on compliance with environmental procedures followed only much later. In the meantime, climate protection law has also become very important. Under the influence of European law, environmental protection is being given greater consideration by national administrations, particularly through the introduction of Environmental Impact Assessments (EIA) and Strategic Environmental Assessments (SEA). Similarly, the introduction of freedom of information rights has made a significant contribution to administrative transparency in Germany. It is primarily thanks to the European Court of Justice (ECJ) that access to justice in environmental matters for NGOs became effective in Germany.

695. The development of European environmental policy has for this reason been called "an unparalleled success story" (WEGENER 2009, p. 459). In recent years, however, environmental policy has not been so centrally in focus at the European level. Due to the criticisms of alleged European overregulation and bureaucratisation, proposals for directives with environmental policy relevance were closely scrutinised under the Juncker Commission, and some were withdrawn or not fully developed. Much of the environmental legislation in the member states is

already European in character (BÖRZEL and BUZOGANY 2018), the "low hanging fruit" has often been harvested and incremental improvements achieved. In view of the far-reaching transformations that are now required in many areas, it is more difficult to ensure a uniform approach to environmental policy in the member states, as this now entails fundamental strategic economic and social policy choices.

696. Overall, European environmental policy has grown continuously via an interplay of national and European regulatory approaches (BÖRZEL and RISSE 2017). Pioneering policies at the national level were quickly Europeanised, particularly where purely national measures would have jeopardised the Single Market, as in the area of product-related environmental standards (SRU 2016, item 38), where there was a particularly urgent need for harmonisation to avoid national trade restrictions. This Europeanisation took place predominantly at a high level (HOLZINGER and SOMMERERER 2011), because member states that were successful in transferring their regulatory models to the European level were able to consolidate their national innovations as a result. New markets were created by "exporting" a country's own regulatory model, while at the same time the national costs of adapting to EU requirements were minimised (SRU 2016, item 38 with further references). In many cases, however, European environmental law was instrumental in helping national environmental and nature conservation regulation in the member states to achieve a breakthrough – especially in those member states that had not previously established an independent environmental policy. This was particularly the case in the Eastern European member states which joined the Community at the beginning of the 2000s. At the same time, member states with developed environmental protection regimes benefited, in terms of the competitiveness of their firms, from the fact that European environmental standards had to be observed throughout the Single Market. There is no empirical evidence of a "race to the bottom", meaning a harmonisation at the level of the lowest common denominator, brought about by the Europeanisation of environmental regulation (HOLZINGER and SOMMERER 2011; BERNAUER and CADUFF 2004; KNILL 2003).

697. However, the achievements of European environmental policy have been overshadowed in recent years. Efforts to limit climate change and the destruction of the natural environment have proved insufficient. There is growing scientific knowledge about planetary pollution limits which, if exceeded, can trigger large-scale and irreversible processes of change that could in future jeopardise the continuation of people's accustomed lifestyles (SRU 2019). The financial and economic crisis was not used as an opportunity to initiate a fundamental ecological transition.

The European Environment Agency published its five-yearly State of the Environment Report (SOER) in December 2019. According to the SOER, there have clearly been some positive developments in the last 10 to 15 years in the policy areas examined. Greenhouse gas emissions in the EU have fallen by 22 % between 1990 and 2017. Over the same period, the share of renewable energy sources in final energy consumption in the EU has steadily increased and energy efficiency has improved. Emissions of harmful pollutants into air and water have been reduced; water abstraction in the EU has fallen by 19 % between 1990 and 2015 (ibid., p. 8). However, current developments are worrying. Final energy consumption has risen again since 2014. Emissions from transport and agriculture continue to rise. The pace of progress has slowed in important areas such as greenhouse gas emissions, waste generation and energy efficiency. The EEA anticipates positive developments in only two policy areas by 2030, namely waste management and climate change adaptation. In the area of natural capital, it even anticipates negative trends in half of the policy areas (EEA 2019).

8.1.2 Realigning European politics: the European Green Deal

698. European politics is currently undergoing a realignment. The elections to the European Parliament in May 2019 resulted in a redistribution of seats and a new constellation of political groups. The result is ambivalent. On the one hand, the Parliament is now split into pro- and anti-European groups (KALTWASSER et al. 2019, p. 19 et seq.), though the pro-European MEPs constitute a majority in favour of a constructive approach to the future of the EU. At the same time, the issue of environmental and climate protection has risen noticeably up the agenda due to its importance for the elections.

699. The increased importance attached to environmental and climate protection issues at the European level is reflected in the European Commission's Communication on the European Green Deal, published in December 2019 (Fig. 8-1; European Commission 2019g). This presents the measures the European Commission in-

tends to take in the coming years and sets out a roadmap for their adoption (European Commission 2019a). At the core of the communication are ambitious climate protection measures. The European Commission intends to propose a climate law that would set a target for 2030 of reducing greenhouse gases by at least 50 %, and if possible by 55 %, and achieving greenhouse gas neutrality by 2050 (European Commission 2019g, p. 5). To this end, all climate-related policy instruments (such as energy taxes) are to be reviewed. In order to facilitate decision-making, consideration is being given to adopting proposals in this area under the ordinary legislative procedure by qualified majority instead of requiring unanimity. This is to be achieved by the use of the so-called passerelle clause, which allows decisions to be taken by qualified majority if this procedure has previously been decided unanimously. For selected sectors, a carbon border adjustment mechanism is to be proposed in order to reduce the risk of relocation of economic activities and emissions abroad (carbon leakage) (ibid., p. 6). The European Green Deal is understood as a growth strategy with the aim of making the EU a fair and prosperous society with a modern, resource-efficient and competitive economy (ibid., p. 2). It thus remains wedded to the belief that such growth is necessary for the future of Europe.

To support the transition, the European Commission intends to present an EU industrial strategy and a new circular economy action plan (European Commission 2019g, p. 8). The circular economy action plan will focus on resource-intensive sectors such as textiles, construction, electronics and plastics, and above all on sustainable products and strengthening extended producer responsibility. It will also examine whether manufacturers can be obliged to carry out repairs (ibid., p. 9).

With regard to buildings, a "renovation wave" is to be launched, covering both private and public buildings. Legislation on the energy performance of buildings is to be rigorously enforced by the European Commission, starting with an assessment of the long-term national renovation strategies of the member states in 2020. In the area of mobility, 75 % of internal freight transport is to be shift-

Figure 8-1

European Green Deal

Source: European Commission 2019g, p. 4

ed to rail and inland waterways. An increasing role is foreseen for automated and multimodal mobility, which should prevent congestion and pollution (European Commission 2019g, p. 12 et seq.). More concrete is the proposal to abolish subsidies for fossil fuels, in particular the tax exemptions for aviation and maritime fuels (ibid., p. 13). It is planned to extend European emissions trading to maritime transport and to allocate fewer free allowances to aviation companies. Both are, however, measures that must be coordinated with measures at the global level. In order to achieve effective road user charges, the level of ambition of the proposed amendment to the Eurovignette Directive 2006/38/EC should be maintained. Alternative fuels should play an important role. Stricter limits on air pollutants and CO_2 emissions for vehicles with combustion engines are also planned.

The European Green Deal appears to be less specific with regard to agriculture. The strategy for the conservation of biodiversity is to be maintained and a forestry strategy is to be presented. However, the contents of the proposed "Farm to Fork" strategy, which is to be presented in spring 2020, are not yet apparent. Above all, it is not clear that the Common Agricultural Policy (CAP) will be systematically geared towards biodiversity protection. Rather, the existing proposals for the future of the CAP are to be retained, despite the fact that they have been heavily criticised in the past, including by the EU Court of Auditors (European Court of Auditors 2018). With regard to the reduction of pesticides, too, it is proposed only that a dialogue will be set up with stakeholders to examine what measures are needed to reduce their use (European Commission 2019g, p. 15).

Discussions are underway as to whether the EU's multiannual financial framework (MFF), which is currently at the consultation stage, should be adjusted to take account of the planned Just Transition Fund. In the view of the European Commission, however, national budgets should also play a central role in the European Green Deal. The plan is to make greater use of instruments for environmentally sound budgeting, which should lead to public investment, consumption and taxation being geared more towards environmental priorities and harmful subsidies being abolished. The European Commission plans to review and evaluate member states' environmental budgeting practices. Improvements to the EU's budgetary governance are to be discussed. Based on those discussions, measures will be developed to facilitate environmentally sound investments within the framework of EU budgetary rules, while safeguards will be put in place to ensure that the debt burden remains affordable (European Commission 2019g, p. 17). Within this framework, the European Semester – a mechanism for coordinating the economic, fiscal and labour market policies of the member states – is to be oriented more strongly towards sustainability goals (item 741; von der LEYEN 2019, p. 10).

One of the goals of the European Green Deal is to reduce emissions by diverting private capital into environmental and climate measures (European Commission 2019g, p. 2). To date, there are no criteria for the sustainability assessment of financial products, which weakens investor confidence in these products and enables "greenwashing" (SRU 2019). The European Commission therefore set up a high-level expert group, whose final report in 2018 became the basis for the Action Plan 'Financing Sustainable Growth' (European Commission 2018d). The Action Plan aims to redirect capital flows into sustainable investments, to manage the financial risks arising from climate change and to promote transparency in financial and economic activity. On the basis of the Action Plan, the European Commission developed a proposal for a valuation framework for sustainable financial products, a so-called Taxonomy Regulation, on which agreement was reached between the Council and the European Parliament in December 2019 (European Commission 2018k). According to the draft regulation, financial products must contribute to at least one of six environmental objectives in order to be classified as sustainable. The exact requirements are to be laid down in implementing regulations.

700. The new priorities are also reflected in the Mission Letters which outline the portfolios and tasks of the Commissioners. At the same time, the organisational structure of the European Commission has been reorganised. The Vice-President is to steer and coordinate the work of the Commissioners involved in the European Green Deal. This offers an opportunity to ensure better integration of environmental policy into other policy areas such as agriculture, transport and energy. It is striking that trade policy is not part of the European Green Deal even though it is of great relevance, and especially at European level.

The Communication, which is relatively brief, remains vague on many aspects and contains many declarations of intent. It is therefore necessary to wait and see how these are underpinned by measures that the member states have yet to agree before making a detailed assessment. In principle, however, the fact that environmental and climate protection policy is to become a political priority for the EU is to be welcomed. The European Green Deal therefore has to convince the member states that an ambitious

environmental and climate policy will not harm their economies, but rather benefit them. The German government should provide support for this. If environmental and climate policy is to be given a higher priority, a systemic transformation will also require new strategies that combine planning certainty, continuity and coherence.

8.1.3 The European Green Deal in the context of the reform debate in the EU

701. Against this background, the question arises whether and to what extent the ambitious goals of the European Green Deal are dependent on EU reform for their realisation. There is thus a link to the conference on the future of Europe, which is scheduled to begin on 9 May 2020 and to last for two years (von der LEYEN 2019, p. 19).

The aims, reponsibilities and powers of the EU as well as its political priorities are currently under discussion at European level (see e.g. Spinelli Group 2018; also CALLIESS 2019, p. 97 et seqq.). Even if it appears undisputed that there is a fundamental need for reform if the EU is to maintain its capacity for action into the future, there is still a lack of consensus among the member states as to the direction this reform should take. The central question is what kind of Union the citizens want in the future, and in particular what depth of integration they can identify with. A possible basis for discussion of the various models conceivable is provided by the White Paper on the Future of Europe from 2017 (European Commission 2017h; see CALLIESS 2019, p. 97 et seqq.). This defines and explains, with the use of scenarios, different development paths for the EU, which have been fleshed out in a series of reflection papers, including one entitled "Towards a sustainable Europe by 2030". Scenarios 1 to 5 of the White Paper describe the pros and cons of the development options currently under discussion (Tab. 8-1; European Commission 2017h). The scenarios are important because they also shed light on how the environmental and climate protection goals discussed earlier can be effectively achieved.

Reflection Paper on "Towards a sustainable Europe by 2030"

702. As a complement to the White Paper on the Future of Europe, the European Commission issued several reflection papers to stimulate debate on the scenarios, using illustrative policies and topical challenges. They relate to the social dimension (European Commission 2017e), globalisation (European Commission 2017g), economic and monetary union (European Commission 2017f), defence policy (European Commission 2017d), fiscal policy (European Commission 2017c) and the sustainable development agenda (European Commission 2019c). The last of these documents is particularly relevant for the continuation and further development of sustainability policy in the EU.

The EU adopted a strategy for sustainable development in 2001 (European Commission 2001). This was revised in 2006 and amended in 2009, and has not been updated since. This is due in part to the fact that the strategy discussion since 2000 has been characterised by two processes which are sometimes in political competition: on one side the Lisbon Strategy, focused on economic policy, and on the other the sustainability strategy, which focuses instead on environmental policy objectives (SRU 2012a, item 686). The Europe 2020 Strategy, which followed the Lisbon Strategy and was geared towards intelligent, sustainable and inclusive growth, did take on sustainability concerns, but did not lead to a revision of the European sustainability strategy.

So, after a long period in which the main focus was on economic development, the Agenda 2030 for Sustainable Development, which came into force in 2016 as an ambitious global transformation programme, has shifted the priorities. In particular, the implementation of the 17 Sustainable Development Goals (SDGs) it contains calls for these goals to be embedded and implemented at the European level. The European Commission has stated that the EU wants to implement Agenda 2030 and the SDGs together with the member states while respecting the constraints of the principle of subsidiarity (European Commission 2016g).

703. The European Commission's reflection paper "Towards a sustainable Europe by 2030" (European Commission 2019c) emphasises the need for a stronger commitment to sustainability. It believes that the EU is well placed to take the lead in implementing the SDGs. The paper outlines three possible scenarios for implementing the SDGs. The first scenario envisages the establishment of an overarching European strategy for the SDGs, which would also be linked to a common approach to the implementation of the sustainability goals. The second scenario sees the EU also bound by the SGDs, but does not involve a joint approach with the member states and leaves it up to them to decide for themselves to what extent they integrate the SDGs into their policy programmes. The third scenario focuses on foreign policy and on helping other countries to reach standards while promoting improvements at the EU level (ibid.).

Table 8-1

Scenarios from the White Paper on the Future of Europe

Scenario	Content
Scenario 1: Carrying on	• Implement and continuously update the current reform agenda. • Strengthen the Single Market e.g. by concluding trade agreements. • Increasingly greater unity in foreign policy. EU involvement in shaping the global agenda, in particular in the areas of climate change, sustainable development and financial stability.
Scenario 2: Nothing but the single market	• Focus on deepening the Single Market. • Reduce EU regulation, problems solved bilaterally. • Less or no representation of the EU as a whole in international forums due to lack of consensus, e.g. in the area of climate protection.
Scenario 3: Those who want more do more	• Groups of member states deepen cooperation and regulation in specific areas ("coalition of the willing"). • The status of the other member states is preserved. However, they may subsequently join those member states going further. • Foreign policy is conducted jointly on behalf of all member states at EU level.
Scenario 4: Doing less more efficiently	• Prioritise a smaller number of areas and concentrate regulation and resources on them. To this end, the EU is given more and more efficient instruments to increase its capacity for action and enforcement. • In non-prioritised areas, the EU takes action only to a limited extent. • Harmonisation is limited to a strict minimum. This will give member states more room for manoeuvre. • The EU speaks with one voice on foreign policy.
Scenario 5: Doing much more together	• Member states decide on more powers, resource sharing and cooperation in all areas. • Overall shift of power to the EU. • Decision-making and enforcement processes at the European level are significantly accelerated. • EU speaks with one voice on foreign policy.

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704. But a restriction to foreign policy cannot be sufficient by itself. The repeatedly emphasised pioneering role of the EU in sustainability issues must also be credibly underpinned in Europe with concrete initiatives (UBA 2016, p. 5). Nor is it justifiable at this time to leave the implementation of sustainability goals solely to the member states. A focus on selected aspects of environmental sustainability would be desirable at European level. In 2016 the Federal Environment Agency (UBA) identified possible practical implementation initiatives at EU level for twelve priority policy areas (UBA 2016). The priority areas identified for implementation of the SDGs at EU level include climate protection and adaptation, resource conservation and efficiency, the transition to a green economy, sustainable consumption, and environment and health. Also included are the circular economy, chemicals policy, air pollution control, urban environmental protection, the reduction of pollutant inputs, water and marine conservation and procedural concepts (ibid.).

