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New Instruments for Environmental Policy in the EU

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Our thesis is that the preference for certain instruments can only properly be understood in the context of the socio-political situation and its historical background. Discussion about instruments should be seen in the light of various conflicting interests. It makes little sense to hold the discussion about instruments in isolation as environmental protection must be placed in the context of the discourse regarding a new manner of regulation.

Command and Control Regulation Instruments

The spirit of the "economic miracle country" initially did not permit debate about trivialities such as environmental protection. Politics was bound up in the magic of economic prosperity and technical innovation. In the 1950s the Water Resources Management Law ("Wasserhaushaltsgesetz" (WHG from 27.7.1957)) was enacted, which today still plays an important role in environmental law, having undergone various changes to increase the level of protection and develop certain instruments. At the time the WHG was enacted, its primary objective was not environmental protection, but to ensure an adequate water supply for the population, which was in turn part of modern health provisions (Kloepfer 1994:59,84). Not only the WHG but also the water supply authorities viewed the supply of water as a public duty which required state control of the resources. At the time of its enactment, the WHG constituted an instrument typical of the command and control regulation as enforced by the police. It regulated individual permits for water use according to the principles of administrative intervention (Gieseke 1992).[1]

At the end of the 1960s and in the 1970s environmental protection became a central topic of social discourse and debate in the Federal Republic of Germany. This beginning of the environmental policy discussion and legislation was motivated by anthropocentric, humanistic and social factors. It was about absorbing the consequences of accelerated industrialisation as they impacted on man's living conditions. It was about the humanisation of life, and in particular socially weak classes who lived near industrial sites and who were particularly effected by their emissions (Umweltprogramm der Bundesregierung 1971, Brandt 1961). These objectives and motives underlying environmental protection were emphasised in Willy Brandt's call for, and promise to create, blue skies over the "Ruhr area".

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[1] The WHG also contained planning elements to be enacted by the German states ("Bundesländer"), namely guidelines to create the framework for water supply measures.

Like many other European states, Germany responded to growing environmental concern with state intervention and command and control regulatory instruments. In the 1970s, the German Federal Parliament enacted important environmental laws which today remain in force in substantially unchanged form. The following are the most important: The Waste Law of 7 June 1972 ("Abfallgesetz""); The Federal Law of Protection against Harmful Effects on the Environment of 15 March 1974 ("Bundesimmissionsschutzgesetz" (BImschG)); The Amendment to the WHG of 26 April 1976, setting standards of permitted levels of emissions from the discharge and elimination of sewage; The Federal Conservation Law of 21 December 1976 ("Bundesnaturschutzgesetz" (BNatSchG)); and the Chemicals Law of 16 September 1980 ("Chemikaliengesetz").[2]

The aforementioned laws are generally characterised as classical command and control regulation instruments, regulations based on the "defences against danger" contained in nineteenth century "police and industrial law."[3] The "defences against danger" concept ("Gefahrenabwehr") uses the requirement-to-obtain-approval instrument for certain activities which are potentially harmful to the environment. The granting of approval is dependent upon compliance with certain (more or less precise) legal requirements. The typical example is the need to comply with limits or technical standards (for example "best available technology") when emitting certain substances into the air or water.

This command and control regulation dimension only covers part of the reform conception of environmental legislation in the 1970s. It was embedded in a conception of global management, which (if only partly) was reflected in environmental legislation. Since the 1950s, the model of the social market economy was the hegemonic political conception. Despite different nuances within the political parties, it was undisputed that the social dimension of the market economy does not occur automatically, and is certainly not an inherent part of the market economy. Rather, the social dimension must be established by the state and protected against market forces. There was consensus across all political parties that state intervention was necessary in order to provide for

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[2] The advisors on the drafting of the Chemical Law and the 6th Amendment to EC Directive 67/548 influenced each other simultaneously, which ultimately led to the enactment of the Amendment to the Directive on 18.9.1979 and the Chemical Law.

[3] "Danger" requires at least a threat of a violation of the law.

people's basic existence and social welfare.[4] With the first signs of an economic recession at the end of the 1960s, the view that the state's social intervention should extend into political-economic intervention grew in popularity. The involvement of the Social Democrats in government (1966) led to the adoption of the Keynesian instruments of economic global management and deficit spending as government policies (Ehrig 1989, Körner 1986).

The conception of politically induced global management of the economy was applied to other areas of society. Two such areas--the attempt to increase land planning ("Raum" and "Landschaftsplanung") and specific environmental planning (e.g.--for water)--were of relevance for environmental protection.[5] Global management was supposed to be supplemented at a decentralised and operational level by the expansion of rights of participation,[6] which today are still contained in environmental legislation or other regulations (such as the Road Laws) which are used for environmental protection. The regulation of the relationship between man and nature was understood as part of this conception of global management. Even if environmental protection was not originally a central issue in this relationship, conservation groups slowly gained greater influence in what planning authorities considered to be the public good through rights of participation in the planning process (Steinberg 1993:19).

The political programme of global management of the relationship between man and nature was never effectively realised by plans which have to balance and take account of different local and regional interests. Its inadequate implementation is mainly due to the fact that the political programme of global management quickly came under pressure from two sides--on the one hand by

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[4] During the discussion of the WHG the aspect of providing a totality of services for the public had already been raised as a motive for effective environmental regulation.

[5] For the different forms of planning see Wegener (1975:365), Albers (1969:10), Wagener (1970:93), Schefer (1970:98), Breuer (1970:101). For water law planning, see Breuer (1987:253). It should be stressed here that global management at state level by the Federal Government was partially delegated to municipal levels (for example standardisation in construction planning law). As with central state planning, local planning was supposed to be extended, improved and simultaneously integrated into state ("Landespläne") and federal ("Raumordnungspläne") land planning.

[6] Within society there were efforts to expand the rights of participation into, for example, the participation rights of employees or within the internal management of schools or tertiary education establishments.

the environmental movement's detachment from, if not hatred of, the state, and on the other hand by the growing influence of neoclassics in economic policy. The growing importance of the latter was based on barriers of national economic management in the light of international financial integration.

Command and Control Regulation Faces a Dead-end

The preference for any particular environmental law instrument stems not only from the development of environmental problems, but is bound together with broader social and historical developments. Throughout the late 1970s and 1980s, existing paradigms underlying the command and control approach came under increasing pressure. Four of the primary sources of pressure were an emerging ecological movement critical of technology, the limitations of classical economic theory which privileged state intervention, the perceived environmental ineffectiveness of overregulation, and concern for maintaining German economic competitiveness in increasingly globalised markets (the "Location Germany" debate).

Criticism from the Ecological Movement

The basic direction of German environmental policies of the 1970s was technological. The traditional view that technological progress (namely the development of productivity) leads to economic and social prosperity for all, dominated, and was applied as the solution to the "recently recognised problems" of environmental protection. The majority view was that environmental problems could be solved by technological progress and environmentally friendly technology.[7] This view is also reflected in the regulation of limits upon emissions and the orientation of environmental protection according to "general rules of technology." The technical orientation of policies became an issue of social debate within the topic of nuclear policy. The decision to use nuclear energy had been made long ago. The conflict, however, first became virulent in connection with the political changes in 1968.

