Nobody is opposed to sustainable development or a high level of environmental protection, but when it comes to a ban on cadmium in batteries or lead in the environment, such high principles are all too quickly forgotten. [EU] environmental law therefore must also remain concerned about details.

Ludwig Krämer

1. Introduction

As the title would suggest, this is an article about environmental enforcement and politics. But equally importantly, it is an article about details, and why details matter. For in the absence of details - and, more specifically, details of living examples - the central issue addressed in this paper could be all too easily overlooked, misunderstood, or dismissed, instead of receiving our urgent attention, which, as this article hopes to show, is the only justifiable response.

Perhaps unexpectedly, therefore, the bulk of this article is dedicated not to discussions of, for example, access to infringement documents, or the Aarhus Convention, or accountability; instead, the primary focus of the article is, unapologetically, to detail and discuss a series of real-world environmental enforcement examples. It is hoped that the sum of these examples will be greater than its parts, and that, through exposing the practical impacts of Commission enforcement decisions, a reader who would perhaps not otherwise be particularly interested in this topic might feel the urge to do something about it.

The aims of the article are therefore two-fold: first, to show, using examples, that the EU’s system of environmental enforcement requires urgent reform; and second, to consider potential directions of reform. That we - collectively - have not done enough in this area is evident. Dishearteningly, the vast majority of an excellent article on a similar topic to the present – Rhiannon Williams’s The European Commission and the Enforcement of Environmental Law: an Invidious Position³ – could be repeated more or less verbatim today, 14 years after its original publication.

The central issue considered in that paper and this can be stated simply: pursuant to Article 17 of the Treaty on European Union (ex Art. 211 EC), the European Commission is responsible, at the supranational level, for enforcing EU environmental law against the EU's...
often recalcitrant Member States.\textsuperscript{4} The Commission also has political functions, such as proposing new EU environmental legislation, subsequently negotiating such legislation with the EU’s Member States, and proposing policy initiatives more generally within the scope of the EU Treaties. There is no separation of these powers, and there is therefore a risk – realised in practice – that the Commission’s enforcement decisions, which can have sweeping effects on the environment, might sometimes be motivated, at least in part, by political considerations (or other irrelevant factors) as opposed to law enforcement considerations.\textsuperscript{5} This risk is compounded by the fact that the Commission’s decisions regarding whether or not to pursue an action against a Member State enjoy immunity, in effect, from judicial review by complainants alleging infringements of EU law.\textsuperscript{5} In other words, a Commission decision not to open infringement proceedings, or to drop ongoing infringement proceedings, cannot be successfully challenged before the EU courts by a complainant, although the Commission’s conduct may be the subject of a complaint to the European Ombudsman alleging maladministration.\textsuperscript{7}

The consequences of the above state of affairs are best illustrated with some examples, and it is to that task that the next section of this article is principally dedicated.

\textsuperscript{4} As Krämer comments, “Member States frequently implement and apply EC environmental law because the Commission threatens legal action under Art.226 EC, not because they perceive the need to ensure an adequate protection for the environment. This is particularly true of Member States which derive their national environmental legislation entirely from Community environmental law, as the national environmental structure is normally not too well developed and not too influential in the political power game.” L Krämer, \textit{EC Environmental Law} (6\textsuperscript{th} Edition, Sweet & Maxwell, London, 2007), 459. Ireland is arguably an example of this, notwithstanding its having some purely domestic environmental law.

\textsuperscript{5} As Hedemann-Robinson, an ex-employee of the Commission, puts it, slightly more cautiously: “The conflation of policy innovation and law enforcement roles potentially leads the Commission into situations where decisions to launch or terminate infringement proceedings may become particularly vulnerable to the influence of political as opposed to enforcement motivations.” M Hedemann-Robinson, \textit{Enforcement of European Union Environmental Law: Legal Issues and Challenges}, (Routledge-Cavendish, London and New York, 2007), 179. Wennerås suggests particular challenges in respect of large Member States: “The most fundamental problem stems from the fact that the Commission is not only the guardian of the Treaty, but is also empowered with the legislative initiative within the EC. This of course harbours the risk that the Commission may take strategically motivated decisions in its enforcement role in order to accommodate legislative ambitions. The Commission would perhaps be less inclined to initiate infringement proceedings, not to mention proceedings against large Member States which may have an already hostile attitude towards its legislative proposals”. P. Wennerås, \textit{The Enforcement of EC Environmental Law} (Oxford University Press, Oxford, 2007) 294.

\textsuperscript{6} I.e. Complainants under Articles 258 and 260 of the Treaty on the Functioning of the European Union (ex Articles 226 and 228 EC).

\textsuperscript{7} This immunity derives from the discretionary nature of the Commission’s powers as guardian of the Treaties. See, for example, case C-247/87 \textit{Star Fruit v Commission}. Interestingly, Tomkins lays the blame for the Commission’s immunity from challenge at the ECJ’s door: “It is the Court which has held that the Commission’s discretion under Article 226 is largely unreviewable…..the Court’s reasoning is thin. There is nothing in the Treaty to require [this] conclusion[…], and the Court’s cursory treatment of [the] issues stands[…] in stark contrast to the teleological approach it famously adopted in cases on individual enforcement, Van Gend en Loos and Francovich especially.” A Tomkins, ‘Of Institutions and Individuals: The Enforcement of EC Law’, In: \textit{Law and Administration in Europe: Essays in Honour of Carol Harlow}, edited by P. Craig and R. Rawlings, (2003): Oxford University Press, 273.
2. Why the European Commission needs policing

In the context of the Commission’s dual policy and enforcement functions, three questions arise: “whether there is scope for improper political influence upon the outcome of legal procedures, whether it may appear to the public that such behaviour is taking place, and whether it is.”\(^8\) The last point, Williams argues, “is impossible to prove, one way or the other, given the current lack of transparency.”\(^9\) The present author would beg to differ, notwithstanding the fact that transparency issues remain. As certain of the examples below will show, it is possible to establish, at least beyond reasonable doubt, that irrelevant - in some cases political - considerations are taken into account by the Commission in reaching decisions regarding whether or not to pursue alleged breaches of EU environmental law.

Concrete examples of such behaviour are scattered thinly and sporadically throughout the literature, tending to be offered up by former insiders – ex-employees of the Commission or of a Member State administration. Many more examples are no doubt stored in the files and in the memories of environmental NGOs and the Commission. The following collection, which is of course by no means definitive, is based on a survey of the literature,\(^10\) and on the present author’s personal experience.\(^11\)

Importantly, the examples considered below should be considered in the light of the present structure of the Environment Directorate-General of the Commission (DG Environment), and the significant changes made to this structure during the mid-1990s, in highly controversial circumstances.\(^12\) This issue is considered in the following section.


DG Environment - previously known as DG XI - was structured rather differently in the early 1990s than it is today. At the top of a pyramidal structure was the Director General, who was (and is) responsible to the Commissioner. Directly accountable to the Director General were four units, one of which was the unit responsible for legal affairs and the application and enforcement of EU law, known then as DG XI.I (the Legal Affairs Unit). In addition to the four directly attached units, there were two large directorates - Directorates A and B - each responsible for a number of sectoral areas of environmental policy (e.g. waste management, conservation, nuclear safety, etc.), each headed by a Director, and each divided into units.

While the heads of units within the two Directorates would in principle be of the same standing as the head of the Legal Affairs Unit, as the head of a directly attached unit, the head of Legal Affairs had, in effect, direct access to the Director General. In contrast, the heads of units within the Directorates would gain access to the Director General only with

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8 R Williams, supra note 3, at 353.
9 R Williams, supra note 3, at 354.
10 Other examples that are not covered in the present paper include, for example: the Commission’s actions following the Prestige oil spill in November 2002: Hedemann-Robinson, supra note 5, at 183-185; and the postponing of the ECJ’s hearing of case C-56/90 (the famous Blackpool bathing waters ‘complaint on a postcard’ case) until after the UK’s 1992 general election: R Williams, supra note 3, at 394.
11 As a former lawyer for the UK government’s Department for Environment, Food and Rural Affairs, and as a member of the NGO Friends of the Irish Environment.
12 The history recorded here is based largely on the account in R Williams, supra note 3.
Working draft: Not for citation

the approval of the Director of the relevant Directorate. In deciding whether to grant such access, such Directors would “be weighing up [the proposed action] in the light of political requirements and the various policy and technical issues” he or she happened to be responsible for at the relevant time.\(^{13}\)

The relative independence of the Legal Affairs unit was, as Williams makes clear, highly significant:

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\text{One of the strengths of [the Legal Affairs Unit]...was that it was constitutionally separate from the working atmosphere of the directorates. In assessing complaints and infringement files, [the Legal Affairs Unit] was required to liaise as appropriate with the units within the directorates, but its Head of Unit was able to make proposals concerning the processing of complaints without having to seek approval for those proposals. There might be strong opposition to a proposal by another unit or directorate, but in any resulting debate, the Head of Unit of [Legal Affairs] had considerable independence in arguing his case before the ultimate arbiter within the DG, the Director General.}\quad ^{14}\]

This all changed in 1994 when, following a turbulent period in DG Environment’s history, the Legal Affairs Unit was “shunted down”\(^{15}\) to become a unit of Directorate B, placing a Director between the head of the Legal Affairs Unit and the Director General, altering the dynamic of independence that had previously existed.

The turbulent period began with the resignation, in June 1992, of Environment Commissioner Carlo Ripa di Meana. Ripa di Meana was forced to resign, it seems, by Commission President Jacques Delors, as a result of the former’s activism in pursuing environmental infringement cases.\(^{16}\) A contemporary newspaper account records that “Officials in London and Brussels hinted yesterday [29 June 1992] that Jacques Delors, the Commission President, gave a nudge to Mr Ripa di Meana....[who has] been involved in [a] bitter row[...] with national capitals, especially London, over [his] crusading style. Mr Delors is known to be concerned that perceptions of an interfering Commission will hamper ratification of the Maastricht treaty on European Union in Britain.”\(^{17}\)

President Delors’ concerns were well-founded: “in an angry letter delivered yesterday to the Commission President, the Prime Minister [John Major] spelled out his annoyance [at the issuance of a Letter for Formal Notice in what were then Art. 169 infringement proceedings, in respect of alleged breaches of the EIA Directive] and served notice that he would now be

\(^{13}\) R Williams, supra note 3, at 355.

\(^{14}\) Ibid, at 355-6.

\(^{15}\) Ibid, at 356.

\(^{16}\) Ripa di Meana is clearly the subject of the following anecdote: “when a Commissioner once announced to a Member State Minister during a meeting of the Council that it would bring that Member State before the Court of Justice for non-compliance with an environmental directive, the answer was: “You are doing that, because you are an Italian Socialist and an ex-Communist”: L Krämer, ‘The Environmental Complaint in EU Law’ JEEPL 6.1 (2009) 13-35, at 21. As the UK Independent noted at the time, “From an environmental perspective, however - one that views the destruction of the biosphere as of more importance than the arcana of Maastricht - the passing of Brussels’ Jolly Green Giant is deeply to be mourned.” D Nicholson-Lord, ‘What will we do without Carlo?: Politicians may welcome his departure, but David Nicholson-Lord says our environment needed Carlo Ripa di Meana’s protection’ The Independent (London, 1 July 1992).

\(^{17}\) The Independent (London, 30 June 1992), cited by R Williams, supra note 3, at 396.
less likely to support the treaty, due for signature by EC leaders at the Maastricht summit in December.\textsuperscript{18}

The controversy continued as follows, as recorded in detail by Würzel:

> The departure of Environmental Commissioner Ripa di Meana and the Dutch Director-General Laurens Brinkhorst, who resigned in 1992 and [1994]\textsuperscript{19} respectively, left DG Environment’s Legal Unit, and especially its head Ludwig Krämer, open to attacks from powerful opponents. The Legal Unit was subsequently downgraded within DG Environment and Krämer was moved ‘sideways’, against his will. On 3 February 1995 Environment Watch: Western Europe reported:

> Krämer’s effective demotion after 10 years in the job and the downgrading of his unit are widely seen as politically motivated revenge by national governments for his strict interpretation of EU environmental law and his uncompromising pursuit in the European Court of Justice of member states that fail to properly transpose or implement them.