Interim conclusions

705. The European Green Deal has made it clear at European level that environmental and climate protection should be prioritised. Carrying on as before, as described in Scenario 1 of the White Paper, cannot therefore solve the EU's pressing future challenges in this area, but threatens to lead to political erosion processes. An effective implementation of the European Green Deal would be impossible in this scenario, which amounts to "muddling through" on the basis of the lowest common denominator.

The desire discernible in Scenario 2 to depoliticise the EU and reduce its legislative activities to the further development of the Single Market is similarly ill-advised. In Scenario 2, the smooth functioning of the internal market becomes the principal "raison d'être" of the EU-27. Since the focus of this scenario is to a large extent on the dismantling of EU regulations based largely on the fundamental freedoms (negative integration), differences on issues of common consumer, social and environmental standards as well as on taxation and state aid would remain or be exacerbated. This creates the risk of a "race to the bottom" in policy areas such as these which support the market. Such a development would not only contradict the goal of a social market economy, as formulated in Art. 3 of the Treaty on European Union (TEU), but would also, in the absence of European legislation, give more scope again for the utilisation of directly applying market freedoms and their capacity to promote deregulation via national legislation (KINGREEN 2009, p. 718 et seqq.; CALLIESS 2010; recently GRIMM 2017, p. 10). This would not only resurrect pertinent questions of democratic legitimacy but would also undermine the powers at the European level required to implement a European Green Deal.

The long-term management of specific policy areas is especially important for achieving the goal of sustainability. In terms of the European Green Deal, and the remaining Scenarios 3, 4 and 5 of the White Paper on the future of the EU, it will be necessary to take a clear view on those areas where the member states want more flexibility and those where sufficient flexibility is already available. In what follows, we will discuss what this means for environmental policy.

8.1.4 The building blocks of a new working method in environmental policy

706. By proposing a European Green Deal, the European Commission has set priorities for its political agenda. Environmental and climate protection will be given priority in the coming years. However, if the EU agrees on a European Green Deal, it must also be capable of commensurate action. Its capacity to act depends in turn on how the reform debate develops and which direction the EU ultimately takes. The scenarios in the White Paper will be discussed below with an eye to the upcoming conference on the future of Europe starting on 9 May 2020.

The scenarios in the White Paper can be used as building blocks for a new working method and thus for a reform of the EU, either with or without Treaty change. At present, what role the proposals might play in the process of refocusing the EU is still open. Interesting strategic approaches are offered by Scenario 4 ("Doing less more efficiently"), which overlaps with Scenario 5 ("Doing much more together") under the rubric of "greater efficiency", as well as by Scenario 3 ("Those who want more do more"), which can act as a kind of auxiliary motor if the member states do not reach agreement (for more details see CALLIESS 2019, p. 105 et seqq.).

Under Scenario 4 of the White Paper, the EU would concentrate on a few key policy areas, in which it would set political priorities and acquire more powers – especially with regard to enforcement. A key motif of this scenario is to close the gap which is frequently observed between European promises on one side and the resulting expectations of European citizens and the outcomes actually

possible in view of existing competences on the other. In this scenario, the EU should be able to act more quickly and decisively in the selected priority areas. In these areas, the EU would be given more effective instruments to implement and enforce common decisions directly – as is already the case today in competition policy or banking supervision.

Legislative proposals from the European Commission should then focus on these priority areas and be adopted by qualified majority in the Council – if necessary, using the passerelle procedure (cf. Art. 48 sec. 7 TEU). The passerelle clause of Art. 192 sec. 2 of the Treaty on the Functioning of the European Union (TFEU) is thus relevant to the European Green Deal, and specifically to measures in the field of energy and tax policy. However, this is an ideal-typical description, which in reality can come up against problems posed by divergent political majorities and capacities to act.

As a consequence, the EU would limit itself to the exercise of a limited number of competences relevant to its political priorities. At the same time, the responsible institutions would be strengthened and the relevant procedures made more efficient. The bottom line is that models of cooperative legislative procedures should be developed which are similar to those used in European antitrust law. This requires well-functioning national administrative bodies, which might have to be established or enhanced with European assistance. Forms of cooperation can be developed in this respect ranging from a simple exchange of information to specialist expertise and personnel or technical support from the European level. The Directorate-General for Structural Reforms (item 753; European Commission – DG Reform 2020), which has emerged from the Structural Reform Support Service (SRSS) (WEINZIERL 2015), may be helpful here.

In addition to such measures to support the administrative bodies in the member states, consideration should also be given to ensuring that Europe has the capacity to act as a safety net in exceptional cases, such as environmental crises, where the national authorities are not in a position to apply the European requirements.

707. In other, non-priority areas beyond environment and climate change policy, the EU would do less. "Less" might suggest first and foremost a review of EU legislative initiatives. A core element here is to give greater weight to the principles of subsidiarity and proportionality. This could be achieved through a mandatory review and reference framework substantiating the requirements of Art. 5 sec. 3 and sec. 4 TEU and through precautionary arrangements at the institutional level (for more details see CALLIESS 2019, p. 106 et seqq.). The assessment of proportionality could be used to further develop the Better Regulation agenda. A "legislative toolbox" would pave the way for European legislation that is more flexible and thus more respectful of the competences of the member states (European Commission 2018c).

In the view of the SRU, however, "less" is not an option in the field of environmental and climate protection policy. Because of the importance for the functioning of the Single Market of harmonised environmental policy measures, and because of the urgency of many environmental problems, robust EU climate and environmental policy is required. This insight is reflected in the European Green Deal, which the incumbent European Commission has set as a political priority. However, in line with the principle of subsidiarity, the EU could allow greater flexibility in the implementation of European legislation by using opt-up clauses, thus enabling member states to introduce tailor-made measures in specific policy areas. In concrete terms of European environmental policy, this would mean that European environmental legislation could also be characterised by a multi-level approach utilising a division of responsibilities but based on shared political objectives, minimum standards and opt-up possibilities (CALLIESS 1999, p. 199 et seqq.), as is already the case with the clause on more stringent protective measures in Art. 193 TFEU.

708. Where no consensus on necessary reform steps can be reached or the implementation of political priorities such as the European Green Deal is endangered, the future architecture must be made more flexible (and thus at the same time more dynamic) in order to ensure continuing capacity to act (on this point broadly, see THYM 2004 ; more specifically CALLIESS 2019, p. 114 et seqq.). The Scenario entitled "Those who want more do more" is not aiming for a static "multi-speed Europe", with parallel and separate strands. Rather, it aims to have a pioneering group leading the way and creating a positive example of deeper integration, with the example of the benefits they gain from membership motivating other member states to join. In the course of this, deeper integration between the pioneers would create further opportunities for member states willing and able to do so to deepen cooperation in current EU policy areas or extend it to new policy areas. In the context of the European Green Deal, this could include, for example, energy and tax policy (Box 8-7). One example of how a few

member states could take the lead is the proposal currently under discussion for a minimum CO_2 price, which would initially only apply in some of the member states.

If every willing and able member state is to be able to join a pioneer group at any time, then, for reasons of coherence, the pioneer groups should not be permitted to establish new institutions. Rather, the existing EU institutions would be used and their procedures and decision-making powers extended to encompass each pioneer group. Majority voting, as provided for in Art. 333 TFEU, would be the rule. The European Commission and the ECJ would ensure coherence in the relationship between the EU and the pioneer groups; in the Council and European Parliament, only the members of the respective pioneer group would decide. It would also be possible for each pioneer group to have its own budget, drawn from the contributions of the pioneer states. In environmental and climate protection terms, this would mean that the new working method could help to circumvent existing logjams and blockades.

8.1.5 Outline of the new working method as illustrated by a cooperative division of responsibilities in environmental policy

709. We now wish to outline in more detail the working method which emerged from section 8.1.4 from the viewpoint of the SRU for the area of environmental policy. Overall, there is a strong case for addressing environmental problems at EU level (item 693 et seqq.). However, environmental policy regulation at the European level is not always the best solution in a multi-level system, because centralised EU environmental policy can also have disadvantages under certain circumstances. Firstly, European environmental protection policy sometimes comes with a time lag and/or may not be very ambitious. Secondly, the background conditions in the member states vary. This applies to their economic development, geographical situation, population density, ecological conditions and also to the environmental awareness of the population. It is therefore not self-evident that environmental problems in the member states can be solved using a single uniform approach. Thirdly, the fact that detailed knowledge of problems, needs and environmental characteristics is greatest at local level may also speak in favour of regulation at Member State – or regional or local – level. Fourthly, the public sphere, which is often absent at EU level, is also closest to the decentralised level of action. In today's highly complex world, the public sphere makes an important contribution to the quality of information and to the decisions based on it, and thus also to governance.

A tension can therefore arise, in environmental policy, too, between the need for centralised regulation (in accordance with the principle of solidarity) and the benefits of decentralised regulation (in accordance with the principle of subsidiarity) (CALLIESS 1999, p. 185 et seqq.). This is particularly the case when the scope for action at decentralised levels is restricted by the primacy of EU law and its pre-emptive power over national law. EU directives often have an opting-up clause which allows member states to strengthen protection and thus to take more far-reaching measures. However, there is then a risk that even those countries which could afford to increase protection measures because of their economic strength and should do so because they are more polluting will fail to do so. This is often justified by invoking the European minimum standard and the principle of non-discrimination, meaning that the member states remain below what their real national environmental policy needs are.

710. The pre-emptive power of EU law can be used as a justification for delaying national environmental protection measures. However, this kind of conflict between the principles of subsidiarity and solidarity should not lead to the rejection of environmental policy at international or European level. The globalisation of the economy requires the emergence of an economic order that is free of competitive distortions, fair and environmentally sound. One consequence of this is the internationalisation of policies that serve to support the economy. This has led, for example, to the competence of the EU to implement the European internal market (Art. 26 TFEU) being followed by the competence to develop a European environmental policy (Art. 191 et seqq. TFEU). If the EU becomes active in the field of environmental protection, this will also have a positive impact on the "European ecosystem".

It is therefore proposed here that a model should be developed for the differentiated exercise of competence in environmental protection on the basis of Art. 5 TEU which would enable EU-wide regulations and at the same time permit necessary national and regional differentiations by leaving scope for action by the decentralised levels. The differentiations should, however, be restricted to ones that would strengthen protection. This means that only upward deviation would be possible. This would also take account of the tension between the principles

of solidarity and subsidiarity. In some areas, EU regulation would then only set a minimum standard that would enable the member states (and the regions) to maintain and introduce protection-enhancing measures as required. Such an approach assumes, however, that the member states would make use of the scope for enhanced protection in order to adapt the respective regulation to their specific circumstances.

711. A general trend can be established for the demarcation of competences, taking into account the principle of subsidiarity. The EU could, for example, exercise its competence in order to define the general environmental policy framework and to develop criteria and mechanisms for the allocation of the costs of environmental pollution based on the polluter-pays principle. It could also set minimum standards for environmentally relevant procedural requirements, as has been done for example with the EIA Directive 85/337/EEC or the Environmental Information Directive 2003/4/EC, and set minimum standards for emissions and products.

The member states are responsible for implementing and applying Union regulations. In doing so, they are empowered to specify, develop and reinforce the European framework legislation with locally and regionally appropriate measures with the aim of strengthening protection and addressing existing deficiencies or gaps according to the needs of their respective local environmental situation. The existing level and degree of integration is then safeguarded by the uniform EU minimum standard, which prevents the standards drifting too far apart and thus also avoids significant competitive distortion in the Single Market. Upward deviation of this kind could also take place in pioneer groups, in line with the approach presented above (item 708), which would also enhance the overall positive environmental impact (Box 8-7). Moreover, any strengthening of protection should be linked – analogous to Art. 114 sec. 4 to sec. 6, Art. 193 TFEU – to an established Union legal procedure for reporting and monitoring. This approach can be described as a form of complementary flexibility. This way of taking account of the need for differentiation can take as its legal basis Art. 5 TEU, which provides for such forms of progressive subsidiarity (for more details see CALLIESS 1999, p. 240 et seqq.).

712. Explicit scope for differentiation is already provided for in Art. 193 TFEU. The provision of Art. 193 TFEU is referred to as the 'more stringent protective measures' clause. It gives the member states scope for a decentralised opting-up tailored to their particular ecological conditions. Despite the primacy and binding nature of EU law, Art. 193 TFEU preserves the member states' (and their regions') capacity for action by minimising the pre-emptive effect of measures based on Art. 192 TFEU. Minimum standards can be exceeded on a decentralised basis, which means that the 'more stringent protective measures' clause enables environmental policy that takes account of the tension between the principles of subsidiarity and solidarity. Such national differentiation has advantages. For example, member states where there is greater pressure to tackle particular problems and where a more sensitised electorate offers greater opportunities for the enforcement of environmental protection can move forward faster. One example of this is provided by those member states that have committed themselves to a more ambitious climate protection policy. Denmark, for example, aims to reduce its greenhouse gas emissions by 70 % by 2030 compared to 1990 (Klima, Energi- og Forsyningsministeriet 2019), and Finland wants to achieve CO_2 neutrality by 2035 (Finnish Government 2019, p. 33 et seqq.). Such frontrunner states are doing pioneering ecological work by testing regulations which provide more stringent protection measures and which can then trigger catch-up efforts at EU level (SRU 2016, item 36 et seqq.). Existing EU environmental law can by this means also be subjected to pressure to adapt to new technological advances. The scope for more stringent protection measures also facilitates decision-making in negotiations in the Council. If the prospect of the adoption of a higher level of protection by one nation arises, this can lead to a general agreement being reached at a higher level. At the very least, however, it will make it easier for the member state in question to accept a compromise or to agree to be outvoted. Last but not least, the acceptance and credibility of EU regulations will be enhanced in the member states.

8.1.6 Environmental policy principles

713. As outlined above, the EU faces the need to preserve its capacity for action, which is also necessary for an effective environmental policy. This is an EU-level responsibility, as clearly laid down in primary legislation. Thus, according to Art. 3 sec. 3 sentence 2 TEU, a high level of environmental protection and the improvement of environmental quality are among the fundamental objectives of the EU. Art. 4 sec. 2 lit. e TFEU names the environment as one of the "main areas" of shared competence, which reflects the importance of environmental protection as among the highest-ranking

discrete and essential objectives of the EU (NETTESHEIM in: GRABITZ/HILF/NETTESHEIM 2019, Art. 191 TFEU para. 16). Art. 11 TFEU requires environmental protection requirements to be integrated across all policy areas in all Union policies and measures. Environmental protection thus constitutes a "public community interest" in the sense of a necessary and primary Union purpose, which has a legitimising function (KAHL in: STREINZ 2018, Art. 191 TFEU para. 18–26). Comparable, albeit weaker, provisions also exist, for example, in the area of consumer and health protection, although the need for integration is most pronounced in the case of environmental protection. There are considerable synergies between environmental, health and consumer protection, as well as integration provisions which can be mutually reinforcing.

Art. 191 TFEU specifies the objectives of EU environmental policy. These are defined as follows in sec. 1:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources, and
- promoting measures at international level to combat regional or worldwide environmental problems and in particular combating climate change.

In order to improve the prospects of the objectives of Art. 191 TFEU being met, a model for a cooperative division of responsibilities between the member states in the field of environmental policy can be developed from Scenarios 3, 4 and 5 of the White Paper. Because of its greater flexibility, this model can also help to reflect the different circumstances of the member states in this area.

8.1.6.1 The precautionary principle

714. The precautionary principle is enshrined in Art. 191 sec. 2 TFEU, which explicitly provides that EU environmental policy shall be based, inter alia, on the precautionary and preventive principles. It obliges the EU to aim for a high level of protection in its environmental policy. The ECJ has given concrete expression to the precautionary principle in that the EU institutions can take protective measures if the existence and extent of risks to human health are uncertain, i. e. if there is only a risk. This means that they do not have to wait until the existence and magnitude of such risks are clearly established (ECJ, judgment of 5 May 1998, Case C-157/96). This applies to all environmental protection goods. Here, the term risk means that there is a certain degree of probability that the negative environmental effects which the measure is intended to prevent might occur. Thus, before taking a precautionary measure, the public body must carry out a risk assessment consisting of a scientific evaluation and a political assessment (SRU 2012b, item 35 et seqq.). This must take account of the objective of a high level of protection in European environmental policy. Scientific and practical uncertainty, which is inseparable from the concept of precaution, affects the scope of discretion and thus also the application of the principle of proportionality. The measures taken must be objective and non-discriminatory (ECJ, judgment of 22 December 2010, Case C-77/09). The ECJ is also of the opinion that, whereas Art. 191 sec. 2 TFEU stipulates explicitly that environmental policy is based on the precautionary principle, the principle must also be applied to other EU policy areas, in particular public health protection policy, and when the EU institutions adopt measures to protect human health under the Common Agricultural Policy or the Single Market (ECJ, judgment of 1 October 2019, Case C-616/17).