The comparatively widespread movement in Germany against nuclear energy was based on two political traditions: the pacifism and anti-military

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[7] A paradigm which today still dominates parts of the environmental discussion, in particular the discussion about the economic advantages of new environmental technology.

sentiments which developed after the War and the anti-capitalist sentiment of the students revolution. In the social debate about remilitarising Germany it was feared that creating a new army would lead to the possibility of the army being armed with nuclear weapons. With the planned expansion of nuclear energy, in particular by reprocessing atomic waste and by "Fast-breeders", the technical know-how and the actual ability to create its own nuclear weapons seemed to exist. Accordingly the criticism of nuclear energy was interwoven with the criticism of atomic weapons, which constitutes an important factor as to why in Germany (contrary to most other European countries) a wide public movement could develop against nuclear energy. There was great sensitivity for warnings about the use of nuclear fission, which turned into public protests.

The ecological movement did not stop at protests against nuclear energy. Nuclear energy became the paradigm for the risks and dangers of the development of technology and "progressing industrialisation." Characteristic features of the ecological movement were the criticism of western and eastern industrialisation, of economic growth, and the distant relationship between new technology and the planning and administering state.[8]

Part of the debate about nuclear energy took the form of direct physical confrontations between opponents of nuclear technology and the state. Not least this conflict with the "social democratic" state led to deep-seated scepticism amongst the ecological movement about the possibility of sustainable state regulation of the relationship between man and nature. The state seemed to be too closely interwoven with economic interests and too focused on technological solutions to actively support environmental protection. The environmental movement preferred decentralised forms of organisations which could supposedly bring about a different economy and a different relationship with nature. The relationship with state institutions was characterised more by the classical liberal defence against restrictions upon freedoms and the imposition of ready-made decisions than by the possibility of state regulation of the environment.[9] It is thus not surprising that the previous consensus in favour

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[8] These elements only show diffuse basic assumptions of a theory within the ecological movement. In fact the details of this theory vary significantly and the theory is in part very sophisticated.

[9] These basic threads found greatest expression in Habermas' concept of the living world as a stronghold of communicative reason which should be protected against colonisation by the state and economic system (Habermas 1981).

of state intervention and command and control regulations came under pressure from the environmental movement "of the left".

Shifting economic paradigms

At the same time other trends also influenced the end of the state interventionist paradigm. The hegemony of neoclassic or monetarist economic theory was of socio-political importance. The classic view that politics as the centre of society could intentionally and effectively manage and regulate the relationship between man and nature was increasingly challenged by social scientists, particularly the work of Luhmann (Luhmann 1984, Luhmann 1986:220), and was also important for the change of the paradigms relating to environmental law regulation.

In addition to the perceived inability of state intervention to manage complex societies, traditional economic theory came under further pressure in the mid-1970s as the international framework conditions of the economy changed. National demand-orientated economic policies were stretched to their limits and not able to solve the problems. 1973 resulted in deep-seated changes. As a result of the oil crisis, production costs increased considerably, and the economies of oil importing states entered into a recession. The system of fixed exchange rates (Bretton Wood) was abandoned. As a result the leading currency, the dollar, came under continuous pressure to devalue and in the 1970s had to accept a decrease in value of an average of 17% compared to other industrial countries (Altvater 1992:149). This resulted in more imports and less exports for demand-orientated anti-cyclical economic policies in other states. At the same time the rate of inflation grew, and with it the demand for credit. At the end of the 1970s the increased demand for credit and high interest policies in the US resulted in extremely high interest rates worldwide (Hübner and Stanger 1986:69). This development was seen as a loss of national sovereignty over interest rates and brought Keynesian economic policies even more into question.

Based on the change of paradigms in US economic theory (for many of these, see Friedman (1962)), the influence of the neoclassic or monetarist conception of economic policies grew in Germany. These questioned the chances of success of demand-orientated and anti-cyclical global management in economic policies, and demanded deregulation and less state intervention in the economy. It was said that state intervention, by imposing restrictions on business activity and engineering socio-political redistribution, damaged the balance of economic development, reduced profits, and led to less investment and slower growth (Herr 1988:66, Kalmbach and Kurz 1983:57).

The proper form of state intervention also became an important aspect of the shifting economic paradigms. Discussion about economic and market-based instruments of environmental policies initially took place amongst economists and became influential as the "new political economy" (Kirsch 1993, Horbach 1992). Based on utilitarian concepts, the central theory was put forward that actions could be more effectively managed by systems of incentives than by prohibition and punishment. It was thus demanded that there be an environmental political change from command and control regulation to systems of market force incentives, which was widely welcomed within the environmental law discussion and by environmental groups as their confidence in the effectiveness of regulation of command and control regulation had been badly shattered long ago.[10]

While it might have been expected to pose a formidable obstacle to any regulatory reform which did not fundamentally alter the trajectory of social development, and which encouraged greater reliance on market mechanisms, even the Green Party was amenable to new environmental instruments. The changes within the Green Party are exemplary of the shift of powers within the political arena in the 1980s. At the beginning of the 1980s the Green Party was split into two approximately equal-sized factions: the pragmatic politicians ("Realos") who wanted to follow policies of gradual reform in alliance with the Social Democrats (SPD), and the fundamentalists ("Fundis") who totally rejected the notion of a coalition with the "established parties" and considered fundamental changes of the system to be necessary. At the end of the decade the "fundamentalist" positions had been pushed out of the Green Party and their leading figures had either left, modified their political programme or become insignificant.

Ineffective Regulation

Scepticism of state regulation was also expressed through criticism of "overregulation" (Voigt 1980) and of the environmental effectiveness of command and control regulation. Overregulation was (and is) seen as a dominant trait of state intervention and must be understood as a tendency to

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[10] Since then however a counter-reaction has been witnessed in the discussion of environmental groups. As the command and control regulation instruments have been cut back without economic instruments having been introduced, the classical instruments are being defended.

regulate all areas of society's life by legal rules. Concerns were initially expressed about the "flood of regulation" (Vogel 1979:321) as it infringed upon freedom. The growing number and complexity of regulations was considered a factor in undermining their effectiveness as people are only willing to follow the law if they are aware of its rules. This could no longer be expected with more comprehensive and more detailed regulation.

Legal rules in environmental law were increasingly viewed as highly ineffective. A flagrant lack of enforcement of environmental law regulations was apparent (Mayntz 1978). Today environmental law discussions generally view lack of enforcement as a central problem (Wagner 1995:1046, Lübbe-Wolff 1993:217, Lahl 1993:249). This results in the empirical fact that the environmental protection objectives of the law are not optimally realised. The regulations are used as tools for discussion and means of exerting pressure in a "bargaining process" between officials and site operators, but not as binding regulations. This process of negotiating environmental standards at the lowest level of law enforcement was characterised as an "informal legal state." (Bohne 1981, Winter 1985:210, Hennecke 1991:267).

Economic competitiveness and the "Location Germany" debate

With the opening of the borders in the East and the accession of the German Democratic Republic to the Federal Republic of Germany in 1990, the political discourse moved in the direction of an environmental-political "roll-back". Whilst environmental protection has not actually been abandoned as a political objective, it is increasingly simply paid lip-service and merely referred to symbolically. The most striking example of this is ozone legislation, where against the advice of the Environmental Ministry the levels for banning driving in the event of summer smog have been set so high that the laws are in effect irrelevant. The demand to "free" the economy from social and environmental law restrictions in order to render "location Germany" more attractive was considered more important.