> British government officials [under John Major’s Tory government] were pleased with DG Environment’s new organisational outlook. And one DG Industry official commented: “I would have sacked Krämer a long time ago if I had been his boss!”

> Sixty prominent European environmental lawyers, including several eminent lawyers from Britain (such as Richard Macrory, who later became a member of the RCEP), thought differently and signed a declaration to get Krämer reinstated. All efforts to reverse the Commission’s decision came to no avail. The EEB, which is a Brussels-based umbrella group representing more than 100 groups, presented Krämer with its Twelve Stars Award 1995 after his departure from the Legal Unit. The EEB’s eulogy stated: ‘In an era of deregulation, the EEB wants to underline the importance of civil servants’ role. Citizens are expecting civil servants to be loyal to the people. The work done by Mr Krämer is of the kind that would contribute significantly to reconcile civil society and public authorities.’\textsuperscript{20}

This shameful period in the Commission’s history should be writ large on the collective memories of EU environmental lawyers. Instead, where it is mentioned at all in the literature, it is largely consigned to footnotes, or to a brief mention in passing.\textsuperscript{21} In the absence of a contemporary record, one can only imagine the effect this episode must have.

\textsuperscript{18} Cited by R Williams, supra note 3, at 393.
\textsuperscript{19} Recorded incorrectly as 1995 in the original.
\textsuperscript{20} R Würzel, Environmental Policy-making in Britain, Germany and the European Union: the Europeanisation of air and water pollution control (Manchester University Press, Manchester, 2006), 70.
\textsuperscript{21} Professor Krämer himself, of course, has been anything but airbrushed from history. That he remains a powerful force in EU environmental affairs, and an inspiration to many within the EU environmental movement, is due in no small part to his courage – both then and since – in speaking up for the environment.
had on the morale, and the subsequent practices, of DG Environment’s Legal Unit: having been pulled apart, and effectively demoted, for doing its job too well (too apolitically), it is perhaps no surprise to find evidence of apparent political interference in a number of its subsequent decisions.

Currently, Legal Affairs & Cohesion comprises its own Directorate, one of seven within DG Environment. While the structure and (some) faces have changed, a summary of the potential for political factors to influence the conduct of infringement proceedings, updated to apply to the current set-up, is as relevant today as it was when first written by Williams:

It is possible for political factors to influence [cases] at a variety of stages:

- at the level of the making of the proposal [regarding infringement proceedings], if the head of the [Enforcement, Infringements Coordination & Legal Issues Unit of the Legal Affairs & Cohesion Directorate] is concerned for his career within the Commission;
- when the technical or policy units of [DG Environment] comment on the proposal, if, for example, any personnel there have an eye upon advancement in national administrations when they return, or upon the advancement of relationships with Member States so as not to jeopardize a project for a new directive for which they are responsible;
- when the Legal Service [a separate department of the Commission, offering horizontal legal advice to all Commission bodies, and reporting directly to the President of the Commission] comments on the proposal if it is an area where the President, for example, is known not to favour the legislation; and
- when it is considered by the Heads of Cabinet and the Commissioners, who are all very much embroiled in political negotiations regarding new legislation, intergovernmental conferences, etc.

That said, in practice it is the head of the unit responsible for infringements who is in the key position to determine which cases should proceed to the next level, and which should be

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22 One is reminded, in the domestic context, of the sudden disbandment by Cabinet decision of the heritage service, Dúchas, which became “hostage to the reckless populism of the [Irish Farmers’ Association] leadership” in 2003: see M Viney, ‘Brooding on the Politics of Conservation’ The Irish Times (Dublin, May 10 2003) B9. The tipping point was Dúchas’s proposal of Special Protection Areas for the hen harrier (Circus cyaneus) pursuant to the Birds Directive (an issue that has not gone away: Ireland was found in breach by the ECJ for, inter alia, its failure to designate SPAs for the hen harrier: C-418/04, judgment of 13 December 2007. Proceedings to enforce the judgment are underway – the next formal step would be a referral to the ECJ under Art. 260 TFEU): “IFA meetings ended in blatant threats to shoot the harriers and send their corpses to Duchas (a prophetic threat, later realised when a dead hen harrier, which had been shot with a rifle, was delivered to the Kerryman newspaper, with a newspaper article regarding the bird’s protection pinned to its body. ‘Hen harrier was shot dead by rifle’, The Kerryman (May 22 2003)). In a guerrilla war over the future of farming policy, [Duchas’s role in respect of the hen harrier] made it a handy stick with which to beat the government” (M Viney, ibid). Rather than standing up for Dúchas, the rule of law, and the environment, the Fianna Fáil/PD government caved in, disbanded Dúchas and transferred its functions elsewhere. Again, one can only imagine the effect this must have had – and must still be having – on Dúchas’s successor organisations, including the National Parks and Wildlife Service.

23 Williams cites the fact that, of a total of about 400 personnel in DG XI, about 56 personnel in the technical and policy units were on secondment from national administrations, to return where “their long-term interests lie” after a maximum of 3 years on secondment. R Williams, supra note 3, at 364.

24 R Williams, supra note 3, at 364.
withdrawn: “Technically, it is possible that their opinion could be overridden either by the
director of the particular directorate in which the unit is located, the Director-General of DG
Environment, or the Commission’s Legal Service. However, this rarely happens, which
means that the office holder of Head of the Legal Unit has a particularly strong position in
relation to decisions concerning the prosecution of infringements. There is nothing wrong
with this, so long as the work of the office holder is not subject to non-law enforcement
considerations, namely political interference.”25 As Hedemann-Robinson rightly notes,
however, there have been “disturbing incidents”26 in the past in that regard: the first – the
treatment of Ludwig Krämer – was recounted by way of background above; the second is set
out in section 2.2.1 below.

Whether the treatment meted out to DG Environment’s Legal Unit in the mid-1990s has
made its successor incarnations more susceptible to the influence of political factors would
naturally be a matter of speculation, but the history recorded above nevertheless casts an
interesting light on the examples that follow, which all post-date that history.

2.2 The Politics of Environmental Enforcement: Examples

What moves us, reasonably enough, is not the realisation that the world falls
short of being completely just - which few of us expect - but that there are clearly
remediable injustices around us which we want to eliminate.

Amartya Sen27

Amidst the many competing claims for our attention, the following examples of remediable
injustice deserve our time - and require time and detail - yet they remain, perhaps for that
reason, largely unknown. But go to the town of Parga in Greece (section 2.2.1), or to the
Sabor valley in Portugal (section 2.2.2), or to the right (or wrong) beaches of south-west
England in spring (section 2.2.3), and the significant real-world consequences of
Commission action and inaction will be clear.

2.2.1 Parga, Greece

An extraordinary example of Commission maladministration is recorded in a July 2002
decision of the European Ombudsman.28 The case concerned EU funding of a sewage and
biological treatment works in Parga, Greece, and that project’s alleged infringement of the
EIA Directive (whose transposition deadline was 3 July 1988).29 The project was the subject
of a complaint to the Commission by 24 Parga residents, one of whom subsequently
complained to the Ombudsman regarding the Commission’s conduct of the case. As a
central element, the Ombudsman’s decision considered the role played by Ludwig Krämer’s

25 M Hedemann-Robinson, supra note 5, at 182.
26 Ibid.
28 Decision of the European Ombudsman, dated 18 July 2002, on complaint 1288/99/OV against the
European Commission.
successor as head of DG Environment’s Legal Affairs Unit, a Greek national (the Head of Legal Affairs).\textsuperscript{30}

In terms of the relevant project’s history, the application for implementation of the works was submitted at the national level by the municipality of Parga in February 1995.\textsuperscript{31} As the Ombudsman’s decision records, in March 1997 the Commission considered that the EIA Directive applied to the project, and that, since construction of the project had started before definitive approval of the EIA, the Directive had been breached.\textsuperscript{32} The Commission therefore indicated that the case would be included as part of horizontal infringement proceedings against Greece, and suspended funding of the project from the Cohesion Fund. That remained the Commission’s position in March 1998, when it confirmed that the issue would be the subject of infringement proceedings.\textsuperscript{33}

However, in May 1998, the Head of Legal Affairs added a note to the Commission’s file concluding that the infringement proceedings should be dropped, on the basis of new elements\textsuperscript{34} in the case which established that there had been no breach of the EIA Directive.\textsuperscript{35} In the note, he stated that a letter would be sent to the complainants to inform them of the Commission’s intention to close the file.\textsuperscript{36} Two months later, in July 1998, further to the decision that there was no infringement of the EIA Directive, the Commission took the decision to fund the project under the Cohesion Fund.\textsuperscript{37} However, the Commission did not inform the complainant of this fact and, indeed, indicated in a letter to the complainant dated 9 December 1998 that it would consider what follow-up to give to the case further to documentation the complainant had sent.\textsuperscript{38} It was not until April 1999 that the Commission informed the complainant of supposed new elements\textsuperscript{40} obtained from the Greek authorities, namely that the project had been approved by a decision in 1986 - before the EIA Directive came into force - and hence did not fall within the scope of the Directive.\textsuperscript{41}

The Ombudsman’s decision highlighted a number of problems with this argument. First, based on the Ombudsman’s inspection of the Commission’s files, it appeared that the 1986 decision was not a new element in the case, since it had been brought to the attention of the Commission by the complainant in July 1995.\textsuperscript{42} Second, the 1986 decision could not, even according to its own basic terms, be considered as the authorisation of the project.\textsuperscript{43} Third, the Commission services considered that it was a Ministerial decision of March 1997 which

\textsuperscript{30} The official in question is named in a contemporary news story: ‘EU Ombudsman Damns “Partial” Commission’ (ENDS Europe, 29 July 2002).
\textsuperscript{31} Supra note 28, para 2.6.
\textsuperscript{32} Supra note 28, para 2.3.
\textsuperscript{33} Supra note 28, para 2.4.
\textsuperscript{34} Supra note 28, at para 3.4.
\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid.
\textsuperscript{37} Decision E(98)2297.
\textsuperscript{38} Supra note 28, at para 3.4.
\textsuperscript{39} Supra note 28, at para 2.5.
\textsuperscript{40} Supra note 28, at para 2.12.
\textsuperscript{41} Supra note 28, under the heading “The background of the complaint”.
\textsuperscript{42} Supra note 28, at para 2.12.
\textsuperscript{43} Supra note 28.
definitively approved the project.\textsuperscript{44} As the Ombudsman stated: “This appears explicitly from two notes in the Commission’s file, dated 4 and 27 May 1998, in which [the Head of Legal Affairs] and another official from DG Environment stated that this Decision gave definitive approval for the start of the project and confirmed the location of the site.”\textsuperscript{45} Fourth, the competent Greek authorities themselves considered that the EIA Directive applied.\textsuperscript{46}

So far so bad. In addition, however, the complainant alleged a lack of impartiality in the handling of the case by the Commission. According to the complainant - who had obtained from the Greek Foreign Ministry’s records a copy of a written expression of thanks to representatives of the Commission for delaying the processing of complaints\textsuperscript{47} - the Head of Legal Affairs held a party political position in Greece that was incompatible with his duty to verify that the project was carried out in accordance with Community law.\textsuperscript{48}

The Commission defended its position on the basis that “there was no reason to believe that [the Head of Legal Affairs] had influenced any decision taken on [the] case and moreover that he was not involved in it, being on annual leave from 15 December 1998 till 31 January 1999, and on unpaid leave on personal grounds from 1 February till 15 June 1999.”\textsuperscript{49} However, as the Ombudsman recorded, having reviewed the evidence, “it is evident that [the Head of Legal Affairs] was deeply involved in the decision to drop the case, which was a necessary condition for the funding of the project by the Commission.”\textsuperscript{50} Further, “in the period preceding the closure of the case, [the Head of Legal Affairs] had been appointed as adviser for European affairs for the President of Nea Dimokratia Party [the same party as the then-Mayor of Parga],\textsuperscript{51} and had attended a party meeting in the region where he gave a speech about EU environmental legislation [allegedly 10 days before a team from DG XI visited Parga to investigate certain details of the file].\textsuperscript{52} It appears that the information on his appointment was made public [in] November 1998, two months before taking leave on personal grounds.\textsuperscript{53}