The debate on the innovation and precautionary principles

715. The innovation principle is a concept which is the subject of controversy at European level and which is understood by some actors, particularly from the business world, as a counterweight to the precautionary principle. They fear that the precautionary principle could hinder the development of new technologies and damage the potential for innovation in the European economy. This has given rise to the demand that an innovation principle be introduced into the Treaties (BusinessEurope et al. 2015). On the other side, the mere mention of the innovation principle in documents relating to the EU research programme "Horizon Europe" has already led to protests from NGOs (Global Health Advocates 2019) which – like some EU member states – fear that this will weaken the precautionary principle.

Since scientific actors and companies can rely on the fundamental rights enshrined in the European Charter of Fundamental Rights in Art. 13 (freedom of science), Art. 15 (freedom of occupation) and Art. 17 (the right to property) to protect their freedom of innovation along the chain of research, development and production (EPSC 2016), innovations have always been recognised as legally protected assets. In European legislation, this must be balanced in a proportionate manner with the

concerns of environmental protection and the precautionary principle (cf. Art. 191 sec. 1 and sec. 2 TFEU). The introduction of an independent innovation principle would not change this, as a principle has less effect in law than fundamental individual rights. From a legal point of view, an innovation principle is therefore superfluous and would have symbolic significance at best.

716. According to its supporters, the proposed innovation principle would help to make European legislation more innovation-friendly. From this perspective, regulation is seen solely as an obstacle to innovation. From the perspective of the SRU, such a view is short-sighted. Transformation research has shown with reference to innovation processes that promoting innovation is often not enough. Rather, especially in the transition phase of innovation from niche to a wider market, flexible political-regulatory control by the state is needed to create the stable framework which gives companies the necessary planning and investment confidence (see SRU 2016 pp. 29–33 with further references). This happens mainly through regulation, which can therefore also be a driver of innovation (EPSC 2016, p. 5). Last but not least, it can encourage and guide innovations which are needed for the achievement of important public welfare goals such as environmental protection. Indeed, today's enormous ecological challenges – for example, climate protection and the circular economy – require precisely the kind of radical innovations that often cannot be expected, or not soon enough, without appropriate regulation. In addition, empirical studies have shown that innovation triggered by regulation can also improve competitiveness and facilitate the growth of new markets. This is the perspective that underlies the European Green Deal.

717. Innovations therefore inevitably take place within a regulatory framework in which the precautionary principle is also relevant. It should be emphasised that regulation serves primarily to realise important public welfare interests. As a fundamental activity of the EU, it thus represents not only a means of taking action, but also a task mandated by the Treaties. For environmental policy, this follows from Art. 11 and 191 TFEU, for health policy from Art. 168 TFEU and for consumer protection from Art. 12 and 169 TFEU (EPSC 2016, p. 3). These tasks are always subject to the general requirements of subsidiarity and proportionality (item 713 et seqq.).

Within this framework, there is a duty – first and foremost on the part of the legislator – to examine in the light of the principle of proportionality which form of regulation is appropriate for the realisation of environmental policy that is open to innovation but at the same time oriented towards precaution (EPSC 2016, p. 3). This also applies to the timing of regulation. It may take place during the research and development, the niche market or the market penetration stage, and may relate to new, mature or ossified markets. In addition, subsequent readjustments may be necessary if the areas subject to regulation change or completely new substances are affected (e.g. nanotechnology). Experimental regulation, which for example allows a deviation from existing standards for certain activities and for a limited period of time, can also promote innovative initiatives (RANCHORDÁS 2015). Regulation can thus act as a driver of innovation; this is achieved in particular through the interplay between competition with rules and existing practices in the field on the one hand, and the influence of policy goals and measures, technological innovation and market dynamics on the other (SRU 2016, chap. 1). One example is so-called top-runner regulations, which at regular intervals declare the most energy or resource-efficient product to be the new standard to be adopted by the entire industry (JEPSEN et al. 2011). None of this requires the introduction of an innovation principle.

8.1.6.2 The integration principle, or the horizontal clause

718. Of particular importance for an understanding of European environmental policy and its future development is Art. 11 TFEU, the integration principle or cross-cutting clause. Art. 11 TFEU is a key instrument for implementing the principle of sustainable development in EU law. It can be understood as an imperative under primary legislation to carry out strategic monitoring of environmental compatibility which extends not only to individual measures but also to policies, programmes, plans and laws. The cross-cutting clause provides for environmental impact assessment for the entire spectrum of EU activities (APPEL in: KOCH/HOFMANN/REESE 2018, § 2 para. 44). The requirement for environmental protection must be taken into account and weighed up against conflicting interests. This balancing process is characterised by two aspects. Firstly, the requirements of Art. 191 sec. 1 and sec. 2 TFEU – in particular the precautionary principle – must be taken into account in the process. Secondly, the term integration means that environmental concerns must not simply be lost in the balancing process. Rather, they must be an integral part of, and demonstrably shape, each individual EU measure (CALLIESS 1998). This argument has increased in importance commensurately as environmental impacts have

grown together with the recognition that environmental assets such as ecosystems, environmental media and the climate are often closely interlinked and that there are therefore strong links between different environmental sectors and problems. The legislative scope in this respect is thus exceeded if the measure is clearly designed in a one-sided way to the detriment of environmental protection. According to Art. 11 TFEU, any such measure, which would in all probability lead to considerable tangible damage to the environment, may not be adopted. A policy that crossed this boundary would be illegal as it would be in breach of Art. 11 TFEU. To date, however, this finding has not led to the successful integration of environmental protection into other policy areas.

The EU works in alliance with the member states to meet the requirements of environmental protection. Within this alliance, regulations are created, implemented or enforced at various levels in order to achieve the required overall high level of environmental protection. Art. 11 TFEU, which requires the integration of environmental concerns in the adoption and implementation of other Union policies and activities (APPEL in: KOCH/HOFMANN/REESE 2018, § 2 para. 44), applies in the first instance only to the EU itself. However, since EU law is regularly transposed and applied by the member states, they too are bound by the provisions of Art. 11 and 191 TFEU when implementing European environmental law (CALLIESS in: CALLIESS/RUFFERT 2016, Art. 11 TFEU para. 11).

As a rule, a principle of sustainability is also inferred from the cross-cutting clause, in particular from the interaction of this norm with the formulation in the Preamble and Art. 3 sec. 3 sentence 2 and sec. 5 sentence 2 TEU. This means that the EU's obligation to adhere to the principle of sustainable development is beyond question (CALLIESS 1998). This principle encompasses the coordination of economic processes and social equalisation processes in a way that is environmentally responsible and aligned with the carrying capacity of ecological systems.

8.2 Challenges for European environmental policy

719. In the following section, the necessity and the challenges for environmental and climate protection at the European level will be discussed with reference to chapters 2 to 7 of the Environmental Report, and illustrated by means of concrete examples. With regard to the challenges, it can be stated that the goals set at European level in recent years when regulations were updated or introduced have sometimes been insufficiently ambitious. Environmental concerns have not been sufficiently integrated into other policies in ecologically problematic sectors. At the level of the member states it can also be observed that directives are sometimes poorly implemented. And environmental regulations are not effectively enforced, sometimes even decades after they have come into force.

Box 8-1: The treatment of river basin districts in the Water Framework Directive

Effective water protection is only possible if it is based on the natural catchment areas of the water bodies. This precise point constitutes a key feature of the Water Framework Directive 2000/60/EC (item 269 et seqq.). It stipulates that member states should define so-called river basin districts. These form the main unit for the management of water bodies, which is intended to ensure that the objectives of the Water Framework Directive are achieved. If river basin districts extend across national borders, the respective member states must coordinate the protection measures. The principle of cooperation expressed in this provision applies to all administrative units responsible for water management within a river basin district, e.g. regional or local competent authorities (Art. 3 Water Framework Directive). Detailed management is carried out on the basis of management plans and programmes of measures, in which concrete steps are specified for the achievement of good water status. There is a requirement for material improvement. Independently of this, a deterioration is expressly prohibited, and compliance with this prohibition must also be examined, in accordance with case law, when projects are submitted for approval.

In practice, coordinating the competent authorities can be a very demanding task, especially when administrative bodies with different structures and potentially different approaches to protection in a number of member states are required to cooperate (KRAEMER 2012). The Water Framework Directive was subjected to a fitness check in 2019, which concluded that it is "fit for purpose" (European Commission 2019b). The European Commission pointed out in the fitness check that the lack of success

of the Water Framework Directive to date is due among other things to the fact that it is difficult to establish a common management guidance framework. The success of the Directive would also require the full implementation of other EU legislation, such as the Nitrates Directive 91/676/EEC and the Urban Waste Water Treatment Directive 91/271/EEC, and a better integration of water protection objectives into other sectoral policies such as agriculture, energy and transport (European Commission 2019b).

720. In addition, a further argument for EU action is brought into the debate under the heading of "ubiquity" (KRAEMER 2019). If a problem occurs in a similar form in many places, it is "ubiquitous" and often the result of the same drivers and trends in all member states. Comparable concepts to ubiquity are the idea of equivalent living conditions or the establishment of an equivalent level of security (REESE 2019, p. 696). In such cases, an EU policy or measure can be considered necessary if it addresses a common driver or source (e.g. a product such as cars or aircraft) and thereby facilitates the solution of the environmental problem. This can be done through subsidiary support, the establishment of institutional frameworks and common metrics, planning mechanisms, research to establish baselines and monitor progress, data exchange, reporting, sharing of experience and policy learning.

Box 8-2: Noise as a ubiquitous problem

Ambient noise is a persistent environmental problem that occurs in all European member states and that has not been adequately addressed so far. It is omnipresent, i.e. ubiquitous (item 356 et seqq.). This argues in favour of addressing the problem of noise at European level and treating it strategically. Such a ubiquitous environmental problem can be more easily solved if the EU makes funds available and if there is at least a framework of rules at EU level on how to deal with the problem in order to promote the uniform gathering of data across Europe, establish baselines and develop joint assessments (KRAEMER 2019).

721. If the source is a product, this comes under the internal market dimension of European environmental policy. Regulation at the European level, especially of environment-related product standards, has the purpose here of ensuring the functioning of the internal market. EU measures may be necessary to ensure that competition in the internal market is not distorted. Divergent measures at the level of the member states could lead to distortions. For example, if only one member state has rules relating to the environmental protection requirements for certain products, it could use these rules to prevent the import of those products from other member states. Harmonisation of norms and uniform standards, for example for industrial equipment, will prevent distortions of competition and obstacles to trade, thus creating a level playing field (REESE 2019) and avoiding a race to the bottom. Because where national markets are opened up to create a common internal market, there is also competition between national economic models, which impose widely diverging minimum standards of socially and environmentally compatible production on their rival companies (CALLIESS in: CALLIESS/RUFFERT 2016, Art. 191 TFEU para. 1). Furthermore, measures may become necessary if barriers to trade in the internal market or international trade would otherwise arise or persist. This is particularly the case with regard to requirements for the design, marketing, use or disposal of products and their packaging (product-related standards). Circular economy regulation serves largely to ensure the free movement of goods and the functioning of the internal market, which requires common minimum standards for product design, labelling and information as well as processing and recycling requirements. The circular economy is thus a good example.

Box 8-3: Product-related standards in the circular economy

The laws governing waste and recycling management are particularly strongly influenced by European law (FRANßEN 2018, para. 1). The core of European waste management law is given by the Waste Framework Directive 2008/98/EC, which standardises waste regulation terms and basic principles. This is buttressed by numerous specific legal provisions containing requirements applicable to products, material flows and packaging at the various stages of the life cycle as well as to waste treatment. The breadth and depth of regulation governing European recycling and waste management law can be explained to a large degree by its relevance, beyond its environmental impact, to the free movement of goods. Under the common internal market, a circular economy is only conceivable if there are uniform minimum standards

for product design, waste disposal, waste export and return, or to extended product responsibility. In this respect, there are points within the area of environmental services and waste law where the EU's environmental protection competence under Art. 192 TFEU and its internal market competence under Art. 114 TFEU overlap.

In a circular economy, product flow-related regulations serve to exclude hazardous substances from the materials cycle from the outset, in order to reduce the use of materials in products and packaging or to improve recyclability through product design and labelling obligations. If each member state were to adopt its own product-related regulations in this regard, there would be a risk of obstacles and distortions to cross-border trade, which would impede the goal of a common internal market. For this reason, the Packaging Directive 94/62/EC and the RoHS Directive 2011/65/EU, for example, are based on competence relating to the internal market. But waste and secondary raw materials are also transported and traded between countries. Following ECJ rulings, waste has in principle been accorded the status of a commodity and is therefore subject to provisions regarding the free movement of goods, even though environmental protection requirements might justify restrictions on the free trade in waste (ECJ, judgement of 9 July 1992, Case C-2/90 and judgement of 17 March 1993, Case C-155/1991). However, insofar as it is freely tradable, safe and environmentally sound treatment must be guaranteed under European law. Minimum standards are needed for waste shipment, treatment and recovery so that waste is not exported to member states with lower standards. Such undesirable environmental dumping could lead to improved waste treatment methods failing to establish themselves and innovative recovery methods not being developed in the first place. Last but not least, poor waste management could damage environmental goods that are important for the Community as a whole. For waste management regulations, the overall focus is on the environmental protection competence of the EU. The Waste Framework Directive, for example, is based on the environmental protection competence of the EU. The same applies to the Landfill Directive 1999/31/EC or the Industrial Emissions Directive 2010/75/EU.

The rationale outlined above leads to a significant additional benefit of European environmental policy, one which must be taken into account in the EU's working methods. By no means all of the EU member states pursue their own independent and ambitious environmental policies. Some are largely limited to the transposition and implementation of relevant EU legislation. For this reason, it is often the case that action at EU level is the first step in ensuring that environmental protection takes place in all member states and thus throughout the "European ecosystem" (CALLIESS in: CALLIESS/RUFFERT 2016, Art. 191 TFEU para. 2). A further additional benefit of European environmental policy can be identified which follows on from this: the effective management and use of common goods (such as fisheries and use of the atmosphere) can only take place in a centralised system under which overuse can be prevented (REESE 2019, p. 693).

Box 8-4: The atmosphere as an overused public good

The atmosphere is a global public good and the consequences of climate-related emissions are transboundary, as greenhouse gas emissions from all countries accumulate in the atmosphere. A global budget (chap. 2) means that all other countries will have to bear the additional burden that arises if one country fails to meet its climate targets. Public goods can only be protected through collective action, which is why climate policy is particularly dependent on intergovernmental cooperation (SRU 2019).

The EU also benefits greatly from being able to set standards at intergovernmental level that are directly binding on all member states and other legal entities and thus bring direct benefits to the "European ecosystem" as a whole. This is possible thanks to an institutionalised process that does not require the conclusion of an international treaty.

EU-wide legislation can also bring added value in certain areas by giving weight and impact to European objectives at international level. The European voice in climate negotiations, for example, only carries weight if it includes the entire Union, which requires uniformity of action. The EU can set standards with global influence and impact because of the trading power it has as a major player. In addition, it is possible for climate protection instruments to be tried out here before being adopted by other countries or regions. These include the European Union Emissions Trading System (EU-ETS).

722. The above considerations on the added value which EU environmental policy can bring are potentially at odds with the European legal principle of subsidiarity (Art. 5 sec. 3 TEU). With regard to the EU, the principle of subsidiarity under European law is discussed almost entirely in relation to limiting EU competences. This also applies to environmental competence. In general, the subsidiarity principle in the narrower sense concerns the question of whether there is a need for action on the part of the Union. When discussing the principle of subsidiarity, it should be borne in mind that it is a relational concept, the precise meaning of which with regard to certain concepts not otherwise defined in law (Art. 5 sec. 3 TEU: "insufficient", "better") has to be specified in the particular context (CALLIESS 1999, p. 185 et seqq.).