It is diagnosed that the whole economy will become internationalised,[11] which is considered an unavoidable consequence of the progress of means of

[11] It appears undisputed that an internationalisation of the markets has taken place. It is however disputed whether this can be characterised as globalisation, that is as unrestricted competition across the whole globe. The opponents of this view assume the development of

communication and the "liberalisation" of world markets. Fears have been expressed that a location problem would arise for Germany from this internationalisation of markets. The result of these processes would be even greater competition, no longer predominantly at a national level but moreover at an international level. As the individual national state can not counter this competition (for a different view see Göll and Schuster 1995:99), industry in particular calls for an improvement of the national conditions in Germany in light of international competition. "Location Germany" should be made more attractive and the national economy should be prepared for competition with other national economies (Hoffmann 1988:148, Klodt and Stehn 1994). To this end, in particular costs of production should be decreased and investment facilitated. Both of these objectives would be achieved by, amongst other measures, deregulation in environmental law and by removing the obstacles to investing imposed by environmental law.

German unification focused particular attention on improving the investment climate in the former GDR. After almost completely de-industrialising the new Federal German States by introducing market competition, the new official objective was to "catch up" in respect of their industrialisation. In particular there is supposed to be an accelerated improvement of the infrastructure, and private investments are supposed to be capable of being realised at an "accelerated" pace. Many have argued that restricting economic activity on environmental grounds hinders this attempt to catch up in respect of industrialisation.

Environmental groups and environmental politicians (one can hardly still speak of an ecological movement) could hardly counter this discourse. Having introduced the co-operative and market conforming instruments, the logic of the "location discourse" seemed plausible. The national competition situation was accepted as a premise for a cost-neutral ecological tax reform. Consumption of resources and the discharge of harmful substances should be made more expensive by taxation; employment of labour cheaper. Thereby it was hoped to achieve a burst of innovation in environmental technology and positive employment effects (Draeger and Wolf 1995:1071, Ewringmann 1994:43). As discussed in more detail below, the governing coalition however showed no inclination to adopt these concepts in any form. It was argued that the

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competition between three blocks which have formed around Japan, the USA and Europe, but whose economic relationships mostly exist within the blocks, for example within the EU (Heise 1996:17, Göll 1995:545).

competition situation for the German economy would become even worse as a result of a comprehensive tax reform. Even amongst the advocates of an ecological tax reform there is little consensus upon many such questions, to the extent that one can hardly speak of a uniform and consistent overall concept.

The Search for New Instruments

Having demonstrated that the environmental law discourse can not be understood outside of its overall social context, this section goes into more detail about the use of new environmental instruments in Germany, and tries to explain why these instruments have only been slowly legally implemented to date. Environmental taxation is comprehensively described because these instruments are at the centre of the discussion in Germany.

The deficiencies of environmental political management by command and control led to the search for alternatives.[12] This search led to different instruments of environmental law management. In summary, the following categories of environmental law instruments exist:[13]

Instruments which seek to improve command and control regulation, distinguishing between:

- The improvement of control and supervision by officials, the public or independent institutions
- Increased flexibility

Procedural improvement and co-operation, distinguishing between:

- Co-operation through rights of participation for individuals, the general public and environmental groups

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[12] Moreover in Germany efforts are being made towards establishing a comprehensive environmental law code (see Bender, Sparwasser and Engel 1995:6 for many examples). In particular enforcement could profit from a comprehensive codification of environmental law (Koch 1996:217).

[13] The Directive on the Freedom of Access to Information on the Environment can not easily be slotted into any of the categories but supports many of the instruments.

- The participation of experts and informal regulations (co-operation between the state and the economy)

Economic Management:

- Direct financial incentives through comprehensive ecological tax reform or at least environmental taxes in specific areas; certificate and compensation models; and invitations of tenders for public contracts.[14]
- Individual liability for environmental damage; liability funds for environmental damage and insurance models.
- Indirect market conforming incentives (labelling; eco-audit).

It is apparent in the environmental law discourse that preferences have moved towards economic management (Beschluß der Bundesregierung 1994:154, 161). This means that the discussion of command and control regulations which was critical of the state and the market economy has lost ground in favour of market-based solutions.[15]

Environmental Taxation

Command and control law separates legal and illegal environmental uses and provides no economic incentive for greater compliance with the required standards than legally necessary. In contrast, environmental taxes are aimed at imposing costs on every environmental use and at creating incentives to minimise environmental uses within the command and control regulation laws and prohibitions. The imposition of environmental taxes is justified on the basis of the polluter pays principle (Hendler 1990:577, Breuer 1992:485, Köck 1993:59, Endres 1994:13). For example, water and air were long qualified as free natural resources. It did not cost anything to use these goods (apart from the precautionary efforts to comply with the emission levels), although their use (even in compliance with the levels) resulted in external costs (the so-called

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[14] In respect of subsidies and public contracts as instruments of environmental management (which are not dealt with here), see Bender, Sparwasser and Engel (1995:53).

[15] Nevertheless, the state retains an important role even in the realm of new instruments. A clear indication of this was the adoption of the state's objective of environmental protection ("Umweltschutz als Staatszielbestimmung") in the German Constitution, Article 20a (Murswiek 1996b:222, Kloepfer 1996:72).

negative external effects). Health costs from environmental pollution, increased costs of preparing drinking water, and the costs of treating sulphur dioxide damage to forests and buildings should be mentioned. The form of market failure (Endres 1994:13, Behrens 1986:86)[16] considered here, namely the creation of external costs (to be distinguished from external uses), results in the produced goods or services being relatively "too" cheap for their producer. These costs are borne partly by the general public and partly by unconnected individual third parties.[17]

In the reform discussion many instruments are mentioned to eliminate the aforementioned external effects, by having the polluter internalise the costs (Endres, Rehbinder and Schwarze 1993, Klocke 1995, Keppler 1994:121). Apart from liability law and certificate models, each of which is discussed below, taxation of environmental uses has received particular attention.[18] Environmental economists suggest that, in accordance with a model developed by Arthur Cecil Pigou, in order to eliminate negative external effects the producers of such effects should pay a tax corresponding to the marginal costs

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[16] In respect of these positive external effects in the light of enterprises' research efforts, see Cremer (1995:23).

[17] To this extent it is often difficult financially to quantify the damages. It is even more difficult to attribute these damages to the entity who caused them (Endres 1994:13, Bender, Sparwasser and Engel 1995:51, Keppler 1994:121).

[18] In economic theory literature a negotiating model based on ownership of rights is comprehensively discussed, linked to the so-called Coase-Theorem (Coase 1960). This involves polluters and those who suffer external effects negotiating over the level of the effects. This is preceded by a command and control political policy decision of principle, which allocates to one of the two parties the ownership right to the "environment" resource. This model is however unsuitable for environmental-political practise for various reasons (Endres 1994:33,41).

