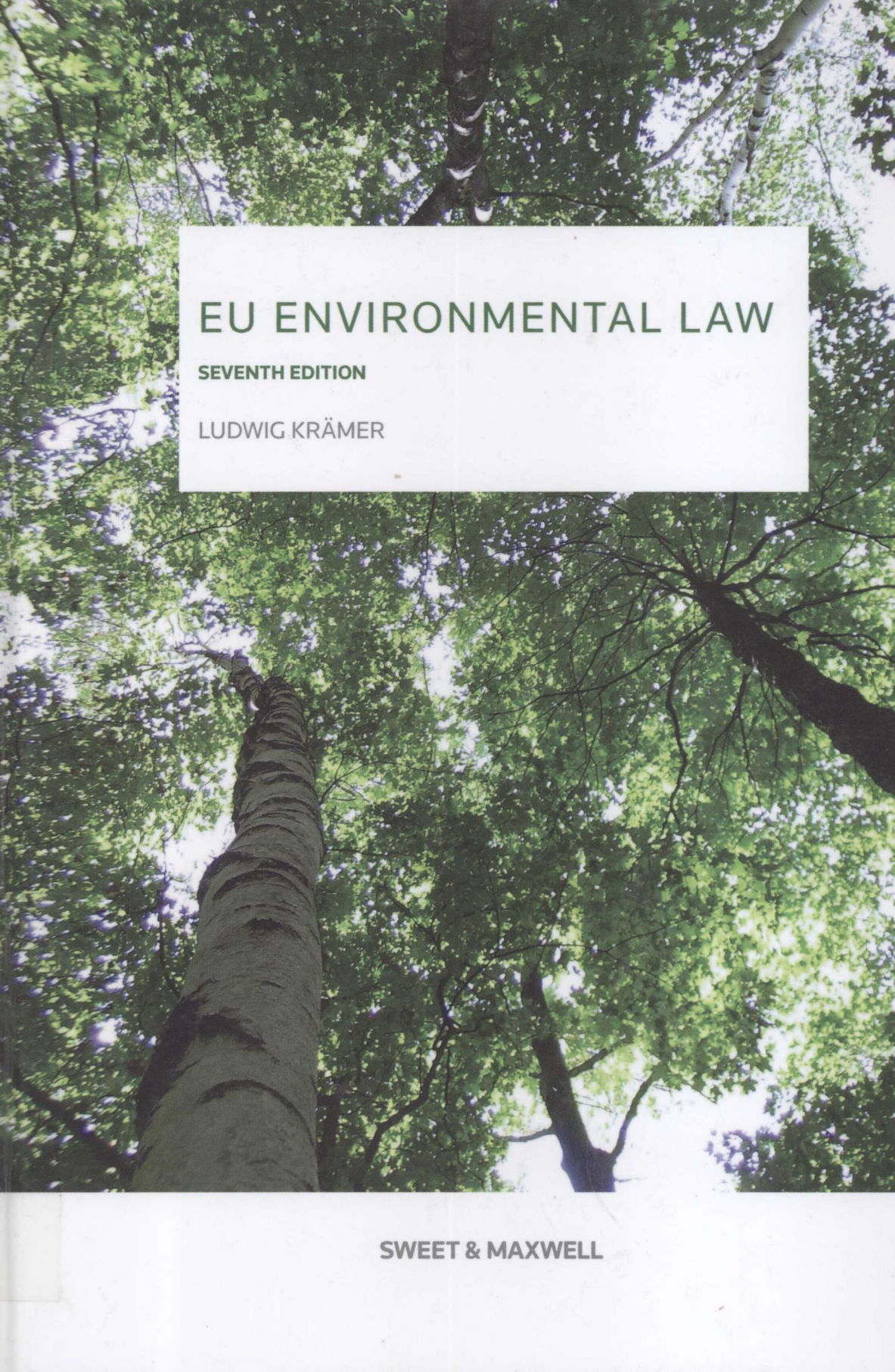




EU ENVIRONMENTAL LAW

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EU Environmental Law

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EU Environmental Law

Preface

This book on European Union environmental law is the result of almost 40 years of occupation with this topic. Indeed, in the early 1970s, as young judge at the Landgericht Kiel (Germany), I was delegated to the European Commission in Bruxelles and worked, since its very beginnings, in the newly established environment protection service which became later the Directorate General for the environment. Thus, I had the privilege to live the evolution of European environmental law from the first hour, and as my delegation to the Commission continued until 2004, I was able to participate in the elaboration and the monitoring of this law for decades. As I had started, for personal reasons, also an academic career, I lectured on EU environmental law since 1985 in some twenty European universities and in six languages. After 2004, I continued lecturing, while acting at the same time as a private consultant. I tried to insert this experience as judge, European official, lecturer and private consultant into the different chapters of this book.