The conclusion is best left to the Ombudsman:

\textit{From the point of view of the complainant, who did not know that [the Head of Legal Affairs] was on annual and later on unpaid leave on personal grounds, and who had moreover recently received a letter signed by [the Head of Legal Affairs] on 9 December 1998 stating that the case was still being investigated, there appear to be sufficient reasons to mistrust the impartial and proper handling of the case and to question that the official in question did not conduct himself solely with the interests of the Communities in mind. In fact it would be difficult for any citizen in any Member State not to doubt the impartiality of the Commission's actions as the Guardian of the treaty if a Commission official who is deeply involved in dealing with an infringement case also holds a post in a}

\textsuperscript{44} Supra note 28, at para 2.13.
\textsuperscript{45} Ibid.
\textsuperscript{46} Supra note 28, at para 2.15.
\textsuperscript{47} Supra note 28, at para 3.1.
\textsuperscript{48} Ibid.
\textsuperscript{49} Supra note 28, at para 3.2.
\textsuperscript{50} Supra note 28, at para 3.5.
\textsuperscript{51} Supra note 28, under the heading “The Inquiry”.
\textsuperscript{52} Ibid.
\textsuperscript{53} Supra note 28, at para 3.6.
political party in the very Member State that the case concerns and acts publicly in that capacity at a time when the case is being dealt with. In the eyes of European citizens, this kind of incident may put at risk the reputation of the Commission as Guardian of the Treaty, responsible for promoting the rule of Community law. The Ombudsman therefore finds that the Commission, as Guardian of the Treaty, has failed to secure that this case was dealt with impartially and properly. This constitutes an instance of maladministration.\textsuperscript{54}

No specific follow-up action was reported to have been taken by the Commission in respect of the Head of Legal Affairs personally.\textsuperscript{55} He remains with DG Environment, and is currently head of one of the three units that comprise the Legal Affairs & Cohesion directorate.\textsuperscript{56} In 2008, he was awarded €10,000\textsuperscript{57} by the Court of First Instance for having been named in the original version of the Ombudsman’s decision, which was published on the Ombudsman’s website from 23 July 2002 to 2 August 2002, before being replaced with an anonymized version.\textsuperscript{58} The Court ordered the parties to bear their own costs. Pending the case, the (new) Ombudsman wrote to the Head of Legal Affairs stating that the “critical remarks were addressed to the Commission as an institution and did not entail, and were not intended to entail, any personal or professional criticism in relation to the Commission officials who worked on this case and, specifically, any personal or professional criticism directed at you.”\textsuperscript{59}

\textsuperscript{54} Supra note 28, at para 4(3).
\textsuperscript{55} M Hedemann-Robinson, supra note 5, at 430.
\textsuperscript{57} He had sought €150,000: see Application in case T-412/05.
\textsuperscript{58} Judgment in T-412/05, at para 155.
2.2.2 The Sabor Valley, Portugal

Introduction

Writing of India’s infamous Sardar Sarovar dam, author and activist Arundhati Roy commented: “few people know what is really going on in the Narmada Valley [the area to be flooded by the dam]. Those who know, know a lot. Most know nothing at all.” The same could be said of the Sabor valley in north-eastern Portugal, the prospective location for Europe’s very own Sardar Sarovar. When complete, in about three years’ time, the 100m-high hydroelectric dam near the mouth of the Sabor river - described as “the last wild river in Portugal” - will create a reservoir around 50 km long, almost entirely within two Natura 2000 sites (Figure 1).

That this is happening at all is shocking; that it is happening with the acquiescence of the Commission is, frankly, inexcusable.

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61 The dams are currently under construction.
62 There will be two dams in total – a smaller dam (35m high) will also be built to control water flow when water from the main dam is released to pass through the hydroelectric turbines.
63 Referred to in European Commission, ‘Sabor Dam Project: Impact Assessment, Mitigation and Compensation Measures’ (D-13006_Annex_EN.pdf, undated), attached to an e-mail dated 13 July 2007 from Peter Mogens Carl, then Director General of DG Environment, to cla@reper-portugal.be, for the attention of the Portuguese Permanent Representative to the EU (referred to as “Ambassador” in the e-mail). Obtained by a Portuguese NGO under access to information legislation.
64 The sites are both named Rios Sabor e Mãças: a Site of Community Importance (code PTCON0021) under the Habitats Directive, and a Special Protection Area (code PTZPE0037) under the Birds Directive.
Figure 1: Above, map showing the positions of the main and secondary dams on the Sabor river, with the projected extent of the reservoir indicated. The towns of Torre de Moncorvo (to the south) and Mogadouro (to the north) are circled in red, to allow comparison with the map below (Source: an edited version of Fig.2 from the non-technical summary of the EIA comparing the Sabor and Côa projects: http://www.edp.pt/PT/sustentabilidade/EDPDocuments/V2_04RNTAvalCompAHBS_AHAC.pdf).

Below, map showing Natura 2000 sites in the Sabor valley. The Special Protection Area for birds is hatched in red, the Site of Community Importance, under the Habitats Directive, is hatched in blue. Again, Torre de Moncorvo and Mogadouro are circled in red. (Source: Natura 2000 Viewer website: http://natura2000.eea.europa.eu/)
Commenting in advance of the decision to approve the dam, Freitas and Horta described the significance of the Sabor as follows:

A dam on the Sabor River would destroy one of Europe’s few remaining regions of extraordinary biodiversity, and one that is home to unique cultural traditions. Much of the Sabor valley in northeastern Portugal is part of the Natura 2000 network, and several habitats along the river are classified as priority conservation areas [the subset of EU protected habitats (itself a small subset of the total) that are given the highest priority in view of their danger of disappearance]. The region contains some of the few remnants of ancient Mediterranean native forest ecosystems, interspersed with low intensity agriculture of olive and almond trees. The Sabor valley is rich in endemic plant species and a critical habitat for endangered bird species such as the Bonelli’s eagle, the golden eagle and the black stork, which nest on the steep cliff formations along the valley. The valley itself is a migratory corridor for wolves [a priority species in Portugal under the Habitats Directive] and other wildlife and the Sabor is the spawning ground for fish species, such as the barbel, which annually swim up-river to reproduce.65

The abortive Côa dam

Ironically, the proximate trigger for dam-building in the Sabor valley was the saving of another valley from a large dam, following a change in Portugal’s government in October 1995.66 Prior to this change in power, plans for a dam in the Côa valley – about 25 km south of the mouth of the Sabor – had been progressing apace under a PSD (Social Democratic Party) government led by Aníbal Cavaco Silva, now President of Portugal.67 By 1995, the PSD had held power in Portugal for ten years, with an absolute majority in Parliament since 1987.68 Interestingly, for present purposes, amongst the party’s ranks was an up-and-coming politician, José Manuel Barroso, who held ministerial posts under successive PSD governments until the party’s defeat in the October 1995 election.69

In November 1994, shortly before this election defeat, the Portuguese media revealed that, whilst carrying out an impact assessment study regarding the building of the Côa dam, the archaeologist in charge, working under the auspices of the Portuguese Institute for the Protection of Archaeological Heritage, had noticed a large number of rock engravings that appeared to be of Palaeolithic age (at least 10,000 years old).70 It seemed he kept this information to himself for at least71 two years, finally drawing his colleagues’ attention to the

67 Ibid, at 132.
68 Ibid, at 131.
70 M Gonçalves, supra note 66, at 132.
71 It later emerged that, as early as 1989, a report following an impact study had mentioned the existence of pre-historical engravings on rocks to be submerged under the flood waters. The report advised that further archaeological exploration should be carried out, something that would require “several years’ work”. Nonetheless, from 1989 to 1992, no further exploration was undertaken. M Gonçalves, supra note 66.
engravings in 1994.\textsuperscript{72} One of these colleagues immediately informed the international archaeological community.\textsuperscript{73} By that time, construction work on the foundations of the dam was already well underway.\textsuperscript{74}

From November 1994, when news of the engravings broke, to October 1995, when a general election was held, the PSD government failed to adopt a position on the dam, resulting, of course, in work continuing as normal.\textsuperscript{75} However, on defeating the PSD in the 1995 election, one of the Socialist Party’s first acts was to suspend work on the dam, bringing an end to this particular dam-building episode in the Côa valley.\textsuperscript{76} In 1998, having been nominated by the Portuguese government, the \textit{Prehistoric Rock Art Sites in the Côa Valley} was inscribed on the World Heritage List by UNESCO.\textsuperscript{77} As one Portuguese NGO representative noted, wryly, “they built the visitor centre on top of a hill, in case they decide to revisit the dam later.”\textsuperscript{78}

The Sabor dam

The respite for environmentalists was brief. Having withdrawn plans for a dam in the Côa valley, in 1996 the government announced plans for a dam in a new location: the nearby Sabor valley.\textsuperscript{79} The proposal ran into immediate difficulties. In light of the projected significant impacts on the Sabor valley’s two Natura 2000 sites,\textsuperscript{80} the first EIA for the project, published in 1999, recommended that the proposal be withdrawn.\textsuperscript{81} There are, of course, substantial legal hurdles to be overcome if a project that will damage a Natura 2000 site is to go ahead. Pursuant to Article 6(4) of the Habitats Directive,\textsuperscript{82} three tightly-defined conditions must first be met: (1) there must be an absence of alternative solutions; (2) there must be imperative reasons of overriding public interest for carrying out the project (which are limited in the case of priority habitats and species); and (3) all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected must be taken.

In view of this legal framework, the Portuguese Ministry for the Environment conceded that alternatives would need to be considered before a final decision was taken regarding the dam.\textsuperscript{83} And the alternative site selected for consideration? The upper Côa valley - upstream of the World Heritage Site, some distance from the protected engravings.

\textsuperscript{72} M Gonçalves, \textit{supra} note 66, at 132.
\textsuperscript{73} M Gonçalves, \textit{supra} note 66, at 132.
\textsuperscript{74} Indeed, the foundations are still clearly visible on the ‘satellite’ view on Google maps, to the west of the village of Orgal.
\textsuperscript{75} M Gonçalves, \textit{supra} note 66, at 132.
\textsuperscript{76} M Gonçalves, \textit{supra} note 66, at 133.
\textsuperscript{77} See \url{http://whc.unesco.org/document/183}.
\textsuperscript{78} Interview between present author and Portuguese NGO representative, March 2010.
\textsuperscript{80} At the relevant time, the SPA had already been designated, while what is now the Site of Community Importance was a proposed Site of Community Importance. Recorded in European Commission (Joaquim Capitão), ‘Note for the file, Complaint 2003/4523’ (24 June 2004). Obtained by Portuguese NGO under access to information legislation.
\textsuperscript{81} SPEA and BirdLife International, \textit{supra} note 79.
\textsuperscript{83} SPEA and BirdLife International, \textit{supra} note 79.
In June 2002, the political baton passed back to the PSD (in coalition with the People’s Party), with new Prime Minister José Manuel Barroso at its helm. Shortly thereafter, in September 2002, an EIA was published comparing the Côa and the Sabor as potential locations for a large hydroelectric project.\(^{84}\) The Côa project - which would comprise a series of smaller dams - would be more expensive, the EIA concluded, and would produce less electricity than a dam in the Sabor, but would have fewer impacts on Natura 2000.\(^{85}\)

In light of this EIA, Portugal’s statutory environment agency (the ICN) published its own report stating that the Sabor option would be unlawful pursuant to the Habitats Directive, given its impacts on Natura 2000, the existence of the Côa valley as an alternative, and the impossibility of compensating adequately for the damage that would be caused.\(^{86}\) In spite of this, on 15 June 2004 the (PSD) Minister for the Environment, Arlindo Cunha, gave approval for the construction of a dam in the Sabor valley.\(^{87}\) Less than one month later, José Manuel Barroso left Portugal to take up his new position as President of the European Commission, a post he holds to this day.