The discussion about environmental taxes is not only held at a political level in Germany. Whether constitutional law permits the imposition of various environmental taxes is also vehemently disputed. As some environmental taxes have already been introduced this question has also been considered by various German courts including the Federal Constitutional Court. This is however not the place to describe the current dispute and the relevant legal precedents. It should simply be noted that in our opinion in a 1995 decision (about a taxation on removing water implemented in the states of Baden-Württemberg and Hesse) the Federal Constitutional Court paved the way for an "ecological resource economy (see Murswiek 1996a:417).

arising in a socially optimal situation (Pigou 1952:191).[19] From an economic perspective it provides the principles for politically more acceptable variations of taxing the external effects which could supplement command and control regulation. The (partial) internalisation of costs resulting from environmental uses, achieved with the help of environmental taxes, aims to motivate enterprises and individuals to develop environmentally friendlier avoidance strategies. In view of the allocation effects the taxation solution is, at least in theory, a superior model to the command and control law because it facilitates an economically more efficient use of environmental goods (Hansmeyer and Schneider 1992:12, Wicke 1991:135). Extensive use has been made of environmental taxation in German environmental policy. Proposals include federal taxes on sewage and traffic, as well as a carbon dioxide tax or an energy tax, sulphur dioxide taxes, packaging taxes, local transportation taxes, road use charges, chloride taxes and ground water taxes. In view of the costs and deficiencies of enforcement, taxes might be preferable to command and control. The enforcement friendly potential of taxes is the capacity to activate the interests of the taxpayers to avoid pollution (Lübbe-Wolff 1996b:103, for views that dispute this see Dose 1990:377).

Sewage Tax

Unfortunately, the Sewage Tax Law immediately repudiates the idea of innovation through economic instruments. It was enacted in its original form on 13 September 1976, at the same time as the most important command and control regulation environmental laws. Pursuant to the Sewage Tax Law, dischargers of sewage are required to pay tax, the amount of which is determined according to the level of harmfulness and the amount of sewage. The goal of this instrument was primarily to initialise a shift in behaviour, to go below the limits.

In 1990, M. Jass presented a study of the effectiveness of the Sewage Tax Law, the central conclusions of which were that over the years the water law requirements led to considerable improvements of the purification of sewage and the environmental technology of the companies studied, but that the requirements of the command and control regulation were the central

[19] However there are practical obstacles to the legal implementation of the "Pigou tax" and environmental-political concerns because of its orientation to pareto-optimal and not actual damages (Endres 1994:95-6, Keppler 1994:128).

instrument. The sewage taxes led at most to accelerated implementation of these requirements, but did not constitute independent incentives for further improvements (Jass 1990).

The limited effectiveness of the sewage taxes can however be put down to a combination of less pollution and falling taxation. Because of the relatively high taxation imposed upon pollution which is prohibited pursuant to the command and control regulation, sewage taxes only create an incentive to comply with the command and control regulation, but nothing more (Lübbe-Wolff 1996b:112).

Petrol and Vehicle Tax

In order to counter air pollution from vehicles, drastically increased petrol prices and increased taxation have long been discussed as a means to reduce the use of private cars. However, taxation of petrol and diesel still primarily constitute sources of finance for the State; the control of behaviour is at most a secondary effect. This is evident from the considerably lower taxation of diesel, which essentially constitutes preferential treatment for freight traffic.

A Law of 22 May 1985 introduced a tax advantage for vehicles with catalytic converters, and a further drastic increase in the vehicle taxation of cars without catalytic converters was planned for 1997. As a result of this advantage and the tax advantages of lead-free petrol, new vehicles are only available with regulated catalytic converters. From an environmental perspective these tax advantages have prima facie only had a positive effect. In the short-term, however, the instrument is double-edged as this has simultaneously created an incentive to buy new cars (leading to ecological damage as a result of production and scrapping).

Environmental Taxes at Local and State Level

Economic taxation was also introduced at local and state level. Various states have imposed the following: requirements to pay compensation for using conservation areas and woods and to extract water (the so-called "Wasserpfennig"); waste taxes; and, in North Rhine-Westphalian, licence fees for disposing harmful waste. On the local level one-way waste taxes (packaging in which food and drinks are sold that can only be used once is burdened with a

tax) were imposed by certain municipalities. As far as there are experiences with the one-way waste taxes they are efficient.[20] Most of the merchants don't use one-way packaging any longer.

Carbon-energy tax

Despite having been approved in particular by economists (Keppler 1994:121, Endres 1994:177, Cansier 1994:642), the implementation of the "environmental taxes" instrument has not experienced uniform success in Germany. In particular the energy- or carbon dioxide tax (or a combination of taxation of energy use and carbon dioxide emissions, a carbon dioxide/energy tax), which has long been vehemently discussed amongst the public and within political bodies, is awaiting its legal implementation. Some economists have expressed a belief that German lawyers' tendency to cling to the command and control regulation is partly the cause of this (Cansier 1994:642).

Explicitly formulated resistance came in particular from German industry, although it did not present itself as a monolithic block here. The failure to adopt a carbon dioxide/energy tax is due in particular to the obligation to reduce carbon dioxide emissions and specific energy consumption by the year 2005 by 20% of the 1990 levels (Aktualisierte Erklärung 1996:3, Bundesverbandes der Deutschen Industrie 1996:3).

For a long time the views expressed by the representatives of trade unions were not unified. After years of internal debate, on 4 June 1996 the federal board of the Association of German Trade Unions ("Deutsche Gewerkschaftsbund" (DGB)) unanimously called for the introduction of an energy tax, which the IG chemical, paper and ceramic trade unions in particular had long rejected.[21] According to this resolution, the energy tax should be imposed on all fossil fuels and electricity (except electricity from regenerated sources). Tax reductions and exceptions are envisaged for enterprises which are

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[20] In 1995 the Federal Administrative Court held that a municipal one-way waste tax (city of Kassel) constitutes a consumption tax, the levying of which by a municipality is constitutionally permissible as long as there is no similar federal tax (ie no such tax exists in the particular case).

[21] Approval by preferably all EU states is (naturally) favoured (DGB 1996a:5).

heavily energy dependent and energy intensive, which ultimately might have facilitated the approval of IG chemical, paper and ceramic trade unions.[22]

The implementation of a carbon dioxide/energy tax in German law can not be expected imminently. After years of controversial discussions and changing statements, the Federal Government (led by the Christian Democrats (CDU; CSU in Bavaria) and the Liberal Party (F.D.P.)) decided not to follow an isolated national path, at least at the moment. It is currently seeking a solution at European Union level (Beschluß der Bundesregierung 1996:161).

Important members of the Social Democratic Party (SPD) have also spoken out against a national carbon dioxide/energy tax in view of the dramatic changes in the German employment market.[23] However, on the whole the party favours the introduction of such a tax in Germany if a carbon dioxide/energy tax can not be implemented at European Union level (SPD 1995:127,129,132,142).

Only the Green Party has long been in favour of Germany following the path of adopting a carbon dioxide/energy tax alone, given the difficulties in implementation at the European Union level. Within the party the question as to how the funds obtained from the tax would be used was long disputed. One section of the party wanted to use the funds for environmental protection; other sections to reduce employment costs. The latter has now become the prevailing view within the party, even if it is felt that part of the funds should be used for ecological investment programmes (Länderrat von Bündnis90 and Die Grünen 1995:1,6).