723. The principle of subsidiarity is therefore expressed in the working method set out in item 706 et seqq., which enables the member states and regions to maintain or introduce measures to strengthen environmental protection in a flexible and customised manner on the basis of minimum standards applicable throughout Europe. For this reason, legislation for environmental protection purposes is generally issued in the form of directives rather than regulations. The former provide the member states only with a framework for implementation (in particular, a result to be achieved), but often leave the choice of form and methods to the member states. According to Art. 288 sec. 3 TFEU, the directive is an instrument of indirect or cooperative two-stage legislation. A directive is binding as to its aim or outcome on each member state to which it is addressed. It thus contains ultimate requirements on the member states, which must realise these through transposing acts (RUFFERT in: CALLIESS/RUFFERT 2016, Art. 288 TFEU para. 23). This also makes it clear that the objective of a directive cannot be achieved by a one-to-one transposition because the scope of the directive is not thereby fully utilised (for details see item 730). The possibility of more stringent protective measures provided for by Art. 193 TFEU can also have a dynamic effect. The scope for action at the (from a European perspective) decentralised level can create a spill-over effect. Firstly, it can trigger pressure for action on the higher level (i.e. the European), and secondly it can create competition for innovation to find better solutions (CALLIESS 1999, pp. 247–258). The principle of subsidiarity must therefore always be taken into account in drafting and developing laws at the European level.

Box 8-5: Subsidiarity in urban transport development planning

The EU is not responsible for transport planning in the member states, so binding European guidelines are not required in the area of transport development planning (item 527 et seqq.). Europe-wide regulation came up against concerns over subsidiarity. This is only appropriate: the creation and modification of transport infrastructure is in the hands of the member states. While the overall goal of making transport more compatible with climate and environmental policy is (also) set by the EU level, the question of how the goal is to be achieved is a national one. Even if a uniform obligation under European law to draw up transport development plans might have a positive impact on urban transport, it cannot be denied that this is an area in which the member states themselves ought to take action on the basis of regional or local circumstances. On the other hand, it is both possible and desirable that the EU should continue and increase its support for the networking of cities of varying sizes and help them to make their urban transport more sustainable.

724. Environmental policy and law are often criticised as creating obstacles to innovation and investment through overregulation and bureaucratisation. Driven by the consequences of the crisis in the eurozone, and prompted by a number of member states (including the Netherlands, the UK, Poland and sometimes Germany), the European Commission has focused on reviewing European regulation with a view to reducing burdens on national administrations, businesses and citizens. To this end, the Regulatory Fitness and Performance Programme (REFIT) (European Commission 2012), established in 2012 already, was extended to consider new legislative proposals from a specially appointed new body within the European Commission, the Regulatory Scrutiny Board (RSB), with the overall aim of better regulation (the "Better Regulation Agenda"). As part of REFIT, European law has since 2012 been subject to a systematic review (or 'Fitness Check'). This extensive investigation includes a public consultation process as well as studies by external experts looking at the application of European law in the member states. To date, 216 such procedures have been carried out. These include 32 REFIT procedures in the field of environmental protection (in two so-called priority areas), eight in climate protection and four in the energy sector.

The Fitness Checks have shown that the European directives considered to date for the purpose of environmental protection are fulfilling their objectives ("fit for purpose"). The directives considered contribute to effective environmental protection without imposing an excessive burden on European companies or citizens.

Box 8-6: Environment and energy directives "fit for purpose"

The following are selected examples of evaluations carried out under the REFIT programme.

Habitats and Birds Directive: In 2016, as part of the REFIT programme, the European Commission evaluated the Fauna-Flora-Habitat Directive 92/43/EEC (Habitats Directive) and the Birds Directive 2009/147/EC, which among other things form the basis for the designation of the Natura 2000 network of protected areas, and also contain requirements for the special protection of species outside protected areas. The Fitness Check showed that the two directives are fundamentally effective, efficient and fit for purpose. The fact that their objectives have not been met is rather the result of shortcomings in their implementation. Insufficient funding, ineffective management of the protected areas and the inadequate consideration of biodiversity concerns in other policy sectors, especially agricultural policy, were identified as major obstacles (European Commission 2016d). Several proceedings are currently underway against Germany for infringement of the site protection requirements of the Fauna-Flora-Habitat Directive.

Environmental reporting: 58 legal acts of EU environmental legislation have given rise to 181 obligations on member states to report to the EU institutions and the public, either on a regular basis or as a one-off report in response to specific events. The REFIT Suitability Test concluded that the effectiveness of environmental reporting is satisfactory and largely efficient and fulfils its purpose. The financial outlay, which was judged to be moderate, justified and proportionate, is far outweighed by the benefits provided by environmental reporting (mainly improved implementation of legislation and better information to the public). However, obstacles are, among other things, a lack of flexibility in the rules and outdated, incomplete and poor-quality reporting data from the member states. Cooperation between actors from related fields was also considered to be unsatisfactory in some cases. Although the assessment was positive overall, opportunities to improve reporting were identified, only a few of which have been acted upon (European Commission 2016b).

The Water Framework Directive and linked directives: The Water Framework Directive 2000/60/EC creates a regulatory framework for water policy in the EU (for more details see item 269 et seqq.). Together with the Directive on Environmental Quality Standards 2008/105/EC, the Groundwater Directive 2006/118/EC and the Floods Directive 2007/60/EC, it was the subject of a Fitness Check. This came to the conclusion in 2019 that the water legislation as a whole is fit for purpose. It found weaknesses with regard especially to the implementation of the existing rules. The fact that the objectives of the Water Framework Directive have not yet been fully achieved is in this account largely due to insufficient funding, slow implementation and inadequate integration of environmental objectives into sectoral policies, and not to shortcomings in the legislation (European Commission 2019b).

Drinking Water Directive: The Drinking Water Directive 98/83/EC, introduced in 1998, regulates the quality of drinking water for human consumption. A REFIT evaluation in 2015 examined whether the Directive was still appropriate and fit for purpose. The Directive was seen as an essential instrument to ensure a high quality of drinking water, effectively protecting human health from drinking water contamination throughout the EU. Potential for improvement was seen in particular with regard to the required quality levels. The quality parameters established in 1998 had not been tested since then, despite new challenges such as the emergence of new pathogens. A lack of coherence (the absence of any reference to the protection of water sources used for drinking water abstraction) was also criticised (European Commission 2016a). In response to the findings of the evaluation and the demands of the European Citizens' Initiative Right2Water, the European Commission proposed a revision of the Directive in 2018 (European Commission 2018i). Basically, this brought the security standards up to date, adopted a risk-based approach and preventive security planning and improved the information provided to users.

REACH: The Chemicals Regulation (EC) No. 1907/2006 (the so-called REACH Regulation), passed in 2006, was subject to a second REFIT evaluation in 2017 ("REACH Review"). The evaluation showed that REACH has made dealing with chemicals in the EU safer and that the financial burden is clearly outweighed by the positive benefits for human health and the environment (European Commission 2018e). The evaluation identified an urgent need for action, as companies only regularly update registration dossiers in a quarter of cases. Complex approval procedures, competitiveness vis-à-vis non-EU companies and interfaces with EU regulations in other sectors (in particular occupational health and safety and waste legislation) pose further challenges, for which measures have been formulated. The REACH review led to changes in regulations governing implementation, such as a requirement to update registration dossiers by the end of 2019 (European Commission 2018g).

Waste management directives: Five directives relating to waste streams (Sewage Sludge Directive 86/278/EEC, Packaging Directive 94/62/EC, PCB Directive 96/59/EC, End-of-Life Vehicles Directive 2000/53/EC and Batteries Directive 2006/66/EC) were reviewed in 2014 to see whether they met their environmental and efficiency objectives. The directives were assessed as effective and providing high added value for the EU (European Commission 2014). Notwithstanding the positive overall outcome, implementation deficits were identified in some cases, resulting from legislative ambiguities and contradictions between the Directives. In the case of the PCB and Batteries Directives, shortcomings in implementation were identified due to incomplete data transmission by the member states (RAYMENT et al. 2017). In 2015 the European Commission adopted a Circular Economy Package which also included revised waste-related draft legislation (item 142 et seqq.). In the course of this process, the shortcomings identified were also addressed, but the legislative inconsistencies were still not completely eliminated. In 2018, the Council and the European Parliament adopted the enhanced waste directives, which are intended, among other things, to facilitate the transition of the European economy to a circular economy.

Energy Performance of Buildings Directive: From 2015 to 2016, the European Commission carried out a REFIT procedure on the Energy Performance of Buildings Directive 2010/31/EU. The aim of the procedure was to further improve energy efficiency in the building sector, to provide cost-effective greenhouse gas reduction measures and to modernise and simplify the Directive so that it continues to fulfil its purpose (European Commission 2018h). The evaluation found that the overall structure of the Directive, which provides for a combination of minimum standards and energy performance certificates, is effective, and that EU policy in this area creates added value over national regulations (European Commission 2016c, p. 2 et seq.). The evaluation report identifies the Energy Performance of Buildings Directive as the main factor behind important improvements in the energy efficiency of buildings in the EU (ibid., p. 2). Although the need for legislative action was regarded as low, there was scope at EU level for simplifying, updating and streamlining existing and sometimes obsolete provisions, taking recent technological developments into account (ibid.) In addition, it was felt that the directive could be better implemented, in particular through effective enforcement of the provisions (ibid.). An important aspect identified was a more effective dovetailing with financial support options (European Commission 2018h). The subsequent Commission proposal also contained measures leading to considerable savings in administrative costs (European Commission 2016h). The REFIT process ultimately led to amendments to the Energy Performance of Buildings Directive.

However, the Fitness Checks tie up significant working capacity within the European Commission and member states without contributing directly to the implementation and enforcement of the directives. Moreover, the selection of directives to be reviewed has so far been somewhat one-sidedly in the area of environmental protection, whereas other relevant policy areas such as agricultural policy have not been considered. Against this background, the European Commission should – in line with the working method outlined above – focus its priorities more on better enforcement of existing legislation and initiate the structural and staffing changes required to that end.

8.2.1 A lack of ambitious targets

725. As described above, due to various crises environmental protection has not been the focus of European policy in recent years. Many developments over the period from 2008 to 2019 therefore tended to be incremental and path-dependent (ZITO et al. 2019). This now appears to be changing as a result of the European

Green Deal, which has broadened the perspective to take in fundamentally necessary transformative elements. Against this background, however, it must also be asked whether the existing targets for successful environmental and climate protection are sufficiently ambitious.

Box 8-7: The need to raise the targets in energy and climate policy

In the past, the EU was often perceived as a leader in climate policy (OBERTHÜR and ROCHE KELLY 2008). The EU has a differentiated system of medium and long-term climate targets and acts as a single negotiating partner in international negotiations, for example at UN climate conferences. As a result, the EU member states do not make their own nationally determined contributions (NDCs), but a joint European NDC. In order to take into account the requirements of the Paris Agreement, and in particular the 1.5-degree-target (European Commission 2018b, p. 17), the long-term strategy is currently being negotiated at EU level with a climate policy target system up to 2050. The European Green Deal has confirmed the commitment to climate neutrality by 2050.

However, in recent years the Eastern European member states have expressed stronger reservations concerning ambitious climate policy and the increased supranationalisation of energy policy. They invoke the right of member states to determine the conditions for the use of their energy resources, their choice between different energy sources and the overall configuration of their energy supply (Art. 194 sec. 2 TFEU). Despite the renewed commitment to climate policy, the EU's energy and climate policy is therefore constrained by the energy policy sovereignty concerns of a few member states, who possess a strong lever in the form of Art. 194 sec. 2 TFEU. An example of this is the decisions of the European Council of 12 December 2019, in which Poland was the only member state not to support the goal of making the EU climate-neutral by 2050 (European Council 2019b). For this reason, the issue is to be raised again in the European Council in June 2020 (ibid., p. 1). To put this into practical terms, the European Council has charged the European Commission with drawing up a long-term strategy for climate neutrality (European Council 2019b). Climate protection is an EU priority, which is given political expression in the European Green Deal. The efficiency of the EU in this area of environmental energy policy is therefore to be strengthened; this could happen through the introduction of majority voting by means of the passerelle in Art. 192 sec. 2 TFEU, so that climate policy blockades based on the clause in Art. 194 sec. 2 TFEU can be overcome (on the continued applicability of Art. 192 TFEU, see CALLIESS in: CALLIESS/RUFFERT 2016, Art. 192 para. 32 and Art. 194 TFEU para.1 and 29). Alternatively, a pioneer group for ambitious climate protection could be formed, which would then, however, have to be allocated the greater part of the benefits set out in the European Green Deal in the form of support measures. However, it must be borne in mind that a higher level of climate policy ambition on the part of pioneer groups must not be allowed to lead to fewer reduction efforts being made in other EU member states, or to the binding nature of the reduction targets as a whole being called into question. Therefore, the measures taken by any such pioneer group should be consistent with the relevant provisions of the EU ETS and the Climate Change Regulation (EU) 2018/842 and should go beyond the emissions reductions already agreed upon by sectors or member states. For example, member states' annual emission allowances which become free as a result of additional climate protection measures in non-ETS sectors should be retired rather than being sold to other member states that have exceeded their emissions allowances. A possible CO_2 minimum price for EU ETS allowances in pioneer countries analogous to the British minimum price (Carbon Price Floor) should also be accompanied by a corresponding reduction in the volume of allowances available in the EU ETS (FLACHSLAND et al. 2020). In this way a "waterbed effect", i.e. the cancelling out of emissions reductions by increased emissions in another part of the system, can be avoided from the outset. Overall, it is essential to ensure that a EU's Paris-compatible CO_2 budget is maintained through both existing climate policy instruments and the additional savings made by the pioneer countries (item 86 et seqq.).

In the European Emissions Trading Scheme, the EU has a key instrument for reducing emissions in the energy sector and in energy-intensive industry across Europe, with the overall aim of reducing emissions by 43 % by 2030. For sectors outside the EU ETS, climate protection regulation also defines binding reduction targets at member state level, with over-

all emissions to be reduced by 32 %. In contrast to the EU ETS, however, in these sectors the member states are responsible for implementation (item 89 et seqq.). Nevertheless, the EU also plays a significant role in climate policy in these areas, too, for example by influencing the energy efficiency of products in the European internal market through product standards such as CO_2 limits for new cars. EU action is particularly needed here because otherwise uncoordinated national action would lead to distortions in the internal market. As a result, countries with less stringent climate policy rules could gain a competitive advantage, and emissions could be shifted abroad (carbon leakage).

No binding national targets could be agreed for either the renewable energy expansion target (32 % by 2030) or the energy efficiency target (a 32.5 % increase over a business as usual scenario). With the Governance Regulation (EU) 2018/1999 and the integrated national energy and climate plans provided for therein (item 94 et seqq.), an attempt was made to compensate for the lack of binding force through reporting and evaluation obligations, which is why the approach can be described as a soft governance approach (VEUM and BAUKNECHT 2019). But the European Commission can formulate recommendations to member states that are in danger of missing European or self-defined targets and demand the implementation of additional measures.

However, the current list of targets, and in particular the greenhouse gas reduction target for 2030 of 40 %, is hardly consistent with the goal of greenhouse gas neutrality by 2050, since the level of ambition would need to be significantly increased after 2030 (GEDEN and SCHENUIT 2019, p. 4). It is therefore to be welcomed that the European Green Deal aims to raise the level of ambition for 2030 to a reduction of 50 %, and if at all possible 55 %. Other energy-related targets and directives, such as the EU ETS and the Climate Protection Regulation, would then also have to be tightened up to reflect the increased level of ambition (on the consequences for German climate policy, see item 99 et seqq.; European Commission 2019a, p. 2).

726. The policy of the previous European Commission should also have been more ambitious with regard to the circular economy. According to the 2015 Circular Economy Action Plan, the Commission should, among other things, have examined how to create a more coherent political framework for the various strands of EU product policy. It was also intended that the interaction of chemicals, product and waste regulation should be addressed, with the aim of reducing the prevalence of chemicals causing concern and improving their traceability (see also EEB 2019).