**Infringement proceedings**

By the time the Sabor dam was approved at the national level, the European Commission was already well aware of the proposal and its potential impacts on Natura 2000. Indeed, following publication of the ICN’s report in 2003, a Portuguese NGO, the Liga para Proteccão da Natureza (LPN), filed a complaint with the Commission regarding plans for the Sabor and its likely impacts on Natura 2000.\(^{88}\)

In light of the strict protection afforded to Natura 2000 sites under EU law, the odds appeared stacked against the Portuguese government. In an internal briefing note for the Director General of DG Environment, a Commission official noted that:

> The Sabor dam will destroy what is sometimes referred to as the last natural river in Portugal. It will affect 50% of the river length and 3660 ha of surrounding land....The site, which...is both [a proposed Site of Community Importance\(^{89}\) under the Habitats Directive and a Special Protection Area under the Birds Directive],\(^{90}\) hosts 19 habitat types of Community interest, of which 3 are priority, as well as 9 animal species of Community interest [one a priority species] and 5 plant species of Community interest....Its designation as an SPA is due to the presence of 34 bird species, many of which are raptors that nest in the cliffs that

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\(^{84}\) SPEA and BirdLife International, supra note 79. Also see 

\(^{85}\) Ibid.

\(^{86}\) SPEA and BirdLife International, supra note 79. The point regarding compensation is noted in a European Commission Memorandum, entitled ‘Analysis of the Portuguese Reply of 19.1.07’, attached to an e-mail dated 12 March 2007 sent by Miguel de Aragão Soares of DG Environment to Miguel Serpa Soares, Legal Adviser, Portuguese Permanent Representation to the EU. Obtained by a Portuguese NGO under access to information legislation.

\(^{87}\) The date is recorded in European Commission, supra note 80.

\(^{88}\) Complaint 2003/4523. See the Order in case T-186/08, at para 6.


Indeed, a later assessment recorded some of the serious on-the-ground impacts that would likely be seen (these are merely extracts):

As regards the wolf (priority species) the [Portuguese government] study indicates that the construction of the dam will have a significant impact by destroying large areas occupied by the wolf thus reducing their hunting area and preventing the connection between populations north and south of the Douro (two of the three main populations would probably disappear (Alcateias da “Paradela” e do “Souto da Velha”).

As for the Gamelys pyrenaicus (a small mammal protected under annex IV of [the Habitats Directive] with a poor conservation status), the study...recognise[s] a very significant impact by bigger dams such as Sabor. The Sabor river contains the most important population of this species in Portugal (1500 individuals – 15% of [Portugal’s] total population). The dam would at least destroy 25% of the Sabor population, representing 3% of [Portugal’s] total population...the project will also destroy 37% of the hydrographic network that represents the natural area potentially to be occupied by the species.

As for wild birds, the study concludes that Sabor dam will have a significant and irreversible impact on all ecosystems upstream and will affect these bird species, already critically endangered at national and European levels (i.e. direct effects on 5 couples of [Aquila chrysaetos (golden eagle)], 4 couples of Hieraaetus fasciatus [Bonelli’s eagle], 2 couples of Britango [Egyptian vulture], 2 couples of Ciconia nigra [Black stork].

As for fish......The Squalius alburnoides population would probably become extinct.

Perhaps unsurprisingly, given such impacts, early Commission assessments of the legality of the Portuguese government’s decision looked promising from the NGOs’ perspective. In respect of alternatives under Article 6(4), an internal Commission document dated 24 June 2004 (just after the project was approved) noted that:

The justification for the Sabor project...is based on the contribution of the dam to the national objectives for renewable energies under the Renewable Energies Directive and to the national targets under the Kyoto Protocol....[T]he Sabor option is considered, from the beginning of the [EIA comparing the Sabor and the Côa], as being the only viable one, since the [Côa] option, being more complex, would require more time to be built and would not be operational before 2015. I cannot help feeling that this effectively pre-conditioned the conclusions of the EIS and, possibly, of the EIA procedure as a whole.....It seems highly likely that

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92 European Commission Memorandum, supra note 86.
the EIS and, even more, its non-technical summary, were prepared with a clear objective to justify the choice of the [Sabor] location.93

Indeed, early on in its dealings with the Commission, timing featured as the Portuguese government’s “main argument”94 to justify its choice of the Sabor, with the Côa project’s end date moving off and over the horizon as time went on: “while the Sabor dam would become operational in 2013, the Côa project would take until 2018, meaning that Portugal would not be able to meet its [2020] national and Community targets regarding the promotion of renewable energy and reduction of emissions.”95 However, as the Commission rightly noted in an internal paper, “the difference of construction and operating deadlines between both locations is due to the fact that while there is already a project [envisaged for the Sabor], for [Côa] everything remains to be done. The acceptance of this argument would lead to [a] “fait accompli”. The Portuguese authorities have authorized and [gone] ahead with the alternative having greater environmental impact.”96

Thus, in October 2005, the Commission launched infringement proceedings in respect of the Sabor dam’s impacts on Natura 2000, issuing a Letter of Formal Notice in Article 226 EC proceedings.97

The Portuguese government’s case did not get visibly stronger as time went on, notwithstanding attempts by the project’s promoter, the national utility company EDP, to play down the project’s negative impacts,98 as it had done previously in respect of the original Côa dam proposal when engravings were discovered.99 Indeed, the fait accompli view received further support from the government’s bizarre argument that “only the construction of the dam [in the Sabor valley] would allow the prime objectives of energy policy and archaeological preservation to be met.”100 In other words, having hand-picked the upper Côa valley as the potential alternative location for a dam, knowing, of course, that the lower Côa valley was a World Heritage Site for archaeological remains, the government sought to argue - with a straight face - that in order to preserve archaeological remains, the Sabor valley was the better location for a dam. As Pia Bucella, current Director of the Legal Affairs & Cohesion Directorate of DG Environment, sought to explain in an internal Commission note (surely with some measure of incredulity): “The Portuguese authorities argue that the

93 European Commission, supra note 80.
94 European Commission Memorandum, supra note 86.
95 Ibid.
96 Ibid.
97 The date is recorded in supra note 91.
98 A joint letter from Portugal’s Ministry of Regional Planning and Regional Development and Ministry of the Economy and Innovation to Stavros Dimas, then Commissioner for the Environment, dated 12 September 2006, records that “the project promoter carried out a substantial series of further studies...These studies show that, in the vast majority of cases, the [EIS] overestimated the area affected by the construction of the [...] dam, so that it can now be established that the species and habitats identified as being of greatest importance in conservation terms will be affected only to a limited extent”: Letter from the Portuguese Ministries of Regional Planning and Regional Development and the Economy and Innovation to Stavros Dimas, then Commissioner for the Environment, dated 12 September 2006. Obtained by Portuguese NGO under access to information legislation.
99 The EDP contracted four dating experts, who reported that the engravings were 1,000 to 3,000 years old. Relying on preliminary reports from these experts, the EDP announced publicly that the engravings were not Palaeolithic, and were instead relatively recent – proto-historic, or even nineteenth century – and hence that there was no reason to stop the dam. See M Gonçalves, supra note 66.
100 European Commission Memorandum, supra note 86.
protection of the archaeological site requires not only the protection of the engravings but also of the surrounding landscape which would be attempted [sic] by the construction of the dam." The obvious response: why, then, choose the Côa as a potential alternative in the first place?

Throughout 2006, it seemed that the Commission’s view remained resolutely in favour of pursuing its infringement proceedings in respect of the Sabor. After all, there appeared to be a clear breach of Art. 6(4) of the Habitats Directive, given the existence of the Côa alternative. Even worse for the Portuguese authorities, other alternatives kept raising their heads, a result of Portugal’s incessant drive to expand its hydroelectric capacity. As an internal Commission briefing note recorded in February 2006:

The problem is that the ambition of the Portuguese electricity company [EDP] is to dam virtually all the potential sites identified in their Plan for the extension of the Electric system. This Plan included the reinforcement of three existing dams...and five new Dams among which are the [Sabor, Côa and the Foz Tua Dams].

The Foz Tua Hydroelectric project has now been announced although the EIA has yet to be done. It is located in a neighbouring river [to the Sabor]...and it could have been evaluated as an alternative to [the Sabor dam] particularly as it would probably have less environmental impact (no Natura 2000 sites are affected).

Of all these proposals, Sabor is the most damaging for nature but the Portuguese are not prepared, it would seem, to see any of the others as alternatives as they want them all!

The Commission’s change of heart

The wind changed abruptly in early 2007, during the run-up to Portugal’s assumption of the rotational six-month Presidency of the Council of the EU in July 2007 – not a period, one might speculate, during which a country would want to be embroiled in a major EU law controversy back home.

In February 2007, Commission President Barroso - who, to recap, was Prime Minister of Portugal when the Sabor dam was approved - received an internal briefing regarding the ongoing Sabor infringement proceedings. The preliminary legal assessment has
unfortunately been redacted from the copy available to the present author, though there seems little doubt what the assessment must have said, given what had gone before. In April 2007, President Barroso received a further briefing, which neatly summarises the position at that time:

The Commission issued a Letter of Formal Notice on 18.10.05 in which it considered that the project breached the Habitats Directive....namely because [the Côa valley] should be considered as an alternative solution (less impacts on the Natura 2000 sites) and the public interest justifications invoked by the Portuguese authorities were not accurate and not proportional to the damages caused by the project in the Natura 2000 network.

In January 2007 the Portuguese authorities provided some complementary studies they had announced in July 2006 aimed at justifying the project and at replying the some questions asked by the Commission services in November 2006. The Portuguese authorities basically argued that (1) the impacts on the Natura 2000 sites were overestimated by the previous impact studies, (2) [the Côa project] would be 70% more expensive and less efficient (both technically and economically) and (3) would be operational 5-7 years later than [the Sabor project].

Incredibly, a mere three months after President Barroso received this briefing, the Director General of DG Environment wrote to the Portuguese government, indicating that the Commission was on the verge of closing its infringement proceedings:

If the above elements [a list of additional compensatory measures plus a timetable for their implementation] are made available to us during August [...], we would have the legal basis to recommend to the College [of Commissioners]

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106 The Portuguese government decided on 15.6.04 to execute the project in the [Sabor] location, on the basis of reasons of public interest linked to (1) the reduction of greenhouse gases (the dam would operate as back-up of a network of wind-farms, allowing for a 1% reduction of CO₂ emissions in Portugal), (2) the prevention of floods in the Douro valley, and (3) the protection of an archaeological rock engravings site”. From a “Briefing for the attention of President Durão Barroso, Subject: Infringement procedure 2003/4523 (project of Baixo Sabor dam in Portugal)”, attached to an e-mail dated 19 April 2007 from Miriam Crawley-Santome Castilla of DG Environment to Dimitrios Giotakos, a member of the then Environment Commissioner Stavros Dimas’s Cabinet. However, as noted in a 2006 internal Commission briefing, “To date the Commission has not accepted the arguments of the Portuguese government on these issues” (Internal European Commission note to Mr Peter Carl, supra note 91). As explained in another internal Commission briefing: “The Commission contested the reasons of public interest linked to the flooding protection and the greenhouse gases reduction invoked in the authorisation of the project....A map showing the flooded areas.... with and without dam, for more or less frequently occurring floods (once every 10 years and once every 50 years) show the difference to be quite small and not very relevant for the more frequent floods, while it would be slightly more important for the less frequent ones. ....Concerning the reduction of production of CO₂....the initial reduction due to the Sabor dam, of 270,000 tons/year, would...be of the order of 6 to 8% of the Portuguese commitment for reductions in the sector of energy generation and supply, and less than 1% of the total production of CO₂ in Portugal” (from a document entitled ‘Annex I, Infringement case no 2003/4523 (project of Baixo Sabor dam), Analysis of the Letter of Formal Notice’, supra note 101).

107 Briefing for the attention of President Durão Barroso, supra note 106.
the closure of the [Sabor] case at the earliest opportunity following such a communication from your authorities.\(^\text{108}\)

In other words, between April 2007, when President Barroso received his briefing, and July 2007, when the Commission wrote to the Portuguese authorities, DG Environment for some reason changed its mind regarding two of the conditions of Article 6(4) of the Habitats Directive - i.e. the issues of an absence of alternatives, and imperative reasons of overriding public interest - with only the issue of compensatory measures remaining outstanding.