The environmental-political management effect of environmental taxes is to a large extent dependent upon the actual amount of the tax. Only a sufficiently high tax is likely to influence the behaviour of the effected entity significantly. In view of this the abovementioned sewage tax is ineffective from

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[22] The revenues should be used to help finance tasks which are difficult to insure in the form of a high Federal subsidy to the Federal Employment Office. The tax should be introduced in 1997, increased in stages until the year 2000 and then evaluated. The levels of tax should be set afresh each year with a level of increase based on revenue objectives. The DGB expects revenues of approx. DM 14 million in the first year; in the year 2000 of approx. DM 30 million. See DGB (1996a:6, 1996b:2).

[23] The most recent being the minister-president of Lower-Saxony and economic-political speaker of the SPD, Gerhard Schröder.

an environmental management perspective, and it is not surprising that the carbon-energy tax encountered determined resistance. Although from an economic perspective environmental taxes correspond to the polluter pays principle which is an inherent element of the market economy, their politically stipulated objectives can engender as much resistance as other instruments of environmental law regulation.

The exceptional rules for energy and/or emission-intensive industries which were widely demanded as a result of international competition should be judged very sceptically. Not only should one criticise the fact that consequently quantitatively relevant environmental uses are not covered and industries which cause a particularly large amount of environmental pollution are spared. In addition necessary structural changes are consequently blocked or steered in the wrong direction. This is because the products of the industries which enjoy the exceptional rules[24] may not only be in international competition, but may also be in (potential) substitute competition with environmentally friendlier products from enterprises which do not profit from the exceptional rules, be they domestic or international. In determining the exceptional rules, these interdependent factors should be taken into account so as not to improve the terms of competition for energy- and emission-intensive goods.

In view of the costs and deficiencies of enforcement, an energy tax would possibly be preferable to an emission tax because the latter would require greater efforts as regards obtaining information and monitoring. However, liberalisation of the energy market on the EC-level will probably increase enforcement costs of an energy tax (Keppler 1994:129).

Principle of Co-operation and Waste Law

An example of "gentle" economic management by co-operation is the introduction of the "Dual System" in connection with waste disposal. In order to reduce packaging waste, at the end of the 1980s the Federal Government planned to introduce an obligation upon shopkeepers to take back sales packaging. It was hoped that this would indirectly influence behaviour in that shopkeepers would convert to offering products with little or no packaging, which would eventually do away with packaging and waste even at the production stage. This model was legally entrenched in the Packaging

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[24] Service industries will hardly be effected.

Ordinance of 12 June 1991. However, after prolonged negotiation with trade and industry the Ordinance was supplemented with an alternative option, a system of separation of waste. In practise it is this so-called Dual System of Germany ("Duale System Deutschland" (DSD)) which has been established.

The system functions as follows: the producers pay a fee to a private waste disposal company, the DSD. In return they have the right to include a "green point" logo on their products' packaging. The consumers are required to collect together all packaging waste containing a "green point" logo and place it separately in a special yellow rubbish bag, which will be collected at regular intervals by the waste disposal company. The consequences of this co-operation model can be outlined as follows. Firstly, instead of avoiding waste, as was initially intended, there is merely a separation of different types of waste. So far there have not been considerable reductions in packaging. In its five year financial statement the DSD declared that a reduction in packaging waste had been achieved. Packaging waste had dropped by 900,000 tonnes in the five years. The weight is however only of little importance. Environmental groups justifiably point out that the packaging industry itself reports continual production growth, as a result of which a drastic reduction of packaging waste can not be realistic (Frankfurter Rundschau 25.6.1996:13). Secondly, the consumer bears the burden in that he finances the profits of the waste disposal companies by way of increased prices.[25] In addition he continues to pay waste charges to the public waste disposal authorities. Ironically it has not been possible to correspondingly decrease the charges despite smaller amounts of waste because it remains necessary to maintain the waste disposal plants and their infrastructure. Thirdly, packaging waste is partly recycled. Although this is a positive factor, the amount of waste recycled at the moment remains below the desired levels.[26]

Certificate Models

Certificate models, which are viewed positively in economic literature, are given less consideration in public discussion (Endres 1994:165, Keppler

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[25] Currently 49 DM per person per year.

[26] A large part of plastic waste is disposed of overseas (Frankfurter Rundschau, 25.6.1996:13). For a generally positive assessment of the packaging regulation see Koch 1996:218.

1994:121). The core of these models is the idea that the political decision-makers will stipulate an overall maximum emission level (or overall energy use) for a certain harmful substance in a certain region and will allocate the rights to use these "environmental capacities" amongst the environmental users. Basically two models are being discussed to allocate the rights, namely auctioning and politically stipulated allocation. According to the latter variation, the allocation should be based upon the amount of harmful substances emitted by the enterprises within a certain period of time.

These rights will then be documented in "emission certificates" and will be tradeable (Endres 1994:106, Endres, Rehbinder and Schwarze 1993) and only to this extent do the certificate models contain a market economy element and follow the objective of efficient allocation. The certificate model has been applied in certain sectors, in particular in the USA (Endres 1994:113). A basic idea of the certificate concept was adopted in German law by the amendment to the BImSchG and formalised in the Technical Direction to keep the Air Pure (TA Luft) in 1986. The compensation model allows emissions to exceed certain limits in one site if the operator of the site or third parties overcompensate with reduced emissions in other sites. The compensation possibilities (Rohde 1990:159) thus achieved were slightly improved by a new amendment to the BImSchG in 1990 (Goßler 1990:255, Schlabach 1990:251). However, little use has been made of the instrument (Gawel and Ewringmann 1994:121, Endres 1994:116), probably because compensation is required within a small region in one calendar year and, according to the TA Luft, exemption from meeting the limits was only granted for a fixed time period in the past (Gawel and Ewringmann 1994:120). The amendment of the BImschG in 1990 has still to be concretised by an amendment of the TA Luft which might offer compensation permits for longer periods.

The environmental-political value of certificate models depends (as with environmental taxes) substantially on the politically stated aims (from an economic perspective an exogenous factor). That is, the stipulation of the overall permitted amounts of emission in a region is decisive. As with environmental taxation, the failure to implement these instruments is due to their management implications.

Particularly in the introductory phase, additional structural problems exist which render doubtful the success of the certificate model as a management

instrument to reduce emissions in individual enterprises, at least in the short-term. The demolition of existing and approved old sites will hardly be worthwhile for financial reasons.[27] As far as enforceability is concerned, the certificate model has no advantages over the command and control regulation as its administration (even if done by private bodies), as well as the continued need to monitor discharges of emissions, is relatively costly (Lübbe-Wolff 1996b:134).[28] From an enforcement perspective the allocation of "energy use rights" would probably be more advantageous.

Liability for Environmental Damage and Fund Models

The Law on Environmental Liability ("Gesetz über die Umwelthaftung" (UmWeltHG)) of 10 December 1990 introduced no-fault liability for most sites as of 1 January 1991. It was installed to optimise the protection of the environment and the legal position of persons who suffer damages by private law (Breuer 1995:491). This instrument differs from command and control as it tries to internalise negative external effects. The law is applicable to environmental damages to air, water and soil caused by substances, noise emissions, radiation, gases, steam and heat. Despite resistance from industry, the liability covered not only actual harmful incidents but also damage from permitted regular operations (Bender, Sparwasser and Engel 1995:54). Only in the event of force majeure does the liability not apply. Furthermore, the UmweltHG renders proof of causation easier, but does not suffice to attribute actual distance and summation damages to individual entities as it is not possible to fulfil the (constitutionally) necessary minimum requirements to prove causation. This is also the reason why the UmweltHG was hardly relevant in practise.