It is obvious that European environmental law has evolved, these last 40 years, in a spectacular manner. In numerous Member States of the Union, it is the first source of national environmental law which is almost at 100 per cent derived for EU environmental law. In the other Member States, it exercised a very strong influence on national environmental law and continues to do so: there is no section of the environment, where EU law did not considerably influence the elaboration and application of national environmental law.

While thus the balance of these 40 years is largely positive, the perspectives for European environmental law do not incite optimism: EU environmental law slowly moves towards a cumulation of good intentions—a high level of protection, the polluter and not the taxpayer shall pay for pollution, a sustainable development the integration of environmental requirements into other policies, the utilisation of the best technique, etc.—which are later on forgotten or bypassed when concrete rules are elaborated and in particular, when rules are to be applied and enforced. In the conflict of environmental interests and economic interests, in 999 out of 1,000 cases, the environment loses. The main raison for this is that the environment has no voice, does not vote and has no important social group behind it—such as agricultural law the farmers, fisheries law the fishermen, competition law the competitors or transport law the transporters (or the transported). To this has to be added that in all Member States of the EU and also at European level, the protection of the environment has been laid into the hands of the administration: it is the administration which grants permits, plans and realises large and less large infrastructure projects, monitors, controls and

examines pollution, the use of resources and which soles conflicts of interests. However, the administration is neither the owner of the environment nor necessarily its best defendant. And in times of economic or financial crisis, the administrations are looking for solutions, even at the price of environmental protection.

Four problems appear to put at risk European environmental law: the first is the obvious lack of political will of the institutions, in particular of the Commission, to keep the promise, often given and lastly repeated in the Lisbon Treaties, to ensure a high level of environmental protection in Europe and therefore conceive, elaborate and apply effective provisions in order to ensure this protection. European environmental law is more and more reduced at general terms which are hardly applicable and the application of which is hardly controlled, neither by the European Commission nor by the European Parliament nor by the national, regional or local administrations in the Member States.

The second problem which goes hand in hand with the first one is the effective application of European environmental law. The Commission which practically has a monopoly in the monitoring of this application, limits itself more and more to oversee the legal transposition of the European provisions into national law, but does not really look at the effective application of these provisions in concrete, specific situations. The Commissions argues that the Member States shall ensure the implementation of EU environmental law, though it knows quite well—it had publicly stated that itself in 2001—the European (environmental) law is treated, at national level as a foreign law: you cannot always avoid having to deal with foreigners, but it is better to try to avoid them.

Nothing undermines the credibility of a State more that laws which are not applied. The Commission did not develop structures or mechanisms to improve the control of environmental law application, for example by transferring tasks to the European Environmental Agency, or granting to civil society representatives the right of standing in order to defend EU environmental law, or be it the setting up of a European inspection service. This passivity contributes so largely to the fact that EU environmental law is no longer altogether taken seriously. One may dare the comparison with the ten commandments: of high moral value, almost never openly disputed, used in Sunday speeches or in the introduction to solemn treaties, but of limited practical application.

This lack of practical application is clearly demonstrated by the fact that the state of the environment within the European Union diverges very considerably from one Member State to the other, even when the European provisions apply everywhere. This difference is explained by the more or less determined national policy to protect the environment. The EU institutions decreasing integrative capacity finds its reflection—and this is the third problem—at global level. Confronted with worldwide problems—climate change, the loss of biodiversity, the omnipresence of chemical substances, the use of natural resources and the fight against poverty—the European Union is not able to present itself as a union. It does not offer a model for the third world how to reconcile economic growth and protection of the environment. Whether it is a system of fair trade, fisheries agreements which care for the environment, a climate change agreement with the Cotonou countries of Africa, the Caraibes and the Pacific, provisions on corporate social and environmental responsibility of European undertakings, agreements with other regions in the world of the “Aarhus Convention type”—the foreign

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