Box 8-8: Lack of success in meeting circular economy waste prevention targets

The 2015 Circular Economy Package has brought changes that are to be welcomed from an environmental protection perspective. However, the Action Plan for the Circular Economy has been criticised for aiming primarily at improving the recycling of the waste produced. By contrast, the first level of the waste hierarchy – waste prevention – is only addressed by a few concrete specifications, even though the continuing high consumption of primary raw materials represents a key challenge for the development of a circular economy (MAURER 2017). This can be seen, for example, in the 2018 revision of the Waste Framework Directive. Among other things, the revision was intended to strengthen the waste hierarchy (Recital 15 of the amending Directive 2018/851/EU). However, there is little evidence of the translation of this objective into specific provisions or requirements. The newly inserted Art. 4 sec. 3 Waste Framework Directive provides that member states shall use "economic instruments and other measures" to provide incentives for the application of the waste hierarchy. Examples of possible appropriate economic instruments and other measures are listed in a new Annex IVa, although these are kept very general. They do not result in binding requirements. In the relevant literature they are classified as non-binding recommendations (RABL and SUHL 2018, p. 264). In addition, Art. 9 of the Waste Framework Directive now contains a list of prevention targets, although most of these are also formulated in an abstract way. For example, Art. 9 sec. 1 lit. a of the Waste Framework Directive stipulates that member states shall take measures to "promote and support sustainable production and consumption models". Such generalised objectives do not entail measurable targets or concrete obligations for the member states. The European legislature thus largely leaves it to the member states to implement the strengthening of the waste hier-

archy, and in particular of prevention, which it is calling for. In this respect, the 29th recital of the amending directive 2018/851/EU is characteristic, in that it states that "waste prevention is the most efficient way to improve resource efficiency and reduce the environmental impact of waste. It is therefore important that member states set measurable targets and appropriate measures to prevent waste and monitor and assess progress in the implementation of such measures". In the future, it will be important for the EU itself to set concrete targets for waste prevention. This includes the reduction of social material flows through strategic but also quantitative targets (item 204 et seqq.). This would make it clear that waste prevention also depends on the input of raw materials for a society's consumption and that the entire life cycle of products and goods must therefore be considered.

'One-in, one-out' rule is an obstacle to ambitious environmental policy

727. It is particularly worrying that Commission President von der Leyen wants to introduce the, one-in, one-out' rule, as applied in Germany, at European level too ("The von der Leyen Commission: for a Union that strives for more", press release of the European Commission of 10 September 2019). According to this precept, new regulations may only be introduced if the compliance burden on business in the same policy area is simultaneously reduced. A particular problem with this political rule is that the cost-benefit analyses carried out in this framework do not adequately reflect environmental policy concerns and consequences. It thus contradicts the legal requirements of Art. 191 sec. 3 TFEU, as no comprehensive cost-benefit assessment (VETTORI et al. 2016) is carried out (CALLIESS in: CALLIESS/RUFFERT 2016, Art. 191 TFEU para. 45). Inflexible provisions such as the one-in, one-out rule can also block fact-based legislation, as there is not always a legal provision that can be replaced. Moreover, such a rule ignores the question of whether the existing regulations are necessary. The doctrine could come into direct conflict with the European Green Deal, which will require extensive new regulation. The SRU is therefore sceptical towards the one-in, one-out rule (SRU 2019, item 237 et seqq.). Newer methods make it possible to quantify environmental impacts in a methodologically sound manner (UBA 2018a; 2018b). A transparent assessment of environmental impacts and their costs should also be carried out at European level.

8.2.2 Inadequate integration of environmental policy

728. From an environmental policy perspective, environmental policy integration involves the integration of environmental concerns into sectoral policies with the aim of reducing policy inconsistencies and achieving synergies (van OOSTEN et al. 2018a; 2018b). Ecosystems, environmental media and climate are closely interlinked and are significantly influenced by human activities. Conflicts between different policy areas should be avoided by addressing redundancies, contradictions and regulatory gaps, especially in the policy development process (DUPONT 2017). Policy integration in the broader sense is therefore understood as the coherence and coordination of policies.

In many sectors, environmental problems can only be solved if environmental aspects are integrated into other policy areas at an early stage, as is legally required by the cross-cutting clause of Art. 11 TFEU. The overriding objective should be to ensure that environmental policy concerns are sufficiently recognised and adequately taken into account in other policies. Difficulties may be encountered in integrating environmental aspects into other policy areas if powerful economic interests are affected in a sector, especially if existing economic uses are to be restricted or existing production processes are to be changed for environmental and climate reasons (SRU 2019). Often, effective integration is hindered by an explicit resistance to change. In practice, difficulties with environmental policy integration can result not only from differing interests, target systems and power asymmetries, but also from different administrative cultures and a lack of cooperation between different departments. Research specifically carried out on the European Commission has established that a more collaborative administrative culture, one which offers networking opportunities and is open to dissent, is conducive to environmental integration (KOPP-MALEK et al. 2009). An example of the negative impacts of a lack of coherence between environmental policy and other sectoral policies is the inadequate regulation of noise emissions at source as an aspect of product regulation in transport policy.

Box 8-9: Inadequate product regulation as an obstacle to effective noise control

National and international Environmental Burden of Disease studies with an explicit focus on noise point to the need for preventive health protection

in Europe (TOBOLLIK et al. 2019; HORNBERG et al. 2013; WHO and JRC 2011; HÄNNINEN and KNOL 2011). The sources of noise are mainly products moved and traded across borders (such as cars or trains). With regard to the integration of noise aspects into other policy areas, the European Commission's 2017 evaluation of the Environmental Noise Directive 2002/49/EC (European Commission 2017a) points out that so far the findings from noise surveys have not been used for product regulation, or more specifically for the regulation of noise emissions from cars, railways, aircraft or tyres. The most cost-effective means of combating noise, one which also complies with the polluter-pays principle, is legislation to reduce noise emissions at source, which can and must be adopted at European level in view of its cross-border dimension as required by the single European market (LAI 2013; European Commission 2017a). However, the noise emission limits previously set at EU level do not exhaust the technical potential for noise reduction (item 432 et seqq.). The first rounds of noise mapping have already shown the enormous need for action which exists on the emissions side as well. This must be viewed particularly critically in the light of the unequal distribution of environmental noise pollution within European countries (DREGER et al. 2019). It would also be much more cost-effective if the legal provisions for reducing noise emissions from vehicles were to be tightened up considerably at European level in order to reduce the noise exposure to which citizens are subject.

In contrast, the adoption of the climate and energy package, which came into force in 2009 (SKJÆRSETH 2016), is considered a successful example of the integration of different policy areas. It aimed to harmonise climate and energy regulation at a new level of ambition linked to a target year of 2020 and contributed significantly to the credibility of the EU's leadership in international climate negotiations. A similar problem to that encountered in noise control exists in the area of CO_2 limits for motor vehicles: due to years of insufficiently ambitious regulation at European level, the CO_2 savings in the transport sector were significantly lower than was necessary and indeed possible.

Overall, the integration of environment and climate policy into other policy areas in the EU is still at a very early stage. In addition to the problem areas mentioned, this applies above all to the CAP, which to date neither adequately reflects the EU's climate goals (FELLMANN et al. 2018) nor satisfactorily integrates the protection of biodiversity (ALONS 2017). The same applies to the Common Fisheries Policy (CFP). The most recent reform of the CFP introduced important instruments for the sustainable management of biological marine resources. For example, "maximum sustainable yield" was introduced as the yardstick for managing fish stocks, and a discard ban was introduced for economically important fish species (for more details see SALOMON et al. 2014). However, total allowable catches for individual fish stocks are still set at levels that are too high and run counter to the objectives of the CFP (and sustainable management) (SCHACHT et al. 2019). Nor has it been possible to date to adequately protect marine species and habitats threatened by fishing activities (ibid.; SALOMON and SCHUMACHER 2019).

Box 8-10: Lack of coherence of German policy positions in other sectors with climate protection goals

In the past, the German Federal Government and responsible ministries have often advocated positions at European level that make it difficult to achieve the climate policy objectives of the respective sector. For example, the German government has repeatedly and successfully opposed stricter Europe-wide CO_2 standards for new cars (ICCT 2019, p. 2). However, in the medium term such standards would have made it much easier to reduce greenhouse gas emissions in the German transport sector.

In the agricultural sector, too, Germany has historically been one of the actors who have tended to hold back rather than facilitate the introduction of stricter ecological qualification conditions for CAP funds (SRU 2016, p. 45), even though the greening of the CAP is a key lever for reducing emissions from the agricultural sector (Alliance Environnement 2018). The German government should therefore pay more attention than hitherto to the consistency of its stance in European decision-making relevant to climate policy. This should also be reflected in the ongoing negotiations on the CAP. Here, the 52nd recital of the draft regulation contains the statement that actions under the CAP are expected to contribute 40 % of the overall financial envelope of the CAP to climate objectives (European Commission 2018j). However, this is not done through the earmarking of funds. As a consequence, subsidies based on land area can count towards climate protection.

8.2.3 Incomplete or inconsistent transposition of European environmental directives, in particular one-to-one transposition

729. The issue of implementation is also problematic at the national level of environmental and climate protection, particularly when the transposition of European directives into national law is slow or unsatisfactory. Extensive studies of the implementation and enforcement of European environmental law in the member states from the years 2017 and 2019 reveal considerable shortcomings. The largest implementation gaps are in the environmental policy areas of waste management, nature conservation and biodiversity, air quality, noise control and water quality and management (European Commission 2017b, p. 3).

On the one hand, it is argued that the implementation of European environmental and climate protection policy is less demanding for the member states in comparison to earlier years, because laws are often being amended rather than introduced (BÖRZEL and BUZOGANY 2018, p. 1). This is also evident from the declining number of infringement proceedings over this long period of time (ibid., p. 18). On the other hand, however, it should be borne in mind that although implementation may not have become more extensive over the years, it has become considerably more demanding. This is shown, for example, by the fact that more recent EU legislation sets much more ambitious targets, for example in the areas of climate protection, air pollution control and water quality. These goals require far-reaching, long-term transformations, and investments in the diverse fields where the problems originate and often persist over years. At the same time, the environmental impacts involved are insidious and much less obvious and annoying than the forms of pollution that were tackled by the legislation of the 1970s to 1990s. Moreover, this finding relates only to the transposition into national law, but does not address the question of how compliance – which is much more demanding than in earlier years – is to be ensured.

Box 8-11: "Unenthusiastic" transposition of the Environmental Noise Directive

The Environmental Noise Directive has been fully transposed into German law, but the transposition is described as "unenthusiastic" (BERKEMANN 2018, p. 143) and, in terms of its detailed content, falls short of what would be required for uniform enforcement at national level (item 379 et seqq.). The possibility to issue secondary legislation was not fully used by the Ministry (ibid.). Additional regulation at national level is therefore necessary. An exception to this are the German provisions on quiet areas in the countryside. In accordance with the Federal Immission Control Act they must be protected against any increase in noise. In this regard, the transposition goes further than the Environmental Noise Directive.

The European Commission has initiated an infringement procedure against Germany in connection with the implementation of the Environmental Noise Directive. Although it is of the opinion that Germany has drawn up noise mapping in accordance with the provisions of the Environmental Noise Directive, it believes that a noise action plan should also be drawn up in all cases where mapping has been carried out, which has not been the case in Germany. The European Commission takes this to mean that compliance has been unsatisfactory in this regard.

A European regulation is needed to deal with the issue of ubiquity, especially as any such regulation would still allow the member states some leeway and flexibility in implementation. Its principal effect would be to prescribe a uniform method of surveying and assessing environmental noise. What measures the member states then take, on the other hand, is left up to them, as long as they draw up action plans. Setting trigger values at European level does not seem advisable for reasons of subsidiarity. At the national level, however, it would make sense for the Federal Government to set guidelines and define uniform nationwide trigger values for noise action plans (item 420 et seqq.).

One-to-one transposition unsatisfactory

730. For many years, the German government has taken the view that EU directives should be transposed into national law on a one-to-one basis (CDU, CSU and SPD 2005, p. 73). According to this view, only those guidelines should be incorporated into national law which the European legislator has made mandatory.

Although Art. 288 sec. 3 TFEU leaves the relevant authorities in the member states in principle a choice as to the means of implementation, the ECJ has held that they are obliged to choose the forms and methods which are

most appropriate to ensure the effectiveness (effet utile) of directives, having regard to the aim pursued by them (ECJ, judgment of 08.04.1976 – Case 48/75, NJW 1976, pp. 2065, 2076; ECJ, judgment of 17.09.2002, para. 67). The transposition must therefore aim to ensure that the objective of the directive is fully achieved. This means that not only a formal literal transposition must take place, but that the entire programme of the directive must be fully implemented, including in its enforcement. A literal adoption of a directive text may therefore be unsatisfactory simply because directives do not cover important questions of operationalisation in the national administrative context. Even detailed directives thus constitute only framework legislation, which must be supplemented by national regulations governing application, organisation and financing in order to be effective in practice.

In this context, it is rightly pointed out that directives also require member states to make additional decisions regarding the substantial scope of the regulation. If, however, European law does not impose rigid requirements on how to proceed in this regard, then it is hardly possible for the one-to-one rule to provide the overall directional control that is claimed. This is particularly true if EU law has made regulation more flexible with the help of ranges, ceilings, minimum standards or opt-in and opt-out procedures, or if certain regulations are only applicable if they have been specified at national level (KROHN 2018). The German Federal Government's guideline that European environmental law must be transposed on a one-to-one basis cannot therefore comply with the requirements of European law (ibid.; PAYRHUBER and STELKENS 2019).

Apart from this, EU environmental law, according to the relevant Treaty provisions, for example in Art. 114 sec. 2, Art. 191 sec. 1 and Art. 193 TFEU, aims at a high level of protection while taking into account the diversity of the member states. Not only is upward divergence possible and permissible, it is actually mandatory if conditions in a member state or region make it necessary. In view of the differing starting conditions in the member states and the emphasis on compromise in the legislative process, it is sometimes not possible anyway to find ambitious solutions. For Germany in particular, however, this should not be the yardstick by which environmental legislation should be guided. For in view of its high population density and level of industrialisation, the pressures generated by problems are often greater than in other member states.

One-to-one transposition also runs counter to the concept of cooperation based on the division of responsibilities. In accordance with the principle of subsidiarity, the EU should take on tasks which the member states are not able to accomplish satisfactorily and which can be better addressed at European level. It is up to the member states to deal with the remaining issues and tasks. So a state which closes off its policy options by applying a schematic one-to-one transposition calls such a division of responsibilities into question. It would therefore have little credibility if the European legislature were to demand strict compliance with the principle of subsidiarity in order to protect the scope for multi-level action, but then to reject the utilisation of this scope for problem-solving.

Box 8-12: One-to-one transposition of the Waste Framework Directive

In terms of waste management, Germany has long been a pioneer in any European comparison and today has a very well-developed waste management infrastructure. Its legal requirements in some cases exceed European legal standards (SRU 2016, item 56). Now, however, new and ambitious targets are increasingly based on EU law, such as the new recycling quotas for municipal and packaging waste (item 145). Although European waste law does indeed leave scope for environmental and resource protection regulations that exceed the European minimum standards, the German government is generally reluctant to make use of this scope. A decisive obstacle in this respect is the political requirement for one-to-one transposition (item 730).

This can be illustrated by the forthcoming transposition of the amended Waste Framework Directive in the German Circular Economy Act (KrWG). According to the draft bill for the Circular Economy Act (KrWG-E), the government is aiming "to the greatest extent possible" for a one-to-one transposition into national law, one which only goes beyond EU law in certain areas. The draft emphasises that the "isolated regulations" that go beyond EU law do not create any significant compliance burden for the economy (BMU 2019). This last point is important because otherwise the one-in, one-out rule of the Federal Government would come into play, according to which any new regulatory burden on the economy has to be offset by a reduction elsewhere (item 727). However, pro-

gress on the circular economy will falter if, on the one hand, European law provides little or no concrete guidance in this respect and leaves detailed further development to the member states, while, on the other hand, the German government does not wish to exceed European minimum standards because of the one-to-one principle. An example of this is given by the goal of waste prevention. The Waste Framework Directive contains only (with the exception of food waste) abstract objectives in this respect, which are to be specified in detail by the member states (item 133). In the draft bill, too, there are hardly any binding targets for the operationalisation of prevention. It is true that it provides specifically for an extension of product responsibility in § 23 and § 24 of the KrWG-E to include various preventative measures, of which, for example, the new duty of manufacturers and dealers in the mail-order trade not to destroy or send back goods is not prescribed by European law (item 148). However, the product responsibility obligations have to be further specified by delegated regulation (§ 23 sec. 4 KrWG). Only further regulation can determine who is to take responsibility for which products and how. Conversely, the abstract provisions on product responsibility in § 23 and § 24 KrWG-E do not establish enforceable legal obligations (BECKMANN in: von LANDMANN/ROHMER 2019, § 23 KrWG para. 28; von LERSNER 2000, p. 106). It is therefore to be welcomed that the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU) has announced the adoption of a transparency regulation to spell out the obligations under the new duty not to destroy or send back goods ("Amendment to the Circular Economy Act lays the foundations for less waste and more recycling", BMU press release of 12 February 2020). It remains to be seen to what extent the government will also use the expanded legal basis to specify and operationalise hitherto abstract product responsibility legislation – possibly even exceeding minimum requirements under European law. In the past, the government has made only very cautious use of this (BECKMANN in: von LANDMANN/ROHMER 2019, § 24 KrWG para. 3). More ambitious and binding prevention targets, especially quantitative targets, are not provided for in the draft (item 148). It is only with regard to food waste that the option to set specific targets as provided for in the Waste Framework Directive is taken up. However, there are new provisions for extended public procurement obligations (§ 45 KrWG-E) which are not specified in the Waste Framework Directive and which may also contribute positively to prevention.