The reason?

In a series of interviews held in March 2010 between Portuguese NGO representatives and the present author, the same explanation was repeated time and again: President Barroso, having presided over the national authorisation of the Sabor dam while Prime Minister of Portugal, had personally intervened to instruct Environment Commissioner Stavros Dimas to drop the case.\(^\text{109}\) One NGO representative stated that he had been given this version of events by Commission officials and Portuguese government officials. Another stated that he had been told by a senior DG Environment official - on a one-to-one basis - that this was what had happened. It seems DG Environment officials were not at all happy to be treated, and to have the environment treated, in this way – though not unhappy enough, it seems, to go public. As one senior DG Environment official is reported to have commented: “This [the Sabor dam] should not be happening, but we are where we are.”\(^\text{110}\)

This would not be the first time a Member State administration has used the President of the Commission’s political influence to its own ends. As Ludwig Krämer comments, having worked for the Commission for over 30 years:

> [over the years] the pressure from Member States increased. Visits and interventions of high-ranked officials, Secretaries of State or Ministers to the President of the Commission, the Commissioner in charge of environmental files or to the Director General for the Environment within the Commission increased in number, in particular at advanced stages of the procedure under [Article 258 of the Treaty on the Functioning of the European Union (TFEU)]. Such interventions were mostly successful, as the Commission’s acting members and high officials had a high interest in maintaining a good working climate with Member States and were themselves under pressure for re-appointment, promotion or other advantages or disadvantages with regard to their professional career.\(^\text{111}\)

And to hammer the point home, he cites a good example: “[In the proceedings that gave rise to case T-168/02] the German Chancellor had successfully intervened with the [then] President of the European Commission [Romano Prodi] to stop a procedure under Article

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\(^{108}\) Letter dated 27 July 2007 from M P Carl, Director General of DG Environment, to Permanent Representative Mendonça. Obtained by Portuguese NGO under access to information legislation.

\(^{109}\) Interviews, Portuguese NGO representatives, March 2010.

\(^{110}\) Interview, Portuguese NGO representative, March 2010.

226 EC Treaty against Germany which concerned the destruction of a natural habitat [the Mühlenberger Loch], in order to allow the Airbus Company to expand its activities.\textsuperscript{112}

The possibility of a direct intervention by President Barroso in respect of the Sabor is therefore neither an NGO conspiracy theory, nor without precedent. But it is perhaps even most egregious than the example cited by Krämer, given Barroso’s nationality and his previous involvement in respect of the dam as Portugal’s Prime Minister.

The end-game

Such was the Portuguese government’s confidence that the case against it would be dropped that, in August 2007, the Minister for the Economy made a public announcement to that effect.\textsuperscript{113} This naturally came as quite a shock to Portugal’s NGOs, prompting the LPN to send further information to the Commission, including information regarding additional potential alternatives, the existence of which would of course render the Sabor project unlawful pursuant to Article 6(4) of the Habitats Directive.

Indeed, the Portuguese government was doing neither itself nor the Commission any favours. As the LPN noted in its correspondence, Portugal’s then recently-announced National Dam Programme foresaw the construction of 10 additional new dams, six of which were, like the Sabor dam, to be on tributaries of the Douro river.\textsuperscript{114} The question, the Commission replied - noting that it had not in fact closed its infringement proceedings, though it was giving a “high priority” to finalising its assessment of the file\textsuperscript{115} - was “whether any of them could be an effective alternative to [the Sabor dam], particularly in terms of energy storage and backup.”\textsuperscript{116}

The answer, the Commission clearly decided, was no. On 18 January 2008, DG Environment wrote to the LPN, advising them that it intended recommending closure of the case to the College of Commissioners, and inviting the LPN’s comments within one month.\textsuperscript{117} On 6 February, the LPN responded, requesting access to certain Commission

\textsuperscript{112} Ibid. at 24, footnote 32. According to the International Fund for Animal Welfare, which released an English translation of a letter dated 15 March 2000 from German Federal Chancellor Gerhard Schroeder to President Romano Prodi, Schroeder wrote that he would “be extraordinarily grateful” if Prodi “personally could work toward the immediate issuance of the statement of environmental acceptability by the Commission.” See http://forests.org/archive/europe/euoprgerm.htm.

\textsuperscript{113} Noted in the Court of First Instance’s Order in case T-186/08, at para 11. The August 2007 date is based on a comment in a letter dated 2 September 2007 from Bernard Brookes – a member of various Portuguese NGOs - to unnamed recipients, copying a letter he had sent to Sati Hassi, then a Vice-Chair of the Environment Committee of the European Parliament: “Last week the Portuguese government announced that the case brought against them by the European Commission had been dropped, and that they are to proceed at once with a tender for offers for construction.”

\textsuperscript{114} European Commission, Letter dated 9 November 2007 from M P Carl to Helena Freitas of the LPN; the letter summarises the contents of the LPN’s correspondence.

\textsuperscript{115} That the Commission was on the verge of closing the file is clear from the language used: “We therefore intend to finalise the assessment of the case in the near future, which at the present stage mainly involves a careful analysis of the measures aimed at adequately minimising and compensating the impact of the project.” “Mainly involves” would appear to suggest that the Commission had more or less reached a decision on the issues of alternatives and imperative reasons of overriding public interest. European Commission, \textit{ibid}.

\textsuperscript{116} European Commission, \textit{supra} note 114.

\textsuperscript{117} Order in T-186/08, at para 16. It is interesting to note that such pre-closure letters and invitations to comment arose following a 1997 own-initiative inquiry by the European Ombudsman into the Commission’s procedures, as a result of which the Commission changed certain of its practices,
documentation regarding the case, and asking that the Commission delay the beginning of the one month response period until the LPN’s receipt of such documentation. On 27 February, the LPN sent the Commission its detailed legal comments regarding the case, comprising more than 40 pages. The Commission replied, in April 2008, to the effect that it had formally closed the case on 28 February 2008, one day after receiving the LPN’s note.

The result

Either the Commission did not give the LPN’s information serious consideration, or it enforced its original one month deadline strictly, and did not read the information at all. Either way, the result is the same: the Sabor dam is currently under construction, in breach of EU law, to the present author’s mind. Soon, much of the Sabor valley’s rich biodiversity and many of its cultural artefacts will be under water, a result of the Portuguese government’s intransigence and, it seems, Commission politicking (Figure 2).

![Figure 2: Clockwise from top left: the Sabor valley; the Sabor valley, with flowering almonds in foreground; the church of Santo Antão da Barca, which will be submerged; and the historic Ponte de Remondes, which will also go under. All photos: present author.](image)


118 Order in T-186/08, at para 17.
119 Ibid, at para 20. The LPN subsequently sent through some clarifications by e-mail on 4 March 2008: ibid, at para 21.
120 Ibid, at para 22.
123 The LPN challenged the Commission’s decision not to continue infringement proceedings, but the challenge was ruled manifestly inadmissible by the Court of First Instance on 7 September 2009: see Order in T-186/08. A challenge before the Portuguese courts temporarily halted construction work on the dam for around a month towards the end of 2009, but the court’s decision was reversed, and construction work began again, and continues to this day.
2.2.3 Dolphins in the English Channel

Introduction

Each year, from November to late spring though principally in March - fishing vessels pair trawl (Figure 3) for sea bass (Dicentrarchus labrax) in the English Channel, targeting large shoals that form offshore in advance of spawning, mainly in the International Council for the Exploration of the Sea’s (ICES) Division VIIe (Figure 3).

From a nature conservation perspective, a problem with pair trawling is bycatch – that is, the mortality of non-target species during trawls. In the case of the bass fishery in the English Channel, which is pursued almost exclusively by French and UK vessels, a particular problem is the bycatch of common dolphins (Delphinus delphis), which become trapped during trawls and drown, their damaged bodies sometimes washing up later in large numbers on the beaches of south-west England.

Figure 3: Above, diagram illustrating pair trawling for bass. Trawl nets - c.150-200m in length - are towed near the surface by vessels c.15-40m long. Right, the hatched area indicates the principal area of operation of the bass pair trawl fishery.

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127 Defra, supra note 125, at paragraphs 1 to 18 of the Regulatory Impact Assessment. Also see M G Pawson et al., ‘Migrations, fishery interactions, and management units of sea bass (Dicentrarchus labrax) in Northwest Europe’ (2007) 64(2) ICES Journal of Marine Science 332.

128 Source of diagram and net/vessel lengths: Sea Mammal Research Unit, supra note 126. The reference to 15m vessels is from paragraphs 37 and 38 of the UK High Court’s judgment in R (on the application of Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2005] All ER (D) 87 (Oct) (R v. SSEFRA).


131 See Pawson et al., supra note 127, at 335.

In 2002, the bass pair trawl fishery was identified by the UK government as having a high level of cetacean bycatch, and in the 2003/4 season, an official UK government study of the fishery observed 169 cetacean mortalities in 131 hauls, amounting to an estimated total annual mortality of 439 animals as a result of the UK pair trawl fleet. Since the French sea bass fleet is significantly larger than the UK’s, accounting for approximately five times more bass landings than the UK element of the fishery, “it could be assumed,” the UK government notes, “that overall bycatch levels are higher than that seen in the UK element of the fishery.” Less cautiously, Greenpeace reports that the French and UK bass fleets combined are estimated to drown more than 2,000 cetaceans a year.

All species of cetaceans are included on Annex IV to the Habitats Directive, and the common dolphin is thus afforded a high degree of protection under EU law. Given this fact, one might have expected the annual death toll cited above to have triggered an end to - or at least significant changes in - the bass pair trawl fishery in the English Channel, but this is not the case.

## Controlling bycatch in EU waters

There are two key bycatch control mechanisms in the EU - the Common Fisheries Policy (CFP) and the Habitats Directive - which are administered and enforced, at the supranational level, by different parts of the Commission. The Commission’s Directorate-General for Maritime Affairs and Fisheries (DG Fish) is responsible for the CFP, and DG Environment...
for the Habitats Directive,\textsuperscript{139} each tending to prioritize its sectoral interest,\textsuperscript{140} notwithstanding efforts in recent years to green the CFP by integrating environmental principles.\textsuperscript{141}

\textbf{The general scheme of the CFP}

Under the terms of Council Regulation (EC) No 2371/2002 (\textit{the CFP Framework Regulation}),\textsuperscript{142} each coastal Member State of the EU has exclusive fishing rights out to 12 nautical miles (\textit{nm}) from its coastal baseline, subject to arrangements with other nations, including the arrangements set out in Annex I to the CFP Framework Regulation. Significantly, for present purposes, French fishermen have the right under Annex I to fish in UK waters within the area from 6 to 12nm in ICES Division VIIe.\textsuperscript{143}

Within its 0 to 12nm area, a Member State can adopt “non-discriminatory measures…to minimise the effect of fishing on the conservation of marine eco-systems” (e.g. measures to tackle cetacean bycatch), though if vessels from another Member State will be affected, the Commission and others must first be consulted (CFP Framework Regulation, Article 9). As will be seen below, in practice this gives DG Fish a veto over Member State action under Article 9.

From 12 to 200nm (the limit of a Member State’s Exclusive Economic Zone) - a Member State’s \textbf{offshore marine area} for the purposes of this paper - vessels from other EU Member States are entitled to fish under the CFP.\textsuperscript{144} Thus, in seeking to control bycatch in the offshore marine area, vessels from more than one EU Member State will typically be involved. For that reason, Member States have very limited powers to adopt unilateral measures to control cetacean bycatch in the offshore marine area, and any such measures may be annulled by the Commission.\textsuperscript{145} If there is evidence of a serious threat requiring immediate action, however, the Commission has the power to adopt emergency measures having immediate effect (CFP Framework Regulation, Article 7).

The result of the above is that DG Fish has a good deal of power in terms of controlling - or not controlling - cetacean bycatch in EU waters, a point that is well illustrated by the bass pair trawl fishery in the English Channel.