In our view this indicates the central problem of the UmWeltHG as well as in general of any environmental liability law geared towards individual polluters. This problem should not be dealt with by the state having to accept liability,[29] but with a supplemental fund. Although difficult to draft, it would

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[27] In particular competition law concerns have been raised about the functioning of the market economy components of the model.

[28] For a different view see Wasmeier (1992:220). See also Endres (1994:104), who sees no enforcement advantages.

also be conceivable for the fund to have a right of recourse against the individual polluters (Rehbinder 1992:120). Only the fund solution corresponds with the polluter pays principle (Kinkel 1989:297, Rehbinder 1992:120) (to this extent to be understood collectively) and the internalisation model. From a management perspective such a model would be welcomed as, besides individual liability, it would increase the avoidance incentives because of the additional risks (although given that it is collective liability the influence may not be significant). There would be a further directing effect if the amount of the contributions payable by the individual enterprises was determined not according to business management factors but to the level of emissions. This variation of the model which is determined in accordance with the individual polluter pays principle is thus preferable despite the increased enforcement costs and the likely enforcement deficiencies (Kinkel 1989:298).

The "Acceleration Amendment"

As mentioned earlier, in recent years the dominant issue in environmental legislation has been "Acceleration". Rather than introducing new instruments, this has sometimes caused an actual reduction of environmental law procedural standards. The "Acceleration Legislation" was initially justified on the basis of the need for quick construction measures in the five new German States and began with the Road Construction Acceleration Law ("Verkehrswegebeschleunigungsgesetz" from 1991) which was specifically for these new States. Moreover, the Investment Measures Law ("Investitionsmaßnahmegesetz")[30] itself specifically provided for certain traffic projects in the East of Germany so that these projects were not required to follow the usual administrative procedure. Having "tested" it in East Germany, the Federal Government wanted to apply the accelerated road construction planning system (with the exception of certain details) to the West of Germany (Steinberg 1993). This was done in 1993 with a law to simplify the planning procedure for roads ("Gesetz zur Vereinfachung der Planungsverfahren für Verkehrswege"). At the same time the Expansion of Highways Law ("Fernstraßenausbaugesetz") and the Expansion of Railways Law

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[29] Bender (1986:335) calls for either state liability or a fund solution. Kinkel (1989:293) favours the fund solution and thinks that the state's financial contribution should be limited to providing the starting capital.

[30] For example, the law relating to the construction of the Wismar-Ost to Wismar-West sector of the A20 road of 19.4.1994.

("Bundesschienenwegeausbaugesetz") were passed, which legally stipulated the need for these transportation routes.

The Law to Facilitate Investment and Residential Building ("Investitionserleichterungs und Wohnbaulandgesetz") transferred substantial procedural elements which had been given an accelerated effect to other areas of law (for example waste law and construction law). Furthermore, the new accelerated procedures apply in these areas for the whole of the Federal Republic of Germany. Moreover, in the new German States since the changes in the Federal Land Planning Law ("Raumordnungsgesetz") it is no longer required that a land planning procedure ("Raumordnungsverfahren") take place if this would disproportionately delay investments. The requirement that the "Raumordnungsverfahren" be open to the public was replaced with a power granted to the States to regulate whether and to what extent the public should be involved.[31]

The Erosion of Rights of Participation and Approval Requirements

An essential element of acceleration has been the erosion of rights of participation. Participation of individuals, the general public, and groups in the transportation route approval procedures and various other approval procedures (for example waste sites) was reduced by restricting the right to object and by partially cancelling the open hearing dates (Fisahn 1996:63). This erosion of individuals' participation and consequently also of the involvement of environmental interests occurred for example by the replacement of the "Planfeststellungsverfahren" by "Plangenehmigungen". This caused for example the abandonment of environmental impact assessments. Irrespective of the site's effect on the environment, the "Plangenehmigung" is not required to include these assessments.[32] In addition it was sought to achieve accelerated effects by reducing the prescribed channels of appeal.

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[31] There is however a further discretionary provision to carry out an EIA with public participation within the context of a "Raumordnungsverfahren." In light of the regulatory powers of the Federal states the relationship between the various provisions is unclear.

[32] That the EIA is linked to procedure and not the material effect of the plan is the subject of controversy between the EU Commission and the Federal German Government (Paetow 1996:57).

The "Acceleration Amendment" not only led to an erosion of rights of participation, but also to the partial abandonment of the requirement-to-obtain-approval. In addition, short-cuts in examining the environmental needs and environmental friendlier alternatives led to far less consideration being given to environmental interests in the administrative proceedings.

Germany does not appear to have stopped adopting acceleration legislation. Various commissions, working parties and ministries have produced and proposed more comprehensive "acceleration catalogues" (Lübbe-Wolff 1995:57) In particular the proposals of the so-called Ludewig Commission and the catalogue based on this by the Schlichter Commission should be mentioned. The Federal Environmental Ministry and the Federal Government have already adopted some of the suggestions of the Schlichter Commission and included them in legislative procedure.[33] Accordingly, for example, pursuant to the proposed amendment to sections of the BImSchG, in order to make certain changes to plants which require approval under current legislation, the operator would in future simply need to submit a notice which substitutes the need for approval. The proposed amendment is intended to reduce the number of changes requiring approval. However, this procedure does not offer the same level of protection that results from receiving approval because the operator would run a greater risk of the authorities subsequently requiring him to implement further compliance measures. The fact that about 80% of the requirement-to-obtain-approval procedures pursuant to the BImSchG relate to changes to sites and only 20% to new sites shows the quantitative relevance of this amendment.

Unlike many of the other instruments described in this paper, acceleration measures are not (even as a side effect) based on any environmental political motives. They appear solely as instruments to make the "location Germany" more attractive,[34] and not as instruments of environmental political

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[33] The draft of the law provided by the Federal Environmental Ministry dated 29.11.1995 followed the drafts of the Federal Government on the amendment to the BImSchG, the 4th Bundesimmissionsschutzverordnung, the Verwaltungsverfahrensgesetz and the Verwaltungsgerichtsordnung, BR-Drs. 27/96 of 12.1.1996 and 29/96, 30/96 and 31/96 of 19.1.1996. The cited drafts may have been implemented as laws at the time of publication, but due to the Bundesrat's (Upper House of German parliament) resistance only in a modified form.

management. It is nevertheless necessary to question both the actual acceleration and simplifying potential of these measures as well as the dangers for the environment associated with these measures.