Last but not least, the one-to-one rule promotes the tendency to adopt European regulations literally, instead of striving for implementation that is as close as possible to the spirit and ends of the regulations (KROHN 2018, p. 386). Thus, with regard to the appropriate instruments for strengthening the waste hierarchy mentioned above (Art. 4 sec. 3 with Annex IVa of the Waste Framework Directive), the draft bill provides for the examples listed there to be reproduced verbatim in a new Annex 5 to the KrWG. Should the draft law be adopted in this way, the German government would thus provide examples of suitable economic instruments and other measures. However, the fact that the government is listing examples of suitable regulatory approaches in an annex to the Act does not serve the overall objective. After all, the government itself is the primary addressee, with the responsibility for assessing the applicability of the European legislative recommendations in Germany and, if appropriate, for introducing them.

731. There is also the possibility of EU-initiated cooperation between the member states. This often has no legally binding force, but relies on agreements based on shared principles, in the form of voluntary commitments. This may be particularly relevant to policy areas which have a strong regional character and which should therefore remain decentralised responsibilities in accordance with the principle of subsidiarity. One example is the adoption of common guidelines and principles for the development of European cities, which were agreed between the member states in 2007 in the form of the Leipzig Charter. The motivation for this European initiative is the creation of comparable living conditions with the aim of establishing common standards.

Box 8-13: The Leipzig Charter – joint European action on urban development

In urban development, cooperation at European level is based on the Leipzig Charter, which was introduced and adopted under the German EU Council Presidency in 2007. By signing the Charter, all participating European member states agreed to focus on the

distinctive features of the European city. In doing so, they committed themselves to pursuing the strategy of integrated urban development, which is oriented towards sustainability and is citizen-centred and multidisciplinary, and to working against the exclusion of disadvantaged urban districts (BMVBS 2007). An implicit goal of the charter is to promote increased political attention on urban neighbourhoods as a policy level for integrated urban development (chap. 7). The Leipzig Charter and the process of drafting it have given rise to both concrete mandates and voluntary commitments. Member states have explicitly stated their commitment to taking into account when developing their cities the objectives of the European Sustainable Development Strategy and the need for a healthy environment. The Charter contains five recommendations for the development of integrated urban development programmes. They relate, inter alia, to consistent development objectives, policy coordination, the pooling of financial resources and citizen participation. The Charter calls on the European Commission to promote a systematic and structured exchange of experience in the field of sustainable urban development. In addition, member states should be enabled to use the European Structural Funds for integrated urban development programmes (BMVBS 2007).

An evaluation of the Leipzig Charter in 2017 confirmed that its central principles are still valid and are widely applied in Europe, even if in some cases there is still some catching up to do (BBSR 2017). The rapidly evolving socio-political challenges for urban development in recent years (such as digitalisation, migration and integration and climate change) are one of the main reasons why Germany has decided to renew the Leipzig Charter and bring it up to date during the German Council Presidency in 2020 (GEIPEL and SCHADE-BÜNSOW 2019). This so-called Leipzig Charter 2.0 will address the key principles of integrated urban development. According to the Federal Ministry of the Interior, Building and Homeland Affairs (BMI), the main topic of the revised Leipzig Charter could be climate change and its relation to mobility (GEIPEL and SCHADE-BÜNSOW 2019). Also of central importance from the point of view of the BMI is the capacity for action of European municipalities, which includes the aspects of municipal self-determination (urban governance), the availability of resources, support from the state level and the capacity of municipalities to manage common goods (BOHLE 2019).

8.2.4 Poor enforcement

732. A major weakness of European environmental and climate policy is that the European environmental provisions adopted are not effectively implemented and enforced in the member states. Under European executive federalism, implementation and enforcement are in principle in the hands of the member states. Sometimes, however, the member states are either unable (because of deficient governance structures) or unwilling (for political reasons) to implement or enforce EU law. Enforcement shortcomings in the member states are responsible for the fact that European "law in the books" does not become "law in action" and thus undermine citizens' confidence in the EU's effectiveness ("the gap between promise and delivery", see European Commission 2017h, p. 12).

The situation regarding the enforcement of environmental and climate change legislation varies considerably between member states. The structural and institutional conditions for ensuring enforcement are different in the member states from the outset. The quality of enforcement at national level is important not only because the effectiveness of European environmental and climate protection policy depends on it, but also because it can lead to distortions of competition: industries in a member state where limits, procedures and the like are continuously monitored and tracked by companies and businesses can suffer a competitive disadvantage compared with industries in another member state where the law is not enforced.

Box 8-14: Problems with the enforcement of the Water Framework Directive

Germany has implemented European water conservation law principally via the Federal Water Act and additionally through various ordinances (Groundwater Ordinance, Surface Waters Ordinance). Even if implementation has formally been complied with, various shortcomings must be criticised. In particular, the polluter-pays principle is not consistently adhered to. For example, diffuse substance discharges are not effectively addressed in German law (SRU 2015). Furthermore, the requirement to (additionally) involve water users in the implementation of the Water Framework Directive (the cooperation principle) is interpreted in Germany as a "voluntary principle". This means that the objectives of the Directive are to be achieved primarily through finan-

cial support and voluntary measures, while regulatory instruments are used only cautiously. In particular, the land required for renaturation purposes in the vicinity of watercourses in Germany is seldom compulsorily utilised for that purpose. As it is seldom possible to purchase these sites, the ecological improvement objectives of the Directive are not achieved (item 313). In addition, implementation is often severely hampered by a lack of financial resources and personnel, and by the fact that the actors involved rarely make politically controversial choices, for example ones detrimental to agriculture or shipping.

All of this contributes significantly to the fact that Germany appears likely to fail to meet the targets of the Water Framework Directive by the end of the third management cycle in 2027. The EU has already issued a warning to Germany about this. However, some of the factors that make it difficult to achieve the objectives are to be found in the Water Framework Directive itself. In view of the structural changes and pollution that have affected many surface waters in the past, at least some of the targets are so ambitious that they will be practically impossible to achieve in the short time available. In addition, the one-out, all-out principle (items 270, 299) makes it difficult to demonstrate successes that have been achieved in some quality categories and that lead to an improvement in water status. However, these frequently problematised regulations of the Water Framework Directive should not obscure the considerable enforcement shortcomings in Germany. The fact that Germany is far below the European average in terms of target achievement bears witness to this. Positive examples from other member states also demonstrate that, with the necessary political will, certain environmental problems such as nitrate pollution can definitely be successfully tackled (SRU 2015, item 41). The SRU is therefore of the opinion that it is not the Directive but its implementation that needs to be improved (item 352 et seqq.; SRU 2018). This view is also supported by the initial results of the REFIT of the Water Framework Directive (European Commission 2019b).

Against this background, and in line with the working method proposed above, greater consideration should be given when setting political priorities (e.g. the European Green Deal) to giving the European Commission (or an agency under its supervision), which is responsible for enforcement monitoring, some form of fall-back responsibility in the event of serious enforcement shortcomings. There can be no universally valid model for all policy areas. What is required in the area of EU external border protection is different from what is useful for environmental and climate protection. However, models of cooperative law enforcement must also be developed for the environmental field, following the example of European competition law. This presupposes well-functioning national authorities, which may need to be built up with European assistance. Forms of cooperation must be developed ranging from the exchange of information to specialist, staffing and technical support from the European level. The new Directorate-General for Structural Reforms (European Commission – DG Reform 2020) can play an important role in this respect. The EU has taken the first steps in this direction, including in the field of environmental policy.

Current EU measures to improve compliance

733. One instrument for improving the implementation of EU environmental law and policy in the member states is the Environmental Implementation Review (EIR). The EIR serves to identify implementation gaps and enforcement deficits in EU environmental policy in the member states and to develop ways of addressing them (European Commission 2019e). The EIR is also intended to provide feedback to the European Commission on the progress made in implementing the key objectives of the EU environmental regulatory framework and on the main implementation problems in the individual member states. To this end, country-specific reports are prepared every two years, which focus on environmental law and policy issues relevant to the respective member state. These country reports set the framework for subsequent bilateral dialogues between the member state and the European Commission to improve the enforcement of EU environmental law and policy. They are published together with a Communication from the European Commission summarising general developments, recommendations and policy conclusions resulting from the process, and a background paper. The first EIR package was presented in February 2017 (European Commission 2016f). In it, the European Commission pointed out that poor enforcement of environmental law incurs significant environmental, economic and social costs (European Commission 2017b, p. 4 et seqq.), of which the economic costs alone are believed to amount to EUR 50 billion per year (COWI et al. 2011, p. 44).

734. The review of the implementation of EU environmental policy and legislation resulted in the adoption of an Action Plan on Environmental Compliance and

Governance (European Commission 2018f). The plan aims to address compliance and monitoring as a subset of the causes of the enforcement deficits identified in the EIR. The Action Plan defines three broad classes of intervention for securing compliance (compliance assurance) under which member states could introduce relevant measures:

- compliance support: measures to help duty-holders comply with EU environmental law (e.g. guidance, helpdesks).
- compliance monitoring: measures to detect breaches of environmental law (monitoring measures and inspections)
- enforcement of the law: administrative, criminal or civil sanctions to stop violations of the law (European Commission 2018f, p. 2 et seq.).

Overall, various aspects of compliance are addressed which are to be improved by different measures (Fig. 8-2). These include peer reviews, support for the vocational training of those responsible for compliance, the exchange of best practice, procedural guidelines and an assessment of national systems (European Commission 2018f, p. 7).

735. The second EIR package was published by the European Commission in April 2019 (European Commission 2019h). It focuses on strengthening environmental governance in the member states. It correctly states that the quality of public administration in the member states has a significant influence on the implementation of EU policies. The European Commission believes there is a correlation between the quality of a country's public services and the level of trust placed in the administration, the ease of doing business and societal well-being. According to the Commission, the implementation gaps in the area of environmental policy are also due to deficient governance structures in the member states.

Box 8-15: Environmental governance in the member states

A study has been undertaken which examined environmental governance in the member states under the five dimensions of transparency, public participation, access to justice, compliance assurance and accountability, and efficiency and effectiveness (NESBIT et al. 2019). It concluded that there is room for improvement in all of the above dimensions of environmental governance in the member states. To this end, it recommends the use of digital options, especially for access to environmental information and for public participation, for example to enable reporting of environmental problems. The difficulty of improving environmental governance at EU level is highlighted by the fact that the general organisational and environmental governance in the member states is very complex and diverse. Uniform requirements are therefore not always easy to formulate (ibid.).

The study also identified opportunities to strengthen environmental governance in the member states at EU level. This can be done in particular through the exchange of best practice. It is also helpful to identify the key elements of environmental policy that are associated with better outcomes. It would also be useful for member states to better understand the contribution that transparency, public participation, the public sphere and public interest organisations can make in pursuing environmental objectives.

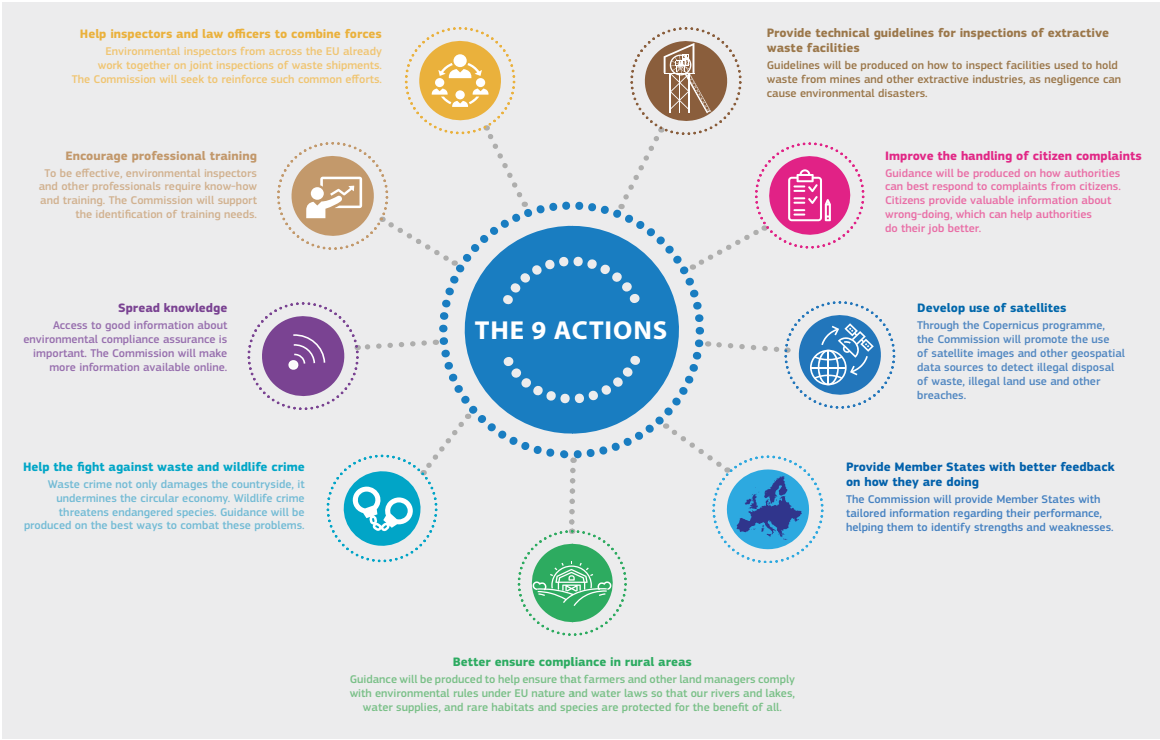
736. In consequence, the European Commission points out that full implementation of the standards for transparency, public participation and access to justice set out in the Aarhus Convention is necessary for better compliance with environmental law. These standards are important for businesses, citizens and administrations (European Commission 2019h). It would be helpful to introduce a directive on access to justice, something which has been under discussion for many years (European Commission 2003). A draft of such a directive was withdrawn by the Juncker Commission under pressure from various member states, including Germany.

In the EIR Communication, the European Commission also refers to the Regulation on the governance of the energy union and climate action, which came into force in December 2018 (item 91). The regulation obliges the member states to draw up national energy and climate plans that significantly strengthen the integration of energy, climate and environmental policy.

737. Networks of experts such as the "European Union Network for the Implementation and Enforcement of Environmental Law" (IMPEL) are also important. The European Commission has concluded that the scope for further improvements to environmental governance has

Figure 8-2

EU Action Plan for Environmental Compliance Assurance



Source: European Commission 2018a

not yet been exhausted and that strengthening it will lead to better implementation of environmental policy as a whole. It emphasises the importance of transparency, which can promote implementation by raising the state of knowledge, the sense of responsibility, public participation and public support. To this end, it is important to improve access to geographical data and services so that the public can be better informed about the actual state of the environment at local or regional level.

In this context, it is significant that the European Commission announced in the European Green Deal that it would adapt the Aarhus Regulation (EC) No 1367/2006, which is the means by which the Aarhus Convention is implemented for the EU itself. This is intended to dispel the accusation of unsatisfactory implementation by the Aarhus Convention Compliance Committee (2017). In the medium term, consideration should also be given to a new initiative to introduce a directive on access to justice in order to ensure that Art. 9 sec. 3 of the Aarhus Convention is also uniformly applied in the member states.