\textbf{Inaction under the CFP Framework Regulation}

\begin{itemize}
\item \textsuperscript{139} E M De Santo and P J S Jones, ‘Offshore marine conservation policies in the North East Atlantic: Emerging tensions and opportunities’ (2007) 31 \textit{Marine Policy} 336, at 337.
\item \textsuperscript{140} M Egeberg, ‘Executive politics as usual: role behaviour and conflict dimensions in the College of European Commissioners’ (2006) 13(1) \textit{Journal of European Public Policy} 1.
\item \textsuperscript{141} See R Caddell, ‘By-Catch Mitigation and the Protection of Cetaceans: Recent Developments in EC Law’ (2007) 8 \textit{Journal of International Wildlife Law and Policy} 241, at 244. In recognition of the failure of the present CFP system, further reform is on its way: on 22 April 2009, the European Commission published a Green Paper on the future of the CFP, initiating a broad consultation that is intended to culminate in a radical reform of the present system: \url{http://ec.europa.eu/fisheries/press_corner/press_releases/2009/com09_21_en.htm}. Whether the reforms will extend beyond managing fish stocks to embrace broader nature conservation concerns remains to be seen. Generally, see \url{http://ec.europa.eu/fisheries/reform}.
\item \textsuperscript{143} \textit{Ibid}, Article 17(2) and Annex I.
\item \textsuperscript{144} Article 17(1), CFP Framework Regulation, \textit{supra} note 142.
\item \textsuperscript{145} Article 8, CFP Framework Regulation, \textit{supra} note 142.
\end{itemize}
Following its 2003/4 study revealing high levels of cetacean bycatch in the bass pair trawl fishery, in July 2004 the UK government asked DG Fish to use its emergency power under Article 7 of the CFP Framework Regulation to close the entire fishery throughout ICES Division VIIe.\textsuperscript{146} DG Fish refused, on the basis that the need for immediate action under Article 7 was not apparent, since the UK’s request was made in the summer, while the bass season was not due to start until the winter, such that “other measures”\textsuperscript{147} could be introduced before the beginning of the next season.\textsuperscript{148} Further, DG Fish argued, a ban in ICES Division VIIe could result in a redistribution of fishing effort, either into other fisheries in the same area, or into adjacent areas, without necessarily reducing the bycatch of common dolphins.\textsuperscript{149}

Round One to the fishermen. The next development came in December 2004 with the UK government’s enactment of the South-west Territorial Waters (Prohibition of Pair Trawling) Order 2004,\textsuperscript{150} which banned UK vessels from participating in pair trawling for sea fish with certain nets in the UK’s 0 to 12nm zone in ICES Division VIIe.\textsuperscript{151} Having thus imposed the maximum unilateral ban available to it under the CFP - a step aimed at putting pressure on the Commission and other Member States to take the issue more seriously,\textsuperscript{152} though acknowledged by Ben Bradshaw, then the UK government’s Minister for Nature Conservation and Fisheries, to be “more of a gesture really than anything that would actually help the dolphin and porpoise population...[since] the vast bulk of [the] fishery is conducted outside our 12 mile limit by French vessels”\textsuperscript{153} - in January 2005 the UK government again approached DG Fish, this time under Article 9 of the CFP Framework Regulation, asking it to allow the UK to ban other Member States’ vessels from pair trawling in the UK’s 0 to 12nm zone in ICES Division VIIe.\textsuperscript{154} DG Fish refused, noting that no new scientific information had been made available that could justify a change in the analysis it had made on the UK government’s earlier request to close the entire fishery.\textsuperscript{155} Round Two to the (French) fishermen – and perhaps the bout?

There are at least two potential explanations for DG Fish’s decisions. The first is that they were (at least in part) politically motivated: closing a wide area of the sea to an entire fishery, or allowing the UK to close an area to other Member States’ vessels (as well as its own), would of course have been politically challenging.\textsuperscript{156} A second potential explanation is that

\textsuperscript{146} De Santo and Jones, supra note 139, at 343. Also see Defra, supra note 125.

\textsuperscript{147} ld.; and see the judgment in R v. SSEFRA, supra note 128, at paragraph 22. What form such other measures might feasibly have taken is unclear.

\textsuperscript{148} ibid.

\textsuperscript{149} De Santo and Jones, supra note 139, at 343.

\textsuperscript{150} S.I. 2004 No. 3397. The original (unamended) version of the Order is available here: http://www.opsi.gov.uk/si/si2004/uksi_20043397_en.pdf.

\textsuperscript{151} Quite how this measure was regarded as “non-discriminatory” under Article 9 of the CFP Framework Regulation is unclear, though perhaps the fact that only a limited number of French pair trawlers (possibly only 2 pairs) in fact exercised their right to fish in the UK’s 6 to 12nm zone under Annex I to the Regulation played some part in the decision: see Defra, supra note 125, at paragraphs 16 and 18 of the Regulatory Impact Assessment, and paragraph 15 of the judgment in R v. SSEFRA, supra note 128.

\textsuperscript{152} R v. SSEFRA, supra note 128, at paragraph 44.

\textsuperscript{153} R v. SSEFRA, supra note 128, at paragraph 68.

\textsuperscript{154} De Santo and Jones, supra note 139, at 343, and see the judgment in R v. SSEFRA, supra note 128.

\textsuperscript{155} De Santo and Jones, supra note 139, at 343.

\textsuperscript{156} ibid.
Working draft: Not for citation

DG Fish was simply following scientific advice. As it noted in its response to the UK’s request under Article 9:

...[the] ICES [has] indicated that ‘other fisheries than pair trawling for bass also catch dolphins’ and that ‘there is a need for a comprehensive monitoring of the numerous trawl fisheries active in this region before we can be precise about mitigation requirements’. ICES considered in particular that a ‘ban on pelagic pair trawling for bass’ would be an ‘arbitrary measure, unlikely to achieve the desired goal’.

This argument could be countered with two points. First, in respect of comprehensive monitoring and subsequent mitigation action, it might be noted that more than five years have passed since DG Fish’s decisions, and no mitigatory steps have been taken at the EU level regarding pair trawling for bass in the English Channel. Secondly, it might be noted that the much-vaunted displacement effect of a ban is unsupported by evidence. As Greenpeace argued following DG Fish’s refusal to ban the entire pair trawl fishery, “The winter bass fishery [in ICES Division VIIe] is targeted precisely because that is where the heaviest concentration of bass is to be found. Fishing in other areas at the same levels of effort (and involving the same levels of bycatch) would not be presumed to occur, because the returns from the effort would be lower.”

And in respect of the UK’s ban within its 0 to 12nm zone, the predicted increase in cetacean bycatch does not appear to have materialized.

Inaction under the Habitats Directive

All species of cetaceans are listed on Annex IV to the Habitats Directive. As a result, Article 12 of the Directive applies to all cetaceans in EU waters. Until relatively recently, the only apparent implication of this in the context of cetacean bycatch was Article 12(4), which requires Member States to monitor incidental capture and killing of Annex IV species, and to take further research or conservation measures “as required” (a weak, discretionary obligation).

However, two legal developments have raised the Habitats Directive’s profile immeasurably in the context of cetacean bycatch. First, a decision of the ECJ in October 2005 (C-6/04

157 Paragraph 58 of the judgment in R v. SSEFRA, supra note 128.
158 Paragraph 27 of the judgment in R v. SSEFRA, supra note 128.
159 Compliance with Article 12(4) has been a problem in the context of cetacean bycatch, with the Commission having commenced infringement proceedings against eight Member States (including France and the UK) in December 2005 for inadequate monitoring (European Commission, Commission starts legal action against 8 Member States over insufficient protection of whales, dolphins and porpoises,” European Commission Press Release, IP/05/1641 (20/12/2005), available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1641&format=HTML&aged=1&language=EN&guiLanguage=en); and in terms of implementing “further…conservation measures”, as late as 2002 only two fisheries - the Danish cod wreck net fishery and the French thonaille (tuna gillnet) fishery were reported to have taken action: see European Commission, Incidental Catches of Small Cetaceans, Report of the Second Meeting of the Subgroup on Fishery and Environment (SGFEN) of the Scientific, Technical and Economic Committee for Fisheries (STECF), Commission Staff Working Paper, SEC(2002) 1134, at 30, available at http://ec.europa.eu/fisheries/publications/factsheets/legal_texts/sec_2002_1134_en.pdf). The French thonaille fishery has since run into serious trouble, with France having been found in breach of EU law by the European Court of Justice on the ground that the thonaille is in fact a type of drift-net (judgment of March 5 2009, C-556/07 Commission v France).
Commission v. the United Kingdom) established that the Directive applies out to 200nm from Member States’ coastal baselines, and not merely to 12nm. The second development was the ECJ’s May 2006 decision in the so-called Spanish otters case (C-221/04 Commission v. Spain). The case concerned the setting of stopped snares for foxes in an area in which Eurasian otters (Lutra lutra) - an Annex IV Habitats Directive species - were found. The issue arose as to whether an otter killed in such circumstances would be captured by Article 12(1)(a) of the Directive, which requires Member States to prohibit the “deliberate capture or killing” of Annex IV species. The ECJ ruled that Article 12(1)(a) requires Member States to prohibit capture or killing not only where a person intentionally captures or kills, but also where he or she has (merely) “accepted the possibility of such capture or killing.” Since the ECJ’s interpretation of course applies in the context of all Annex IV species, cetacean bycatch was suddenly in principle captured by the Habitats Directive’s prohibition on deliberate capture or killing.

The combined effect of these two ECJ decisions is highly significant in the context of sea fishing. First, unlike the CFP, it is for the Member States, via their national transposing legislation, to enforce the Habitats Directive from their coastal baselines to the 200nm limit. Enforcement of the Spanish otters case in the sea fishing context would therefore effectively end DG Fish’s monopoly on controlling fisheries and bycatch via the CFP. Secondly, the Spanish otters case, if enforced, would potentially bring to an end all fisheries in EU waters in which cetacean bycatch is an evident problem. Evidence would suggest, however, that political appetite for such enforcement is lacking.

One needs look no further than the UK’s Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 (the OMRs), which transposed the Habitats Directive in the offshore marine area to comply with the ECJ’s judgment in case C-6/04. The legislation contains, as regulation 39(9) and (10), a defence to the offence of deliberately capturing, injuring or killing an Annex IV species, which addresses the issue raised by the Spanish otters case in the context of sea fishing. A similar defence has been added to the separate UK

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160 Paragraphs 115 to 120 of the ECJ’s decision of October 20 2005 in C-6/04 Commission v United Kingdom. This followed an earlier UK High Court decision to the same effect: see R. v. Secretary of State for Trade and Industry, ex parte Greenpeace (No. 2) [2000] 2 CMLR 94.
161 The ECJ’s decision of May 18 2006 in C-221/04 Commission v Kingdom of Spain, at paragraph 71. See the ECJ’s earlier decision in C-103/00 Commission v Greece for a similar interpretation of “deliberate”, this time in the context of Article 12(1)(b) of the Habitats Directive (deliberate disturbance).
162 Regarding the relationship between Articles 12(1) and 12(4) of the Habitats Directive, see the Advocate General’s Opinion of December 15 2005 in C-221/04 Commission v Kingdom of Spain, at paragraphs 40 to 52.
legislation that covers the area from 0 to 12nm.\textsuperscript{165} The defences essentially allow cetacean bycatch to continue, provided the fisherman in question (emphasis added): (1) did not \textit{intend} to capture, injure or kill the cetacean, and (2) had taken “any steps that \textit{could reasonably be taken} to ensure compliance with the requirements” of the CFP.\textsuperscript{166} This conflicts with the ECJ’s decision in the Spanish otters case, and is hence a breach of EU law: a person who does not \textit{intend} to capture or kill a cetacean may nevertheless have accepted the possibility of such capture or killing.

