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THE YEARBOOK OF
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Volume 7

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Editors' Preface

As in previous volumes of this *Yearbook*, this seventh volume contains a collection of scholarly articles, a current survey detailing the annual legislative and judicial highlights in environmental law in the European Union (EU) and global context, a book reviews chapter with highlights of recent literature, and a section in which official documents emanating from the EU are summarized and critically reviewed.

EU documents, which have been analysed by Krämer since the launch of the *Yearbook* in 2000, will offer readers insights in the state of the environmental policy of the EU. In those early years, hopes were held that the large-scale digitalization of EU documents, in combination with the widespread introduction of fast Internet connections to common European households, would open up the spectrum for a transparent and more accountable environmental policy.

With hindsight, such hopes appear to have been unfounded. Year after year, Krämer has exposed the lacklustre quality of many of those documents, and it is difficult to escape the impression that at times this betrays conscious efforts to keep the European public in the dark about vital developments affecting their daily lives. It is difficult to comprehend, for example, why annual reports that ought to inform on compliance rates by individual Member States should adopt a slightly different format each year, thus making it virtually impossible to compare or to ascertain trends. Rather, after more than twenty such reports, one would have thought that by now the Commission would have established a preferred format, which for the sake of efficiency *and* transparency it would simply stick to in each consecutive reporting year. Likewise, the practice of publishing important Annexes as separate SEC documents—which unlike COM documents themselves are not always publicly available without a prior request for access to information—is difficult to explain to the average European.

The fact that Krämer, known for his expertise and *engagement* when it comes to issues of compliance, feels that it is no longer possible or even useful to discuss future compliance reports because they have become devoid of substance, amounts to the starkest possible signal that now the moment has come for a radical change. For EU citizens, it will come as little comfort that, according to Kravchenko, the Aarhus compliance mechanism is having a positive effect on open government, at least in Eastern parts of Europe, the Caucasus, and Central Asia.

Change is needed not only because current practice makes a mockery of the principle of transparency, but also because the issues raised by the reports are, literally, of vital importance: global climate change, sustainable development and sustainable use of natural resources, air pollution, and conservation of the marine environment, are just some of the topics reviewed in this year's documents section. In a sequel to his contribution to this *Yearbook's* fifth volume, De Sadeleer adds to

this depressing list the destruction of European habitats and species, which despite a relatively effective regulatory regime shows no sign of slowing down.

The EU policy documents reviewed in this volume provide food for thought in other ways as well. In respect of climate change, for example, it seems that EU policy appears to be shifting from pinning hopes on 'precaution', to focusing on the reality of 'damage control'. That precautionary measures have failed to prevent climate change may not come as a surprise, but the fact that the voluntary controls which the Commission agreed with the European, Japanese, and Korean car industries have, without exception, not been realized, is still remarkable. Although there still exists considerable intellectual and political support for voluntary approaches in environmental law, a systematic assessment of their actual performance over the past few years would be very interesting. Such an assessment would be useful also for purposes of aiding the design of an effective product and life-cycle policy, explored by Dalhammar, in which voluntary initiatives have traditionally played a significant role.

A second reality that emerges from Krämer's analysis of EU policy documents is that the Lisbon process¹—with the strategic objective for the EU to become the most competitive and dynamic economy in the world by 2010—is a more important driver for EU policy-making than European Community (EC) environmental action programmes. Environmental lawyers must live with this reality on a daily basis, which Krzeminska's chapter also shows to be true for national policies that stimulate renewable energy where, paradoxically, *short-term* reliance on provisions of competition policy to challenge such policies effectively frustrate a healthy, competitive *long-term* energy market which incorporates renewables.

In a strategy that invites comparison with recent anti-terrorism policy, rather than by regulating environmental externalities directly it may be more effective (also) to regulate the financial sector that provides the investment for the activities that give rise to those externalities. Richardson and Zwier explore this idea from complementing perspectives in the final two stimulating and interesting chapters of this volume.

Similarly, the question needs to be asked whether, when direct regulation on its own fails to halt and ultimately reverse the trend of rising global temperatures, recourse should not also be had to some form of liability for state negligence. As Verheyen correctly observes:

In fact, the question of (financial) responsibility or liability is already being asked by many domestic lawyers representing *inter alia* house owners, insurers, poor communities, and cities.² While no case for damages has yet been brought before a court, there certainly is increasing interest in the issue, and more and more judges are dealing with the problem of climate change in the context of various legal claims.

¹ See Presidency Conclusions, Lisbon European Council, 23 and 24 Mar. 2000, published on the Internet at: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm.

² See, e.g., A. Whitmore, 'Compulsory Environmental Liability Insurance As a Means of Dealing with Climate Change Risk' (2000) 28 *Energy Policy* 11, 739–41.

As experience with Directive 2004/35/EC on Environmental Liability with Regard to Prevention and Remedying of Environmental Damage (Environmental Liability Directive) shows, however, devising an effective liability scheme for environmental damage is easier said than done.³

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HAN SOMSEN
(*Editors-in-Chief*)

³ [2004] OJ L143/56.

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Benjamin J. Richardson is a Professor at Osgoode Hall Law School of York University in Toronto, Ontario (Canada). Previously, he taught at the law faculties of the Universities of Auckland (New Zealand) from 1996–99, and Manchester (United Kingdom) from 1999–2002. The many other institutions where he has been visiting teacher include the law schools of Milan (Italy), Copenhagen (Denmark), and Stockholm (Sweden). Professor Richardson has also been a policy advisor for the National Parks Service in Australia, as well as a legal consultant to the World Conservation Union in Kenya and Nepal. He is a long-standing member of the IUCN Environmental Law Commission. His research interests span environmental law, financial regulation, and indigenous peoples law. Among his major publications are: *Environmental Law for Sustainability* (Oxford: Hart Publishing, 2006), co-edited with S. Wood; *Environmental Regulation through Financial Organisations* (The Hague: Kluwer, 2002); and *Environmental Justice and Market Mechanisms* (The Hague: Kluwer, 1998), co-edited with

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Nicolas de Sadeleer was the recipient of one of the first EU Marie Curie chairs which was established at the law faculty of the University of Oslo (Norway) from 2004 to 2005. He has had teaching positions at several law faculties of universities in Belgium, France, Peru, Thailand, and Norway, and has worked as a consultant for several national and international authorities. His areas of research and teaching include EC and international environmental law, health and consumer law, free movement of goods, and Belgian environmental law. He has published widely in European and international legal journals. His major publications include: *Environmental Principles: From Political Slogans to Legal Rules* (Oxford: Oxford University Press, 2002); and *Droit international et communautaire de la biodiversité* (Paris: Dalloz, 2004).

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