The outlined erosion of the participation of individuals should be criticised from a legal political perspective because of its supposedly negative consequences for environmental protection. Based on the philosophy of the European Court of Justice,[35] in European Community law the individual and environmental groups are attributed the role of protector of environmental interests.[36] This line of argument developed by the Court for court proceedings in particular can also be applied to administrative proceedings. The role of the individual and environmental groups as protectors of environmental interests is important because of limited administrative resources, in particular for monitoring environmental law. In addition, in the area of preventive control of environmentally relevant projects, the authorities often do not possess sufficient information about the affected environmental interests. Public participation (at least in theory) achieves a more balanced representation of the conflicting economic and ecological interests. In view of the objective to accelerate proceedings by reducing rights of participation, the first specific evaluations paint a relatively optimistic picture (in respect of the acceleration measures relating to motorway planning, see Paetow 1996: 57). It is, however, doubtful that the intended acceleration effects will play a significant role in making the "location Germany" attractive. Recent studies show that the length of the approval proceedings only play a minor role in investment decisions (Steinberg 1995:209 n.4).

In respect to the partial substitution of the approval procedure by notice proceedings even the efficacy of the intended acceleration effect is doubtful. The proposed amendments would cause an increase in the number of proceedings which would complicate the activities of environmental administration. The administration must examine whether a simplified

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[34] See the objectives of the mentioned governmental drafts, BR-Drs. 27/96, 29/96, 30/96 and 31/96.

[35] The European Court emphasises this viewpoint particularly frequently in competition law (Everling 1993:215).

[36] Besides enforcement before national courts with the help of a generous ability to litigate granted by Community law, it is also possible to provide the Commission with information to follow the Art. 169 EC Treaty route.

procedure is permissible in individual cases, which is inconsistent with the acceleration effect (Koch 1996:220). It further complicates the officials' examination of which procedure to select and renders it relatively time-consuming that the officials have to apply uncertain legal concepts which particularly hinders enforcement (Mayntz 1978:33,349,410, Lübbe-Wolff 1996b:92, Koch 1996:216). In addition, from an operator's perspective, the planned amendment does not appear particularly attractive because of the risk of retrospective orders. The representative of the Lower Saxony Business Association ("Unternehmensverbände Niedersachsen e.V."), Wolfgang Rohde, agreed--in his view it was not comprehensible why industry had been greatly in favour of the proposed amendment to the BImschG. It is possible that his prognosis that this instrument will hardly be used in practise will be proven correct. From an environmental-political viewpoint the notice procedure is problematic where construction is carried out following submission of notice and the operation of the site then conflicts with environmental law because it is very difficult to enforce any retrospective orders.

In this context the point should also be made that when a procedural law is changed the related new demands upon the administration cause short- to medium-term procedural delays, simply because of the time necessary to adjust and the difficulty of applying uncertain legal concepts (frequently these are first implemented by way of an explanatory declaration by one of the highest levels of courts). Thus the removal and substitution of specific instruments and procedural models should not take place before an evaluation, which is often not the case (Paetow 1996:60).

The introduction of the so-called "star proceedings" should be welcomed without any reservations. This envisages all officials involved with the environmental procedure handling the matter at the same time. This procedure, which does not infringe material environmental law, is preferential to the previous practise, pursuant to which the officials were involved with the procedure one after another, because of its acceleration effect. A further possibility for acceleration, which could also reduce lack of enforcement, would be to increase personnel within the environmental administration, but for cost reasons this is not feasible (Lübbe-Wolff 1996b:10).

Finally, it should be noted that the German legislature was much more energetic in implementing the "environmentally detrimental location policies" than the aforementioned environmental protection orientated instruments. The President of the Bundesumweltamt (Federal Environmental Protection Agency), Heinrich von Lersner, refers in this context to an "ecological counter-reformation." (Quoted from Bender, Sparwasser and Engel 1995:8, n.25).

(Poor) Implementation of EC Law in Germany

As well as nationally initiated measures, the implementation of EU law has shaped national environmental law in recent years. While EC law imposed tools in all member states, it is useful to show the poor implementation of important environmental Directives in Germany. The outlined implementation of EC law in Germany should give a more comprehensive idea of environmental policy in Germany within the last decade.

In the past, numerous proceedings were instigated against Germany, which likes to claim a leading role in environmental protection (Everling 1992:379, Breuer 1990:80). These actions were based on incorrect implementation of EU environmental Directives and frequently resulted in judgements against Germany (Gellermann:1994:117, n.3). In respect to proceedings relating to environmental matters between 1988 and 1992, Germany ranked in the middle of a table produced by Christoph Demmke based on the Tenth Report on the Application of Community Law (COM(93) 320, 28.04.1993; Demmke 1994:42). The EU Directives on the Freedom of Access to Information in the Environment (the national implementation of which is outlined and assessed below) was also first implemented by Germany into national law after long delays.

Freedom of Access to Information on the Environment

Germany delayed by almost one and a half years the implementation of the 1990 EU Directive on Freedom of Access to Information on the Environment.[37] The German Freedom of Access to Information on the Environment Implementation Law ("Umweltinformationsgesetz"), however, in no way ended the discussion about the extent of rights to environmental information. The often ambiguous formulations of the German legislature and also the restrictive and from a European law erspective questionable provisions in The Freedom of Access to Information on the Environment Implementation Law contributed to this.[38]

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[37] Council Directive of 7.6.1990 regarding free access to information about the environment (90/313/EC), EC OJ 1990 No.L158, p.56. The deadline for implementation expired on 31.12.1992. The German Law came into force on 16.7.1994.

[38] See Scherzberg (1994:733) for a critical viewpoint. See also the less restrictive drafts from the Federal Environmental Ministry: Sachverständigenrat für Umweltfragen Umweltgutachten 1994, BT-Drs. 12/6995, Tz.560.

These uncertainties led to an overwhelming "flood of publications" in Germany within a short space of time. By June 1996 over seventy articles in periodicals (Theurer 1996:327) and four commentaries had appeared (Fluck and Theurer 1996, Schomerus, Schrader and Wegener 1995, Röger 1995, Turiaux 1995).

The analyses and assessments of the many disputes would fill a book on this subject. We will only try to compare the principles of The Freedom of Access to Information on the Environment Implementation Law with German administrative law culture. Undoubtedly the codification of rights to environmental information results in an important change to the general public's function in respect to a limited area of German administrative law. Whilst the laws of other states, including members of the EU, already recognised rights to information from the administration before the Freedom of Access to Information on the Environment Directive was passed (Engel 1993:146, Bidner 1994:408), official documents remain confidential from the public in Germany, almost without exception.[39] The right to information conceptually expands the possibilities for the public and environmental groups to support the authorities in monitoring substantive environmental law, but also to control it. In view of the importance of the right to information for officials, industry, and the environment, there are deep-seated differences of opinion in assessing this new environmental instrument. These range from euphoria[40] to scepticism (Erichsen 1992:418, Schmidt-Aßmann 1993:933) and in part to tastelessly discrediting[41] this instrument. We favour the positive assessments of this instrument because comprehensive information helps optimise the use of other environmental instruments.

The internalisation concept as well as command and control regulation are dependent upon knowledge of the extent of and the effects on the use of the environment (see Heyvaert 1997). An informed public can thus provide important assistance. Besides influencing environmental policy the public can also follow enforcement informatively and on the other hand control the monitoring authorities. Ultimately, being informed and achieving transparency

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[39] For the history of access to official documents, see Engel (1993:11) and for recent political initiatives to expand the rights of access to documents see Theurer (1996:326, n.2).

[40] The "king's route to environmental protection" provides improved public information (Führ 1994: 453, 468).