At first glance, the UK’s reasons for including such defences in its legislation might seem hard to fathom. After all, the relevant UK authorities could use the opportunity presented by the Spanish otters case to prosecute French pair trawlers for deliberately capturing or killing common dolphins in the English Channel (having clearly accepted the possibility of such capture or killing), thus finally achieving the UK’s goal of closing the bass pair trawl fishery. However, there is an important difference between the UK’s requesting the closure of a specific fishery in a specific area under the CFP, and its enforcing the ECJ’s interpretation of the Habitats Directive in the Spanish otters case (which is its clear legal duty, one might add).\textsuperscript{167} The latter would apply across the board, not only geographically, but also in terms of the Annex IV species affected. In other words, a ban under the CFP would have targeted a fishery dominated by French fishermen, and would have applied only in ICES Division VIIe. In contrast, UK enforcement of the Spanish otters case would have ramifications well beyond the bass pair trawl fishery: it would have the potential to impact on UK fishermen in other fisheries, for example (since one would expect authorities in other Member States to prosecute UK fishermen in appropriate cases), and it would impact on other activities, such as forestry, for example, since a forester might (incidentally) kill an Annex IV species having accepted the possibility of such capture or killing.

One might argue that DG Environment must be unaware of the defences in the UK’s legislation, and will bring infringement proceedings against the UK government when it realises. This seems unlikely, however, for a number of reasons.

First, as noted above, the OMRs were drafted to comply with the ECJ’s decision in C-6/04, which was a decision against the UK.\textsuperscript{168} As a result, the Commission will have been involved\textsuperscript{169} in screening the OMRs to ensure that they were in compliance with the ECJ’s judgment in that case.\textsuperscript{170} Secondly, enforcing the Spanish otters case would undoubtedly have serious adverse effects for the fishing industry in Europe (e.g. it would likely result in the closure of certain fisheries altogether, and would raise the prospect of tit-for-tat


\textsuperscript{166} Regulation 39(10) of the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 (2007 No. 1844). The original (unamended) version of the Regulations is here: \url{http://www.opsi.gov.uk/si/si2007/pdf/uksi_20071842_en.pdf}. The words in italics in (2) presumably address the fact that compliance with the Pingers Regulation is not expected at present: see A Jackson, supra note 124.

\textsuperscript{167} See Article 4(3) of the Treaty on European Union, which provides, “The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.” Before the Treaty on European Union came into force, a similar obligation applied under Article 10 of the EC Treaty.

\textsuperscript{168} Supra note 163, at paragraph 4.2.

\textsuperscript{169} Under Article 228 of the EC Treaty; now Article 260 TFEU.

\textsuperscript{170} That Article 228 EC proceedings had commenced is clear: supra note 163, page 4 of Appendix III.
prosecutions, with authorities in one Member State prosecuting fishermen from other Member States), something the Commission would not be keen to precipitate, one would imagine. Thirdly, enforcing the Spanish otters case in respect of sea fishing would, as noted above, effectively end DG Fish’s monopoly on controlling sea fishing, and it is well documented that the Commission guards its competences closely.\(^{171}\) Fourthly, allowing or requiring Member States to take action under the Habitats Directive would undermine DG Fish’s previous decisions in respect of the bass pair trawl fishery in the English Channel, such that the defences in the UK’s legislation actually help to sustain the status quo in terms of DG Fish’s existing policy. In that regard, one might speculate as to the balance of power between DG Fish and DG Environment, and how, precisely, the UK’s legislation came to pass.

Clearly, a decision by the Commission not to bring proceedings against the UK government for including defences in its legislation that allow cetacean bycatch to continue in breach of EU law is, at least in principle, defensible as a matter of EU law. That said, it is also clear that this situation is far from satisfactory.\(^{172}\) Even if the Commission is unwilling to act, however, there would be nothing to stop a sufficiently-interested\(^{173}\) individual or NGO seeking to enforce the EU law position through their national courts. It would be possible, for example, for a declaration to be sought from the UK High Court to the effect that the defences in the UK’s legislation are incompatible with EU law.\(^{174}\) As part of any such proceedings, the UK court could refer the issue of interpretation (i.e. the compatibility of the defences in the UK’s legislation, and, by extension, the issue of cetacean bycatch, with the ECJ’s decision in the Spanish otters case) to the ECJ under Article 267 of the Treaty on the Functioning of the European Union,\(^{175}\) in effect ensuring an impact across the EU as whole. In that way, the EU’s Member States might finally be forced to tackle cetacean bycatch.\(^{176}\)


\(^{172}\) Indeed, the absence of an effective means of challenging Commission decisions regarding infringement proceedings is arguably in breach of Article 9(3) of the Aarhus Convention: see Hedemann-Robinson, supra note 5, at 405. The Aarhus Convention of course contains a stand-alone compliance mechanism, such that it would be possible for an individual or NGO to raise a complaint regarding this issue directly with the Convention’s Compliance Committee.

\(^{173}\) As is the case in most jurisdictions, in order for an applicant to be granted leave to bring proceedings for judicial review, it is necessary for the applicant to have a sufficient interest in the matter to which the application relates. See, e.g., the UK House of Lords’ decision in Equal Opportunities Commission and another v. Secretary of State for Employment [1994] 1 All ER 910.

\(^{174}\) A reference to the ECJ under Article 267 of the Treaty on the Functioning of the European Union could be made by the national court of its own initiative or following a request by a party to the proceedings. Note, however, that with one exception it is for the national court to decide whether or not make a reference: under Article 267, the national court “may, if it considers that a decision on the question [of interpretation] is necessary to enable it to give judgment, request the [ECJ] to give a ruling thereon.” The exception is where an issue of interpretation is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law; i.e. a court of last resort – e.g. the House of Lords in the UK.

\(^{175}\) The Commission could point to specific actions under the CFP that have not been addressed in this paper: namely, a ban on drift-nets, and the adoption of the so-called Pingers Regulation (Council Regulation (EC) No 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation 133
3. Potential directions of reform

The combined force of the above examples will, it is hoped, have been enough to convince the reader that something ought to be done about the potential for political factors to impinge on the Commission’s enforcement role. After all, the on-the-ground impacts resulting from such interference are all too real – visceral, even, in the cases of the Sabor and the English Channel. The remainder of this paper considers some potential directions of reform.

3.1 Transfer the Commission’s enforcement powers elsewhere

Given the serious issues identified above, to the present author’s mind the only viable long-term solution would be a separation of the Commission’s political and enforcement functions. In other words, transfer the Commission’s enforcement powers elsewhere, leaving it free to conduct its political business of, for example, new policy formulation and negotiation.

Separating out the Commission’s powers is not a new idea, of course. Indeed, it was the principal conclusion of Rhiannon Williams’s 1996 paper, cited on the first page of this paper:

...a far more radical approach is needed in order to ensure the proper application of Community environmental law in a way which is independent, and seen to be independent: the formal division of the Commission’s enforcement and political functions.

A body charged with enforcement, with enough staff to do the job properly, and equipped with environmental (and possibly other) inspectors with appropriate powers (akin to those of competition officials who have powers of search and seizure), would enable those charged with the enforcement of Community environmental law, to take more initiatives and to assume a much less reactive role. In short, to be more effective.

Why, then, has this not happened? In short: because the Commission and the Member States do not want it to happen. Williams reports that, as early as the late 1980s, the UK Labour peer, Lord Clinton-Davis, Commissioner for Environment, Consumer Protection and Transport from 1985-1988, “indicated his preference for [a small but efficient environmental inspectorate capable of, where necessary, undertaking dawn raids to ensure that incriminating evidence is not destroyed], though he reported that opposition within the Commission and the Council meant that it was not a politically realistic option.”

This view was later borne out during the establishment of the European Environment Agency. As Krämer reports, the European Parliament argued that the new Agency should

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(177) Before the flood waters of the Sabor begin to rise, contractors will move throughout the valley cutting down all vegetation above the size of small bushes, in order to minimise decaying organic matter in the water, which would decrease water quality and release methane. One can only imagine the impact - both visually and environmentally - on an area of such outstanding natural beauty and biodiversity value.

(178) EC) No 88/98, OJ L 185, 24.5.2004, p.4), which requires acoustic deterrent devices to be attached to certain nets on certain vessels. However, for the reasons discussed in A Jackson, supra note 124, such measures are in practice ineffective.


R Williams, supra note 3, at 399.
be given the task of monitoring the application of Community environmental law in the Member States. However, “this request met very strong resistance from the Member States, in particular from the United Kingdom and the Netherlands. Member States met in an informal Council meeting in October 1991 in Amsterdam and pronounced itself against the installation of an environmental monitoring and enforcement structure at Community level. The Commission sided with the Member States.” The idea effectively died a death, and has never re-emerged. Indeed, earlier this month the UK government expressed its disapproval regarding the idea of establishing an EU Waste Implementation Agency, which is the subject of an ongoing feasibility study by the Commission. If a large Member State like the UK is unwilling, even now, to accept the possibility of a genuinely independent sectoral enforcement body, there seems little to no chance of the Council’s accepting, of its own volition, an independent enforcement body covering all areas of EU environmental law.

Given this impasse, in practical terms what could we - individuals or NGOs - do to make the case for an independent enforcement body? Two options present themselves: first, weak as it may sound, we could lobby national politicians and MEPs – after all, the Member State administrations will never take the issue seriously unless it becomes - i.e. is made - their business; second, EU environmental NGOs could perhaps temporarily refuse to engage with the Commission - the latter would lose a valuable source of information, and the point would be made. This process could be coordinated and repeated periodically. There would, of course, be potential problems with any such approach. First, NGO complainants will inevitably have ongoing EU infringement cases, and they would not want to lose touch or miss deadlines in respect of such cases; nor would they typically want to delay positive steps being taken in respect of environmental protection. Second, the environmental community is disparate and difficult to herd, making genuinely collective action hard to envisage, although a degree of collective action could perhaps be coordinated by an umbrella organisation like the European Environmental Bureau. Third, given the Commission’s recent moves to prioritise certain types of infringement cases at the expense of complaints alleging bad on-the-ground application of EU environmental law (which typically come from individuals/NGOs, and are often the most politically sensitive cases), the Commission would perhaps regard a period of NGO silence as welcome respite more than anything else! Nevertheless, such a move by NGOs would be important, symbolically, and would send a message that would no doubt be picked up by the press.

3.2 Changes to the existing arrangements

180 L Krämer, supra note 111, at 21.
181 April 2010.
In parallel with efforts aimed at having the Commission’s enforcement functions transferred to a genuinely independent body, there are a number of steps that could usefully be taken by way of altering the existing arrangements, including at the national level. Such alterations would, of course, also be of relevance in the context of any new enforcement body, assuming it would inherit a similar body of rules to those currently governing the Commission’s enforcement functions.

3.2.1 Access to infringement documents

A typical complaint levied against the Commission is its lack of transparency. During the pre-court phase of environmental infringement proceedings, the Commission and the relevant Member State exchange certain formal documents: Letters of Formal Notice and Reasoned Opinions on the Commission side; responses to such documents on the Member State side. A longstanding issue has been the Commission’s unwillingness, as a general principle, to make its Letters of Formal Notice and Reasoned Opinions available to the public. The justification cited, which has been approved by the Court of First Instance, is the need to maintain confidentiality between the parties, in order to facilitate, where possible, an amicable settlement between the Member State and the Commission.

However, there are forceful arguments that the Commission’s current approach cannot be justified, either on first principles, or legally. To be clear, there is a degree of acceptance in the literature that there may be justifications for withholding documents relating to the (early) investigation stages of an infringement procedure. In contrast, as Krämer comments, “where the Commission - after detailed technical, administrative, legal and political examination - takes a formal decision to open infringement procedures against a Member State under [Article 258 TFEU] or to issue a Reasoned Opinion under the same provision, it is difficult to find a justification for denying access to the formal infringement documents that ensue (i.e. the relevant Letter of Formal Notice/Reasoned Opinion).

184 An exception applies in practice, it seems, in respect of Letters of Formal Notice and Reasoned Opinions in non-transposition cases (i.e. failure to transpose a Directive into national law on time): L Krämer, supra note 111, at 25. Such cases are not, of course, likely to be of particular interest to NGOs, since they are typically ‘open-and-shut’ cases.