In general, it is particularly difficult to persuade the member states to allocate more staff to environmental compliance tasks, even though inadequate staffing levels are the main obstacle to effective enforcement (ZIEKOW et al. 2018). In the medium term, it may therefore be necessary to explore new ways to make EU environmental law effective. One means to this end could be the increased use of digital technology. This includes, for example, remote sensing, which can be used to monitor whether the agricultural industry is complying with nature conservation requirements. Data protection would need to be ensured, however. The commitment of environmental associations (environmental NGOs) also remains important, as they can exercise a monitoring function through exercising their participatory rights. Since responsibility for monitoring compliance with EU law in future will continue to lie with the member states, models of cooperative law enforcement that go beyond these initiatives should be developed for political priority-setting (European Green Deal).

8.3 Recommendations

738. European environmental and climate policy is at a turning point. It is called upon to prove its capacity to act in the face of enormous ecological challenges. The new European Commission has raised great expectations with the European Green Deal, and these now need to be given life. The European Green Deal offers great opportunities for the future of European environmental and climate policy.

An intact environment and the prevention of climate change are the basis for all economic activity. This must particularly be reflected in policy areas beyond traditional environmental protection, i.e. in economic and infrastructure policy and in sector-specific regulations (environmental policy integration). The integration clause in Art. 11 TFEU thus provides a clear mandate for EU policy and legislation to integrate environmental protection requirements into all relevant policies in order to promote sustainable development.

Implementation of the existing EU environmental acquis also needs to be significantly improved. In many areas, environmental protection suffers from weak enforcement. This is not primarily due to shortcomings in environmental legislation. The evaluation of various European environmental protection directives as part of the REFIT process has shown that these directives are fit for purpose (Box 8-6) and that the implementation shortcomings are mainly due to a lack of legal, organisational and fiscal support at the member state level. This issue should be addressed through better compliance mechanisms which also take up elements of the new working method (item 706 et seqq.). Figure 8-3 provides an overview of the main recommendations of this chapter.

8.3.1 Fleshing out the European Green Deal

739. The European Green Deal presented at the end of 2019 is a signal that the EU is moving towards sustainability. In fact, no other European institution has ever presented such an ambitious plan for the environment. The European Green Deal therefore represents an opportunity to develop European environmental and climate policy in an ambitious direction. Up to now, the European Green Deal has mainly represented a roadmap heralding a large number of separate initiatives. These individual initiatives should now quickly be specified and consistently taken forward. In some areas, it will only be possible to assess whether they are fit for purpose after the necessary specification. In addition, there are aspects

Figure 8-3

Overview of recommendations

European Green Deal	EU implementation of Agenda 2030	Enforcement
- Fleshing out the European Green Deal - Climate Law at the EU level - Greening the EU Budget and economic policy - Greening sectoral policies (CAP, CFP) - Use the 8th Environment Action Plan as a monitoring instrument for the European Green Deal	- Set priorities for the implementation of Agenda 2030 at EU level - Strengthen sustainability in the institutions Develop the EESC into a European Sustainability Committee - Coupling the European Semester with the SDGs	- **Capacity Building** in the member states to improve the enforcement of environmental law - Issue an Inspection Directive at European level - Improve environmental governance Transparency, public participation, access to the courts, ensure compliance, efficiency and effectiveness

SRU 2020

that are not yet sufficiently represented in the programme. Against the background of the current environmental situation, the path of ecological modernisation alone is no longer sufficient to achieve the sustainability goals. Ambitious targets are required for this. In order for economic activity to remain within planetary boundaries (SRU 2019), very significant reductions in resource consumption, pollutant emissions and greenhouse gas emissions are needed.

In view of the catastrophic consequences of exceeding these boundaries, the concept of planetary boundaries formulates a "safe area for action" and applies a safety margin when determining critical thresholds. This represents a starting point for linking this concept with statutory requirements. The planetary boundaries result not only from the fundamental obligations of the EU and its member states to protect life and health (Art. 3 of the CFR and Art. 8 of the ECHR, see CALLIESS 2006, para. 16 and 17), with the aim of maintaining a safe margin from the constitutionally guaranteed ecological minima, but also from the Union goal of environmental protection (Art. 191 sec. 1 TFEU). The protection mandate given by Art. 191 TFEU includes the precautionary principle as a legally binding guideline for European environmental policy (Art. 191 sec. 2 TFEU). The integration clause in Art. 11 TFEU, according to which environmental protection requirements must be integrated into the formulation and implementation of all Union policies and activities, links environmental and climate considerations with the objectives of other policies, such as economic, transport and agricultural policy, in keeping with the principle of sustainability.

The precautionary principle enshrined in European law gives rise to an independent principle of observing ecological limits. It reflects the "safe area for action" in that it requires the maintenance of a clear gap, stipulating that political action must be taken in advance of any tangible danger – by which is meant the scientifically plausible possibility of critical limits or tipping points being exceeded.

At the same time, European policymakers are automatically afforded political leeway, since the goals of environmental and climate protection have to be weighed up against conflicting constitutionally-embedded considerations (economic freedom, the principle of the welfare state). However, the more immediate the threat of exceeding the planetary boundaries becomes, the greater the weight that must be given in any political balancing deliberations to the requirement to maintain a safety gap, such as the 1.5 to 2-degrees-target in climate protection. This means, then, that the planetary boundaries and the associated ecological subsistence level for EU citizens set an absolute limit to any such political balancing deliberations. Beyond this limit, the aforementioned provisions of the European Treaties, which together with the Charter of Fundamental Rights form the constitutional law of the EU, require that the planetary boundaries must not be exceeded, and that this is ensured by means of an appropriate and effective, i.e. long-term, coherent and legally binding safeguard strategy. However, such a safeguard strategy is only effective as an "absolute guard rail" in politics if it is introduced by the government in the form of binding framework legislation.

The European climate law, which is intended to ensure climate neutrality by 2050, is therefore a welcome step. With the exception of Poland, all member states have committed themselves to this step. However, in order to be sure of achieving the European climate protection targets, the reduction path must be sufficiently ambitious. An ambitious European climate law, combined with the measures announced in the European Green Deal, would be the core building block for the effective safeguard strategy required by law. Still, in view of the poor record of enforcement of environmental and climate protection policy in everyday EU politics to date, additional consideration needs to be given to "environmental and climate protection through procedures". In concrete terms, this means effective monitoring of the safeguard strategy adopted throughout the political process.

In addition, in order to fulfil its crucial role, the EU should strengthen its efforts to protect biodiversity and make them binding. To this end, it should lobby for a global agreement which – similar to the Paris Agreement – sets legally binding targets for the protection of species, genes and ecosystems. These targets should be backed up by target dates and indicators and be linked to regular reporting. In this context, the SRU expressly welcomes the European Parliament's initiative in this regard (European Parliament 2020).

If substantial improvements are to be achieved in rapidly deteriorating environmental areas such as climate and biodiversity, but also in other policy areas, better policy integration is required above all, including at EU level. Key contributions can be made by policy in various other sectors beyond the environment. The success of the European Green Deal will also be largely dependent on the effective integration of environmental concerns into the relevant sectoral policies. It will require a compre-

hensive greening of European policy, above all of the budget and all financial support mechanisms. To this end, environmentally harmful subsidies, which have a considerable negative impact on the environment, the ecosystem and human health, must also be reduced (SRU 2019).

8.3.2 Establishing the 8th EAP as a strategic instrument for the monitoring of the European Green Deal

740. The European environment ministers have agreed that there should be an 8th Environmental Action Programme (EAP) (Council of the European Union 2019). This was also announced in the Communication on the European Green Deal (European Commission 2019g, p. 29). In preparation for this update, the European Commission carried out an evaluation of the 7th EAP (European Commission 2019d), several workshops and a consultation. It came to the conclusion that the 7th EAP had been an important influence on the development of Union policies. In particular, the evaluation programme emphasised the point that environmental and climate protection can promote "green growth" (ibid., p. 9). The fact that the consensus on the 7th EAP has strengthened the EU's negotiating position in the global context of multilateral cooperation was also viewed positively. It was disappointing, however, that the goals set (e.g. protection, conservation and improvement of natural capital, together with climate protection) were often not achieved (ten BRINK 2018). There was also criticism of the fact that the ecological impacts of the mobility and food sectors remained too high (European Commission 2019d). In addition, there was criticism of the existing enforcement deficit, which is shown, for example, by the fact that one third of the chemicals used in the EU do not comply with the REACH regulation (ten BRINK 2018). The enforcement deficit also has a direct impact on people's health. For example, many cities in Europe do not comply with the jointly agreed and legally binding air quality standards. Stakeholders therefore believe that many environmental goals should remain on the agenda. There should also be a stronger focus on integrating environmental concerns into other policy areas. In addition, the 7th EAP would have benefited from more stringent prioritisation and a specific monitoring mechanism (European Commission 2019d, p. 9).

However, the discussion about an 8th EAP must now take into account that the European Green Deal, as an integrative strategy, already covers many aspects of environmental protection – a function that would otherwise have fallen to the EAP – even if gaps remain in individual areas such as noise control. It therefore seems sensible to give the 8th EAP the role of a monitoring framework for the implementation of the contents of the European Green Deal. This is because it has so far been a project of the European Commission alone, whereas the EAP must be adopted in the ordinary legislative procedure with the participation of the Council and the European Parliament. This may make it more difficult to introduce detailed content into the EAP, but at the same time means that it represents a consensus between the institutions.

The stakeholder workshops on the 7th EAP additionally highlighted several points that could be improved upon in an 8th EAP. These included that the 8th EAP should take the SDGs into account. This in turn would enable to integrate the interdependence of social, economic and environmental objectives to be taken into account (EEA 2019, p. 8). The comprehensive implementation of the UN Agenda 2030 in Europe and active support for its global implementation is also an essential building block on Europe's path to a global leadership role in sustainability transformation (ibid, p. 11).

8.3.3 Linking the European Semester to the SDGs

741. The President of the Commission has announced that the SDGs will be integrated into the European Semester (von der LEYEN 2019, p. 10). The European Semester is an annual cyclical process aimed at coordinating the economic, fiscal and labour market policies of the member states. It was developed in 2011 in the context of the measures to stabilise the eurozone and the Europe 2020 strategy in order to establish a preventive mechanism for monitoring national budgets at European level as a consequence of the sovereign debt crisis. The aim is to motivate the member states, by means of various reports, discussion processes and recommendations, to better coordinate their policies and align them with the objectives agreed at European level. However, the European Semester is a non-binding process within the framework of economic policy coordination (see Art. 121 TFEU), so only some of the recommendations are actually implemented by the member states. Economic and sometimes social aspects of sustainability

traditionally play an important role (European Commission 2016e). In future, the ecological dimension in particular is to be strengthened (European Commission 2019i). This follows from the observation that both ecological challenges and environmental policy measures have increasing economic relevance. Moreover, environmental protection is seen as an economic opportunity. The widening of the understanding of the economy is reflected, for example, in the renaming of the "Annual Growth Report" at the beginning of the cycle as the "Annual Strategy for Sustainable Growth" (European Commission 2019i).

How the integration of environmental sustainability is to be implemented in detail has not yet been decided. However, it can be assumed that the coordination of national economic policies will remain at the core of the European Semester. The reform is therefore a positive initiative towards the mainstreaming of environmental protection and sustainability, but it is no substitute for an EU sustainability policy. This is because the European Semester, as a predominantly technical instrument, cannot by itself decisively advance the implementation of SDGs at the European level, if only because the overall process is primarily focused on implementation in the member states. The European Semester should – as recommended by the multi-stakeholder platform – be aligned with the yet to be developed Sustainable Europe 2030 strategy and, in particular, should also include a sustainability check (European Commission 2019c, p. 31). The advantage of this measure would be that already existing EU instruments would be utilised and sustainability goals would thus be better integrated into the development of Union policies (NIESTROY et al. 2019).

8.3.4 Strengthening the integration of the environment, and greening the CAP and CFP in particular

742. Art. 11 TFEU requires the integration of environmental protection requirements into all Union policy areas and measures. So far, it has not been possible to effectively reduce the environmental pressures caused by activities in various economic sectors (EEA 2019, p. 8). The need for integration and adaptation is particularly evident in relation to agriculture, where there are persistent negative impacts on biodiversity and air, water and soil pollution (ibid.). Decisive steps therefore finally need to be taken to green the CAP. The efforts made so far to integrate environmental and nature conservation concerns more effectively into agricultural policy (greening) have not been enough to trigger the necessary ecological changes. The SRU has repeatedly drawn attention to the fact that public funds should only be used for the provision of public goods, which include nature conservation and environmental protection as well as the preservation and maintenance of a varied, ecologically rich cultural landscape (most recently SRU and WBBGR 2018). In the light of Art. 11 TFEU, environmental, climate and biodiversity concerns must be more consistently taken into account both in detailed European legislation to implement the CAP and in its application and enforcement by the member states.

In the multiannual financial framework for 2014 to 2020, the EU spent 39 % of its total budget under the budget heading "Sustainable Growth: Natural Resources" (European Commission 2019f). The CAP takes 97 % of the funds under this heading (European Commission 2019j). Around EUR 239 billion of the CAP funds over the period 2014 to 2020 were channelled into direct payments (Heinrich Böll Foundation et al. 2019). These payments are based on the area of agricultural land used or on production (i.e. paid per quantity produced) rather than on the fulfilment of sustainability criteria. The greening of the first pillar has contributed little to biodiversity stewardship (SRU and WBBGR 2018). In future, public funds should be used to provide public goods in the field of environmental, climate and biodiversity protection (ibid., p. 26). The CFP must also be made more ecological. This involves in particular the establishment of sustainable stock management and an effective prohibition on unloading, as well as the protection of sensitive ecosystems and species (SRU 2011; SCHACHT et al. 2019).

743. In procedural terms, the integration of environmental concerns at the administrative level has been promoted mainly through the instruments of environmental impact assessment (EIA) and strategic environmental assessment (SEA). EIAs and SEAs for plans and programmes with an environmental dimension are an integral part of environmental law and form part of the integration strategy. At the level of EU legislation, however, effective procedural provisions are still lacking to ensure that the integration requirement is observed. In order to prevent the European Green Deal from becoming yet another strategy that loses more and more substance in the course of its detailed rea-

lisation in practical politics and ultimately fails to achieve its ambitious goals, its implementation should be safeguarded by procedural arrangements in accordance with the EU's political decision-making procedures. One such measure might be the introduction of environmental officers in the Directorates-General of the European Commission tasked with monitoring the implementation of the European Green Deal against the benchmarks set in the European climate law and the 8th EAP. Political implementation conflicts could be made visible by means of a suspensive veto right, which would result in a referral to the meeting of Directors-General and Heads of Cabinets. If any such conflict could not be resolved there, it would have to be discussed by the College of Commissioners and, if necessary, decided by the President of the European Commission, who has declared the European Green Deal to be a benchmark priority, using her guideline competence. In addition, the Commissioner for the Environment could be given greater powers of cross-departmental initiative and veto rights. The former would give the Commissioner responsible for environmental protection the opportunity to introduce draft legislation in matters of particular relevance to environmental policy outside their portfolio. The right of veto, on the other hand, would enable them to block draft legislation from other Directorates-General which was particularly negligent in relation to environmental concerns and therefore ran counter to the principle of environmental integration. This would apply, at least temporarily, until such time as the College of Commissioners would again deal with the issue.

744. The "better regulation" agenda could be further developed in line with the principle of proportionality. It would be useful to have a genuine improvement in regulation rather than a discussion over less or more legislation (WIENER 2006). As a general rule, economic interests should not be regularly prioritised within the framework of the better regulation agenda over other public interests such as environmental protection. Instead, a "Think Sustainability First" principle could be introduced within this framework – as has been proposed by the High Level Expert Group for Sustainable Finance (High-Level Expert Group on Sustainable Finance Secretariat 2018). The Better Regulation Agenda, and in particular the one-in, one-out rule that has been announced, must not be used to prevent the introduction of environmental legislation that exceeds European standards (item 727).

8.3.5 Setting priorities for the implementation of Agenda 2030 for sustainable development

745. The EU has committed itself to achieving the SDGs. As early as 2016, the European Parliament called on the European Commission to submit a proposal for an overarching strategy for implementing the SDGs (for an overview of sustainability policy at the European level since 2015, see NIESTROY et al. 2019, p. 56 et seqq.). However, the time available for implementation has shrunk considerably, so that the development and coordination of a long-term strategy no longer makes sense. The EU should therefore concentrate on setting priorities for the implementation of Agenda 2030. The priorities of the European Green Deal, for example, could be used as a starting point (on possible priorities see also UBA 2016). The EU also needs to be guided at the highest political decision-making level to set such priorities. Such a focused strategy must take into account the time perspective up to 2030 and thus extend beyond the European Green Deal, which runs until 2027. The European Commission's collective perspective is central to this, because it is not enough for all Commissioners to focus solely on the sustainability targets that fall within their area of responsibility. Instead, the goals must be considered as a linked set and synergies as well as conflicts must be taken into account.