[41] One author has described the public as performing the work of an "environmental-stasi."

are conditions of the free market economies within Germany and the EU, assuming one accepts that the environmental impact of a product is a parameter of competition. However, there is little cause for rejoicing, according firstly to a survey performed by the newspaper "Öko-Test" in the summer of 1995, which found the environmental administration's knowledge and application of EIA unsatisfactory, and secondly, due to a relatively restrictive interpretation of the Access to Information on the Environment Implementation Law by the German administration courts (VG 1995).

Eco-Auditing

In December 1995 the Eco-Auditing Law ("Umweltauditgesetz") and a series of supplementing ordinances came into force in Germany to implement the EC Eco-Auditing Regulation (see ch 10). Whilst the Regulation did not require implementation in the narrow sense of the word because of its direct effect pursuant to paragraph 2 of Article 189 of the EC Treaty, in order to function the auditing system nevertheless required national laws about the admissibility of environmental experts and organisations of environmental experts, the supervision of reporting functions and the registration of examined locations of enterprises and the appointment of the various responsible bodies.[42] Whereas the enactment of the German Eco-Auditing Law was in principle supported by a wide political and social consensus (Lütkes 1996:231), there was disagreement between the interest groups involved with the legislative process regarding important details.[43] As we do not have the space to analyse the provisions of the Eco-Auditing Law in detail here, we shall only outline its overall tendency to favour industry which could jeopardise the success of the auditing system.

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[42] In addition the Eco-Audit Regulation gives rise to interpretation problems, see Lübbe-Wolff (1996a: 219). In Germany the question whether the validation of the environmental declaration by the admitted environmental expert constitutes actual compliance with the applicable environmental provisions at the location is very much disputed. For views in favour see Schottelius (1995:1551), Köck (1995:648), Falke (1995:5), Lübbe-Wolff (1994:369). For views against see Sellner and Schnutenhaus (1993:930), Förschle, Herrmann and Mandler (1994:1099), Schnutenhaus (1995:9), Schneider (1995:378). For criticism of the lack of protection for commercial confidential interests in the Regulation see Martens and Moufang (1996:246).

[43] Even between the Bundesrat (Upper House of Parliament) and the Bundestag (Lower House of Parliament) there were individual points of dispute as a result of which the Bundesrat called upon the mediation committee of the German Bundestag and Bundesrat.

During the legislative procedure industry and environmental groups disagreed about who should be entrusted with the task of determining the eligibility of the environmental experts. Whereas environmental groups called for an "authority model," and the Federal Environmental Ministry initially favoured the Federal Environmental Protection Agency ("Umweltbundesamt") as the responsible body, industry sought a self-administering model to be run by industry. The compromise ultimately includes substantial demands made by industry. Pursuant to an Ordinance ("Umweltauditgesetz-Beleihungsverordnung") of 18 December 1995 enacted by the Federal Environmental Ministry, the "Deutsche Addkreditierungs- und Zulassungsgesellschaft für Umweltgutachter mbH (DAU)" adopts the task of determining the eligibility of environmental experts. Members of the DAU are groups representing the interests of industry and groups representing the interests of environmental experts. The groups representing the interests of industry cited as the central argument for this model the fact that eco-auditing would have to be administered by industry because of the voluntary participation of enterprises. However, eco-auditing was not conceived primarily as a marketing instrument of industry or even as a means of creating employment for environmental experts, but, based on Article 130(s) of the EC Treaty, should primarily serve environmental protection. The fact that these public interests should be considered dominant shows that the eligibility decision is not an internal matter for industry and that these tasks should have been granted to a public authority (Lübbe-Wolff 1996a:219).

The self-administering model also conforms to the provisions of the Eco-Auditing Law, according to which the chambers of industry and commerce and the chambers of crafts are entrusted with the task of registering examined locations of enterprises. Due to the aforementioned reasons the transfer of the registration of examined locations to a public authority would also be preferable (Lübbe-Wolff 1996a: 224).

Even if the dominance of the self-administrating organisation is justified from an environmental protection perspective by the argument that this results in a greater willingness of enterprises to participate in audits, in our opinion this could lead to a pyrrhic victory for not only the environment but also the participating enterprises. The right of validated and registered enterprises to obtain a certificate declaring their participation, which offers the economic incentive to participate in eco-auditing, does not in itself help the enterprise. The right will only become important as a parameter of competition if the consuming public is convinced of the seriousness of the audit procedure and the impartiality of the experts involved. As a result of the present auditing system not only the environment but also enterprises which follow ecologically

orientated environmental policies could suffer disadvantages. Whether this sceptical assessment of the auditing is justified will have to be proven by a careful evaluation of the auditing procedure, and in particular through an examination of the quality of published environmental certificates declaring participation.

Conclusion

The result of our attempt to assess the development of new environmental instruments in Germany is sobering. The "old" state interventionist and command and control regulation instruments are no longer in fashion given changed social framework conditions. But effective alternatives, new means of regulating the relationship between man and nature, have not been found. Economic instruments (if one wants to refer to them as "new"), although comprehensively discussed in view of their advantages, are not implemented in German law to the extent that significant positive effects can be determined in practise. Even economists are no longer convinced of their suitability as substitutes for command and control law instruments. But they could provide a supplemental role. Besides the search for "new instruments" the improvement and maintenance of "old" ones must be given the same priority.

Environmental quality depends upon the politically desired and stipulated objectives even in the case of market-based regulations. As with emission levels in command and control regulation, economic incentives can be arranged so that they only contribute insignificantly to behavioural changes. Until there is political willingness to stipulate objectives for overall emissions and overall waste amounts and to base the level of environmental taxes on these objectives, environmental taxation will remain insufficient. In view of the prevailing fixation upon improving national competitive advantages in the world market such political objectives can not be expected (see Golub 1997). Because of the lack of international environmental regulation, a race to reduce environmental standards and international eco-dumping is more probable. A tendency towards an environmental law counter reform is evidenced in Germany in the form of the erosion of the procedural and participation rights of groups and the public as well as by the reduction of legal protection possibilities. If environmental standards are to be eroded then it is not a good time for experiments with new instruments.

Since the mid-1980s the decisive innovations in environmental law in Germany have come from the EC. But from an environmental perspective the implementation of EC law in Germany was often done in a manner that was not

very efficient and indeed somewhat dubious. Important innovative instruments of the EC, such as the Directive on the Freedom of Access to Information on the Environment, are based on a functioning society which incorporates "environmental interests" in administrative procedures and permits the general public to influence decisions. In view of the dominance of the discourse regarding economic problems and a more competitive situation (however real these factors may be), environmental protection is given low priority in comparison to employment arguments and economic interests in decision-making that requires the balancing of these interests. This means that control by society loses importance if the scope for environmental protection diminishes. It is necessary to at least substitute the "weak" controls by "general public opinion" with institutionalised rights to be heard and to object. If the scope for national environmental protection is dwindling because of international competition, there is obviously a necessity for international securing of minimum standards. These could be introduced at supranational level directly as environmental protection standards. In addition, however, adoption of social minimum standards and economic-political regulation by the EC would increase the scope for environmental protection in the national states. The responsibility for environmental protection should therefore not be delegated, but the discussion about environmental law instruments must involve more closely the necessary economic and social framework conditions.

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