185 See, for example, T-461/93 An Taisce and WWF-UK.

186 However, as Williams comments, sceptically: “Negotiation’ and ‘compromise’ in searching for a settlement to a dispute without bringing it before the ECJ smack rather worryingly of political rather than legal priorities. The law and its enforcement should be the Commission’s primary aim, not an overriding desire to avoid confrontation in court. Enforcement agencies should enforce, not negotiate and compromise routinely and overridingly in order to avoid embarrassment to a Member State...If there is a serious disagreement between the Commission and a Member State over a point of law, once the information-gathering stage is over, there is overwhelming public interest in being informed about the issue, for the sake of clarity in the understanding of the law, and its application to the protection of our environment. There is also a legitimate public interest in knowing what an elected representative government and an unelected bureaucracy have been spending their money and time on.” R Williams, “Enforcing European Environmental Law: Can the European Commission be Held to Account?” (2002) 2 Yearbook of European Environmental Law 271.


188 See, to that effect: R Williams, supra note 186, at 292, and L Krämer, supra note 111, at 25.

189 L Krämer, ibid.
In fact, there would arguably be numerous benefits in the Commission publishing its Letters of Formal Notice and Reasoned Opinions. First, it would encourage compliance through the public shame factor. Second, it would provide complainants with material to allow them, if necessary, to activate enforcement mechanisms at the national level. Third, it would help the Commission: national NGOs, for example, often have specific expertise and detailed knowledge of the relevant national rules and practice, putting them in a position, if only they were allowed, to contribute usefully to the Commission’s case. Finally, it could, of course, help to facilitate an amicable settlement, by ensuring a full airing of all relevant arguments.

After all, Letters of Formal Notice and Reasoned Opinions are routinely made available by certain Member States, and to certain vested interests:

...Member States with an “open society” approach to administrative secrecy – the Netherlands, Sweden, Denmark, possibly also Austria and Finland – do make letters of formal notice and reasoned opinions available to the public, apparently without any negative consequence. Secondly, in other areas such as industrial, internal market, insurance or competition policy, or transport and energy policy, letters of formal notice and reasoned opinions are systematically available to the interested trade and industry associations. There is not even a discussion on the necessity of keeping the Commission’s opinions confidential. This shows that, overall, the system works with two measures: letters which are of interest to citizens are kept secret, while letters which are of interest to vested interest groups are accessible.

This dichotomy cannot be justified, and should not be allowed to continue. Indeed, the issue of access to Commission infringement documents appears ripe for a challenge before the Aarhus Convention’s Compliance Committee, on the basis that Article 4(2) of Regulation 1049/2001, upon which the Commission relies in denying access to infringement documents, is narrower than Article 4 of the Aarhus Convention.

3.2.2 Right of review

With a view to leaving the institutional balance of the existing Treaties more or less intact, the present paper would propose something less radical than seeking Treaty changes to allow complainants to challenge Commission infringement decisions directly before the EU courts. Such a move would be both fraught with complexities, and politically unviable.

That said, whether or not a new, independent body were to take on the Commission’s enforcement functions, there would still be a useful role for some form of substantive review mechanism regarding decisions not to proceed with infringement proceedings. In that regard, the EU’s part-implementation of the Aarhus Convention, via the Aarhus Regulation (Regulation 1367/2006), is of some interest. Article 10 of the Regulation provides for a review mechanism, as follows:

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190 See Harden, supra note 117, at 510.
191 Ibid.
192 The UK’s RSPB springs to mind – well resourced, and specialists.
193 See L Krämer, supra note 111, at 26.
194 L Krämer, supra note 4, at 460-1.
195 Even setting the issue of standing to one side.
Article 10

Request for internal review of administrative acts

1. Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

Such a request must be made in writing and within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, six weeks after the date when the administrative act was required. The request shall state the grounds for the review.

2. The Community institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Community institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request.

3. Where the Community institution or body is unable, despite exercising due diligence, to act in accordance with paragraph 2, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the period mentioned in that paragraph, of the reasons for its failure to act and when it intends to do so.

In any event, the Community institution or body shall act within 18 weeks from receipt of the request.

Unfortunately, “administrative acts” is defined, under Article 2(2), to exclude acts or omissions under Articles 258 and 260 TFEU (infringement proceedings):

2. Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under:

[...]

(b) Articles [258 and 260] of the Treaty (infringement proceedings);

[...]

Arguably, there is no justification for the retention of this exemption.\textsuperscript{196} Given that members of the public and NGOs are unable to challenge Commission infringement decisions directly before the EU courts, they should at least be entitled to request an internal review of such

\textsuperscript{196} Since the Article 12 Aarhus Regulation right to bring proceedings before the ECJ applies only “in accordance with the relevant provisions of the Treaty”, it seems that granting complainants rights under Article 9 would not necessarily entail rights under Article 12. For the reasons noted at the outset of this section, the present author would not propose extending the Article 12 rights to NGO complainants in respect of Commission infringement decisions under Articles 258 and 260 TFEU.
decisions. In the current situation, where politics potentially impinge on enforcement decisions, one can imagine that a review by a totally fresh group of individuals within DG Environment might go some way to alleviating concerns of political interference.

Again, this issue could perhaps be the subject of a challenge before the Aarhus Convention’s Compliance Committee, on the basis that the Aarhus Regulation’s exclusion of infringement decisions from the Regulation’s review mechanism is incompatible with Article 9 of the Convention.

3.2.3 Delay

The time it takes for environmental cases to move through the EU infringement process is a major, longstanding problem, with significant practical impacts. And as with other aspects of the infringement process, timing decisions have been shown to be susceptible to political influence.\(^{197}\)

In respect of the first five fines pursuant to Article 228 EC (now Article 260 TFEU), for example, which arose because the relevant Member State really dragged its heels in terms of complying with an earlier judgment of the ECJ, Wennerås highlights that:

\[\text{...the overall time (from the moment the first [Letter of Formal Notice] was dispatched in the [Article 258 TFEU] procedure [to the judgment imposing a fine under the Article 260 TFEU procedure was] a stunning 7.5, 9.5, 14, 11 and 20.5 years, respectively.}\]

And since the Commission makes exceedingly sparing use of its interim measures powers (i.e. powers to, for example, require a Member State to halt work on a construction project pending the outcome of an EU case),\(^{198}\) justice delayed can, in a very real sense, be justice denied. A famous example is the ECJ’s decision in case C-44/95 Lappel Bank. By the time the ECJ ruled that the conservation area in question should be protected from development, it had been turned into a car park.\(^{200}\)

A potential direction of reform in this area would perhaps be to provide that, as a general principle, cases must move through the various infringement steps (i.e. from Letter of Formal Notice to Reasoned Opinion, and from Reasoned Opinion to a decision regarding referral to the Court, etc.) according to a fixed timetable. Where the Commission wishes to depart from this timetable, it must provide reasons in writing, to be published on its website. A decision to depart from the timetable could then be subject to the internal review mechanism discussed above, assuming, of course, that the relevant changes were made to the Aarhus Regulation.

3.2.4 Prioritisation of cases, and case-handling

\(^{197}\) See the example given by Williams in note 10 above.

\(^{198}\) P Wennerås, \textit{supra} note 5, at 292.


\(^{200}\) See \texttt{http://www.foe.co.uk/resource/briefings/caje_general_briefing.pdf}. 
As an organisation with limited resources, the Commission must, of course, make choices regarding its enforcement priorities. As explained below, however, such choices can sometimes be characterised as political in nature.

Working with an NGO, a refrain one often hears from the Commission is that, in terms of bad application complaints (i.e. a failure to implement EU environmental law in practice, which would be typical fare for an NGO complaint), it is most interested in hearing about structural breaches of environmental law (e.g. general and persistent breaches), as opposed to one-off examples (e.g. a construction project that will damage a particular Natura 2000 site). Indeed, it has formally identified its enforcement priorities as follows (in no particular order): (1) Non-transposition of EU Directives; (2) Failure to act to comply with judgments of the ECJ (i.e. Art. 260 TFEU proceedings); (3) Bad transposition of key environmental Directives; (4) Widespread breaches of environmental quality standards or other environmental protection requirements; (5) Breaches of core, strategic obligations, on which fulfilment of other obligations (e.g. non-designation of Natura 2000 sites); (6) Breaches concerning big infrastructure projects or interventions involving EU funding or significant adverse impacts.

In parallel with these developments, the Commission has introduced a pilot project for handling environmental complaints in 15 Member States, including Ireland. Under the scheme, “Any environment cases will be promptly transmitted to Member States taking part in the pilot project. Member States will be encouraged to apply the best practice emerging from individual cases on a broader basis.”

With this pilot, and the Commission’s stated priorities, Krämer argues that “the environmental complaint seems to die a rather silent death…[T]he Commission has made a full circle: from the “guarantee” that environmental complaints would be investigated by its services, it has reached the conclusion that complaints - the 2008 Communication speaks of “cases” - would immediately be communicated to the Member States concerned.”

Whether the environmental complaint has indeed died a death remains to be seen, but it is certainly hard to see how poorly-resourced national NGOs can be expected to put together ‘general and persistent breach’-type complaints. If it turns out in time that the Commission indeed refuses to entertain complaints identifying, for example, one-off breaches of environmental law, this will have significant repercussions for the work of NGOs, and for environmental protection more generally, particularly when access to justice issues remain at the national level (e.g. prohibitive costs).

It follows that any such decision, based in essence on limited Commission resources, could be characterised as political in nature: it would effectively sever an important link between the Commission and the EU’s citizens. For the time being, the present author remains optimistic. In Ireland, at least, the Commission’s practice appears to be to try to find homes for complaints alleging one-off breaches - either within existing proceedings (e.g. as part of Art. 260 TFEU proceedings following-up on an earlier ECJ judgment establishing a ‘general and persistent’ breach) or as part of fresh Art. 258 proceedings, with the Commission gathering together a series of complaints under the banner of a single Directive, for example.

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Nevertheless, we would be wise to keep a close eye on the Commission’s practice in this area. Any move that lessens the role played by environmental NGOs in the EU infringement process would be a retrograde step, with practical impacts that should not be downplayed.

3.2.5 Access to justice at the national level

The Commission justifiably protests that it cannot, and should not, be expected to deal with every environmental infringement in the EU. As Harden notes, “There have been persistent calls within the Commission to restrict the use of Article [258 TFEU], on grounds both of limited resources and of principle. In its fourteenth annual monitoring report, for example, the Commission protested against the idea that it is ‘capable of solving every individual situation – a kind of Community Supercourt, as it were’. It pointed out that citizens could bring proceedings in national courts to enforce their rights under Community law.”

Well, yes, in principle. However, as is well documented elsewhere, there are significant impediments to accessing justice at the national level within the EU - cost being one major factor.204 The Commission has stated that it is prioritising infringement proceedings aimed at freeing up access to justice before national courts, with a view to alleviating its own caseload.205 (An example in the Irish context, of course, is the ECJ’s recent judgment in case C-427/07.)206 Similarly, the Aarhus Convention’s Compliance Committee provides a valuable forum for seeking redress regarding national access to justice issues (though not in respect of Ireland, since the government has yet to ratify the Convention).207 That said - and while space precludes a detailed critique of environmental access to justice issues in the present article - there remains an important role for the Commission to play.

Thus, whilst addressing national access to justice issues is clearly an important task, it should not come at the expense of reform of the Commission’s enforcement role.

Conclusion

In summary, this paper’s conclusions are straightforward: the Commission’s enforcement and political functions should be separated, with its enforcement functions to be transferred to an independent body. Pending (or after) this, there are numerous other changes that could usefully be made to current EU enforcement rules and practices, as detailed above.

In addition to these practical suggestions, it is hoped that this paper has, at least, painted an interesting picture of the practical effects of politics on Commission enforcement decisions, and, more importantly, on the European environment itself. The next time someone mentions EU environmental enforcement, think not of Commission officials in Brussels, or the Courts in Luxembourg, or package meetings with Member States. Think of the Sabor valley, and the flood waters, soon to rise.

203 Harden, supra note 117, at 497.
204 See, for example, http://www.ukela.org/content/page/1007/Justice%20report.pdf.
206 Albeit that the Commission unfortunately raised failure to transpose issues only, and hence could not raise issue of poor transposition (in other words, it was not open to the Commission to argue both that Ireland had not transposed certain provisions of Directive 2003/35/EC at all, and that it had transposed those provisions badly).
207 Despite the Renewed Programme for Government’s promise: “We will ensure that Ireland can ratify the Aarhus Convention by March 2010.”