8.3.6 Strengthening sustainability and climate protection at the institutional level

746. Even if the updating of the sustainability strategy and the detailed specification of the European Green Deal form important building blocks for the reorientation of European environmental policy, there is reason to fear that this alone will not automatically lead to an appropriate consideration of long-term interests in political decision-making. In everyday political life, short-term interests tend to dominate, while long-term interests often prove to be difficult to implement. The SRU dealt in detail with the obstacles and structural difficulties facing a policy of ecological sustainability at national level in its special report "Democratic Governance within Ecological Limits – On the Legitimation of Environmental Policy" (SRU 2019). In that report, it developed

recommendations on how environmental policy in Germany can be strengthened by institutional and organisational changes. The strategy of embedding environmental sustainability in the political decision-making process by strengthening institutional and procedural provisions can to a large extent be transferred by analogy to the European level. Indeed, in the light of Art. 11 TFEU, which has already been mentioned several times, such measures are actually legally prescribed (see CALLIESS in: CALLIESS/RUFFERT 2016, Art. 11 TFEU para. 14 et seqq.). Proposals as to how this can be achieved within the European Commission, which has a monopoly on European legislative initiative, have already been outlined above. However, in order to lend additional weight to the sustainability strategy and the European Green Deal in political decision-making, an independent institution to carry out monitoring and evaluation of the European sustainability and climate protection strategy would be useful. Any such institution should also be able to review actual upcoming political and legislative decisions in terms of their compatibility with the sustainability goals and, if necessary, to raise concerns. Similar ideas were already being discussed at the European level in the early 1990s under the motto of an "Ecological Senate" or "Ecological Council" (CALLIESS 1994; 1991; Arbeitskreis "Europäische Umweltunion" 1994).

747. Within the existing European institutions, the European Economic and Social Committee (EESC), which is an advisory subsidiary body laid down in the European Treaties, appears to be the most suitable location for this task. It advises the Council, the European Commission and the European Parliament on economic and social matters. Ecological issues, on the other hand, are not included as a matter of course. The new task envisaged here for the EESC therefore requires a fundamental reorganisation and political reinforcement of this body. This could be done to a certain extent on the basis of political will as reflected in the existing treaties.

Box 8-16: Members and working practices of the EESC

The EESC is a subsidiary body of the EU which is intended to represent the interests of various social groups and, in particular, to act in an advisory capacity in the EU legislative process. It was enshrined in the founding treaties establishing the European Economic Community (EEC) in 1957. It is modelled on an institution of French constitutional law (HAYDER 2010). Since the 1920s, this has included a National Economic Council which advises the government and parliament on economic issues. In 1958, this was expanded to become an Economic and Social Council, and in 2008 finally an Economic, Social and Environmental Council (CESE 2020). The EESC now has 350 members, put forward by the member states and appointed by the Council (Art. 301 and 302 sec. 1 TFEU). It is made up of representatives of various social groups, with a clear weighting towards business and employers' associations. This is already clear from the (non-exhaustive) list in Art. 302 sec. 2 TFEU, according to which the EESC is made up of 'representatives of employers' and employees' organisations and other representatives of civil society, particularly from the social, economic, civic, professional and cultural spheres'. In line with the EESC's traditional remit, economic and employee interests predominate, whereas environmental protection plays a minor role.

The EESC understands its role as helping to make the EU's decision-making and legislative process more democratic and efficient and to ensure that the real needs of citizens are taken into account. It sees itself as the voice of civil society organisations (EESC 2018a, p. 2) – although this could be seen as true only with some qualifications, in view of the business and employers' associations represented in it.

The EESC has an advisory function (Art. 13 sec. 4 TEU). In particular, it must be consulted on legislative proposals where this is required by the TFEU. This is the case in numerous areas (some examples relevant to the environment are agricultural policy, transport policy, consumer protection, industrial policy, environmental policy and energy – overview available at SUHR in: CALLIESS/RUFFERT 2016, Art. 304 para. 5). Where mandatory consultation is not required, the European Parliament, the Council or the European Commission may consult the EESC on an optional basis, as indeed happens in practice (SICHERT in: SCHWARZE 2019, Art. 304 TFEU para. 6). Finally, the EESC may issue opinions on its own initiative (Art. 304 sec. 1 sentence 3 TFEU). Other activities are also possible, such as the organisation of conferences and workshops or the establishment of competence centres (HAYDER 2010).

Its composition and working methods reveal two tendencies which are inherently somewhat in conflict. On the one hand, the EESC has diversified over

time and now represents a wide range of social interests. In addition to the traditional groupings of employers and employees, these include, among others, representatives of professional groups, the self-employed, consumer rights organisations, women, young people, minorities, community associations and representatives of science and research. Representatives of environmental conservation groups are also among the members (EESC 2019b).

On the other hand, despite this diversification of members and topics, the structural dominance of employer and employee interests has been maintained. This can be seen, for example, in the division into three groups in which all members are organised. These are the employers (Group I), the employees (Group II) and the Diversity Europe Group (Group III). The last group includes all the organisations listed above, including the environmental conservation organisations.

Among other things, the EESC also addresses the issue of sustainability and has set up a so-called Sustainable Development Observatory (SDO). However, the strong position of economic and labour interests in the EESC is evident here, and also shapes the approach in terms of content. The SDO thus defines sustainable development as "development that creates conditions for long term prosperity giving equal importance to the three pillars: economic, social and environmental" (EESC 2018b). Sustainability in the EU is to be promoted "by advancing economic prosperity, social inclusiveness and environmental responsibility in an integrated and balanced way" (EESC 2019a). However, this ignores the fact that stable environmental conditions are the basis of all social and economic activities. Securing stable ecological foundations for life is therefore of paramount importance (SRU 2019, item 200).

748. Current primary legislation already offers some scope for strengthening the EESC as the representative of environmental and sustainability interests. In the past, some member states – including Germany – have proposed representatives of environmental conservation groups as members, and the EESC has taken up environmental protection as an issue, albeit as one among many (BOISSERÉE 2000). In the literature it is suggested that the EESC should align itself more closely with the guiding principle of sustainable development (SUHR in: CALLIESS/RUFFERT 2016, Art. 300 TFEU para. 16). This has already been considered (European Commission and EESC 2012, point 16). However, this requires more than just taking ecological interests into account as a "third pillar" alongside economic and social interests. Here, a european sustainability strategy revised on the basis of ecological sustainability, together with the European Climate Law and the 8th EAP, could form the yardstick for evaluation.

749. Above all, it would be important to change the EESC's internal structure and working methods, which up to now have maintained the emphasis on the interests of employers and employees. In its current composition, the EESC ultimately reflects the social structures of industrial society in the 1950s, in which employers' and employees' associations played a central role in pacifying social conflicts. The criticism is justified that this no longer does justice to the greater social differentiation and the changed world of the 21st century (HAYDER 2010, p. 176). It is significant that the French Economic and Social Council, the historical institutional model for the EESC, was expanded in 2008 to become the Economic, Social and Environmental Council (Box 8-16). This shows that many issues of economic and social development can no longer be dealt with properly today without substantial consideration of the environmental challenges. It is up to the member states who put forward the members of the EESC for appointment to substantially strengthen environmental protection. For the new appointment period of the EESC, from autumn 2020 onwards, the German government should therefore propose more representatives of environmental and sustainability organisations.

750. In the medium term, the EESC should be guided entirely by the principle of sustainability and renamed the European Sustainability Committee. However, such a reorientation, renaming and reinforcement of the existing EESC requires an amendment to the European Treaties and is therefore more feasible in the medium to long term. The priorities for implementing Agenda 2030 for sustainable development (item 745), together with the European Climate Law and the 8th EAP, could form the central substantive starting point and benchmark for reviewing legislation. In principle, the EESC could continue to address the issues it has dealt with so far. In contrast to the previous approach, however, long-term interests would be the main benchmark for the work of the EESC (or European Sustainability Committee), and the conservation of natural resources as the foundation for social and economic development would be given greater weight, in accordance with the principle of ecolo-

gical sustainability (SRU 2019, item 200 et seqq.). This change of remit would also have to bring with it a different composition of the Committee. A Sustainability Committee would have to have a balanced tripartite composition reflecting the ecological, economic and social sustainability goals.

751. The task of the new European Sustainability Committee, following the transformation of the EESC into this new body, would be to work towards the implementation and enforcement of the European sustainability and climate protection strategy. This work could take the form, firstly, of monitoring, by which the achievement of sustainability goals would be assessed at regular intervals and deficits identified. However, in order to make long-term interests visible in day-to-day political business and to be able to influence the actual political decision-making processes towards policy integration, the European Sustainability Committee should at the same time be allowed to give its opinion on specific political or legislative measures. In this respect, it could maintain the existing mandatory consultation rights of the EESC. The right to be consulted would enable the reformed European Sustainability Committee to point out the long-term consequences of draft legislation and to check its compatibility with the sustainability and climate protection strategy. In addition, the European Sustainability Committee should be allowed to issue opinions on its own initiative regarding the impact of current political decisions on people in the future. It could also be called upon by the European Parliament, the Council of the European Union or the European Commission to raise relevant questions. This corresponds formally to the consultative role of the present EESC.

752. However, it should be noted that the existing EESC, with its purely consultative role, carries relatively little political weight. It would therefore be important to give the European Sustainability Committee proposed here a higher political profile. This presupposes the willingness of the other institutions to actually take on board the assessments of the European Sustainability Committee and, where appropriate, to take proper account of any concerns it might raise.

8.3.7 Improving enforcement

753. In order to change and reform the EU in the direction of environmental sustainability, it is essential to ensure that relevant EU legislation is actually enforced. In this respect, it is the member states which are crucial in the EU's federalised system of enforcement. They must therefore not only be willing but also able to implement the complex provisions of the sustainability strategy and the European Green Deal. To do so, they need well-functioning governance structures, and they must provide sufficient financial, technical and human resources. In the working method proposed, the EU would have a fallback responsibility in the event of serious enforcement deficits and would have to meet this by means of a cooperative division of tasks and cooperative enforcement (item 706 et seqq., 732).

In its Communication on the European Green Deal, the European Commission has made it clear that the adoption of new measures will not be sufficient to achieve its objectives. It has therefore announced that it will work with member states to strengthen EU efforts to ensure that existing legislation and measures relevant to the European Green Deal are enforced and effectively implemented (European Commission 2019g, p. 5). The national energy and climate plans, which are intended to ensure that the climate protection efforts of the member states are sufficiently ambitious, are a step in this direction (item 92).

It is also necessary to assist member states with enforcement. The Directorate-General for Structural Reform Support set up by the Juncker Commission can be used for this purpose. The newly created Directorate-General coordinates the relevant departments within the Commission and works with them to provide customised technical assistance to EU countries. This support is provided primarily through the Structural Reform Support Programme. The aim is to help EU countries develop more effective institutions, a stronger governance framework and more efficient public administrations. This support strengthens the capacity of EU countries to devise and implement policies to promote job creation and sustainable growth. Areas eligible for support also include government leadership and public administration (European Commission – DG Reform 2020).

Existing networks should also be used. These include above all IMPEL, which should be further expanded, but also the European Sustainable Development Network (ESDN) as well as the cooperation between governmental and non-governmental research institutions within the European Environment Information and Observation Network (Eionet) of the European Environment Agency.

To date, there are only very limited guidelines at European level on how European environmental law should be enforced, particularly with regard to precise requirements for permits and inspections. Initiatives from member states have made proposals as to how enforcement could be improved by guidelines from the European level. It is possible, in principle, to incorporate more precise specifications on the enforcement of the respective regulations into the existing directives – as has already been done in some cases. In addition, for some years now discussions have been going on about issuing a cross-cutting directive to improve enforcement at the member state level (ZIEKOW et al. 2018). This so-called inspection directive, for which preparatory work is already underway, might represent a significant step forward, because it would provide the member states with detailed guidelines for the enforcement of environmental law and thus also ensure that environmental administrative bodies were better equipped (ibid.). The SRU supports the idea of an inspection directive at European level. In addition to this inspection directive, the European Commission should resume work on a directive on access to justice in order to facilitate the implementation of Art. 9 sec. 3 of the Aarhus Convention at the level of the member states.

754. As the European Green Deal and the Sustainable Development Strategy are political priorities for the EU, the EU has a default responsibility for implementation. The European Environment Agency could therefore be given a stronger role in assisting member states with enforcement. Research and interviews with enforcement authorities have shown that there are a number of approaches that have proven to be useful. These include strengthening the exchange of information between authorities, in particular in the form of common procedural and technical guidance documents and task forces to solve priority problems. The increased provision of guidance and training is also considered useful. In general, data on the state of the environment should also be made available in the form of databases with filtering and search options (ZIEKOW et al. 2018).

In order to strengthen the enforcement of European environmental law in the long term, it would also make sense to conclude infringement proceedings more quickly. Enforcement should also be strengthened by new instruments such as compensation payments (MEYER-OHLENDORF 2018).

8.4 Conclusions

755. European legislation today largely defines the framework within which the member states conduct environmental policy. This is due in part to the cross-border nature of many environmental challenges. Additionally, the relevant sectors where policy is enacted, such as energy, transport, agriculture and the circular economy are often linked to the internal market. In particular, the objective of a Single Market creates a pressure towards uniform environmental protection requirements throughout the member states, especially in the area of products, even though Art. 114 sec. 2 and Art. 193 TFEU allow member states to create regulations providing for a higher level of protection in the environmental field. However, the concerns of national governments that their economies may suffer competitive disadvantages may inhibit the political will to adopt ambitious national environmental protection measures.

756. The member states exert a decisive influence on the content and effectiveness of European environmental policy. This is because the member states not only influence political decision-making at the European level and participate in the EU legislative process through the European Council and the Council of Ministers; they also have an obligation to implement European environmental law and to apply it in practice. However, in the area of environmental protection especially there are considerable enforcement deficits in the member states. European environmental policy is therefore faced with the dual challenge of, firstly, effectively tackling the epochal environmental problems, and therefore first overcoming the ambition gap, and secondly, overcoming the implementation gap in environmental policy and thereby maintaining its credibility and political legitimacy. Where the EU does not regulate or only sets minimum standards, and particularly when it does so because of the principle of subsidiarity, it is up to the member states to pursue environmental policy on their own responsibility. The EU and the member states thus form an environmental alliance. This alliance can only achieve the goal of a high level of environmental protection by cooperating on the basis of a division of responsibilities and by means of a cooperative enforcement of the law.

757. The responsibility of the EU and the member states for the protection of the natural foundations of life also has a global dimension. Many environmental problems today are global problems. In particular, the planetary boundaries as identified by Earth system scientists mark

limits whose transgression would lead to serious, potentially catastrophic and irreversible consequences for living conditions on Earth (SRU 2019). The core challenges include limiting climate change, preserving biodiversity and reducing anthropogenic material flows and the discharge of harmful substances into the environment. European countries contribute to these problems both directly and indirectly. Biodiversity is particularly threatened not only by climate change but by land use, the associated destruction of habitats and eutrophication. This happens both in Europe itself, but also through the global trade flows for which Europe is (jointly) responsible. For example, agricultural products (including animal feed), raw materials and products imported into Europe on a large scale cause an expansion and intensification of land use elsewhere (ibid., item 46 et seqq.). Due to the globalisation of material flows, the goal to recycle waste products and thus provide secondary raw materials that substitute primary raw materials also has a dimension that extends far beyond Europe.

As an association of countries which are wealthy by global standards, the EU and its member states have a particular responsibility with respect to the global environmental problems they have contributed to causing. As a globally significant trading bloc, the EU is also able to exert influence in order to strengthen international environmental protection, for example through trade or foreign policy. When the 27 member states act together under the umbrella of the EU, this sends out a more powerful political and economic signal than the individual member states are able to do at the international level. A joint EU environmental policy is therefore important not only for the achievement of a high level of environmental protection within Europe, but also and in particular for strengthening the international cooperation needed against international and global environmental problems.

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