# LUXEMBOURG SURVEY 2000-2001*

by

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## I. INTRODUCTION

The following contribution covers the main developments in Luxembourg environmental law between January 2000 and December 2001. The period under survey has been significantly influenced by two major changes in the legal and political landscape. The first is the creation, in 1997, of a system of administrative courts replacing the former judicial committee of the *Conseil d'État* (Council of State) (1) and the second is the change of government as a result of the 1999 elections (2). A brief presentation of these events may be useful so as to gain a better understanding of the different issues discussed below.

### 1. Creation of an administrative courts system

Following the French example, the Constitution of 1856 set up the *Conseil d'État* (Council of State), a body with a dual function: advisory and judicial. Its advisory function, which consists in deliberating on draft legislation and any amendments proposed thereto, is a consequence of the lack of an upper legislative chamber. As for its judicial function, a committee composed of eleven members chosen from the *Conseil d'État* was, until 1997, the court of first and last instance in administrative proceedings.

Time and again, subsequent governments attempted to reform the *Conseil d'État* in order to separate its legislative and judicial functions. The initiatives failed owing to the latter's opposition. It was finally a judgement of the European Court of Human Rights that opened the way for the long overdue reform.[1] The Strasbourg judges held that the mere fact that certain members of the *Conseil d'État* successively performed the two types of functions in respect of the same decisions is capable of casting doubt on the institution's structural impartiality. From this, they deduced that there had been a breach of Article 6 (1) of the European Convention on Human Rights.

After the revision of the relevant passages of the Constitution, Parliament could at last adopt an Act on the organisation of the administrative courts[2]. NGOs, especially those active in the field of environmental protection, welcomed the reform, because it was in keeping with what they had long been demanding. In fact Article 7 (2) establishes the framework in which NGOs of national

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1 **Procola v. Luxembourg**, European Court of Human Rights, 28/09/1995, notice A 326.

2 *Loi du 07.11.1996 portant organisation des juridictions de l'ordre administratif, Mémorial A 79 du 19.11.1996, p. 2262.*

importance may challenge administrative acts laying down general rules[3].

2. The aftermath of the 1999 elections

After the 1999 elections, the Socialist Party, which had governed for fifteen years without interruption together with the Christian Social Party, was replaced by the Democratic Party. As a result of lengthy negotiations, the new majority agreed on a government policy accord with rather ambitious environmental aims. The Government announced that it intended to adopt the principle of sustainable development as a guideline for all its actions, to reconcile environmental, economical and social interests and to promote high levels of protection at a European level.

But in spite of these announcements the coalition accord provoked a general outcry from national ecological circles. Two members of the Democratic Party, which has its traditional voters among industrialists and the business community, were appointed Minister and Secretary of State, respectively, for the Environment. It was feared that, when economic and environmental interests were in the balance, the former would prevail over the latter. Besides that, two important departments, water management and land use planning, which had formerly been attached to the Ministry of the Environment, came under the responsibility of Minister for Home Affairs. As far as water management is concerned - all the stages of the water cycle are referred to here - the new policy aims to gather in one single unit all the parties involved in water management. This unit has been placed under the responsibility of the Minister, who also exercises the supervision of the main actors in the field, i.e. the communes. On their own or jointly pursuant to the Act of 14 February 1900[4], the communes ordinarily deal with the production and distribution of drinking water as well as the treatment of wastewater. Land-use planning, a ministerial department on its own, which had previously been linked to the Ministry of the Environment, was also transferred to the Ministry of Home Affairs. The new Government declared that land use should be considered in the light of the principle of sustainable development and, in order to achieve this aim, the relevant responsibilities should no longer be gathered in one single Ministry (e.g. the Ministry of the Environment)[5]. This matter will be discussed in more detail below.

## II. ATMOSPHERIC POLLUTION

1. Protection of the climate

The Government declared its determination to pursue a comprehensive and proactive policy so as to attain two major aims: sustainable development and the protection of the climate. Pursuant to the European Union's commitment to reduce greenhouse gases by 8% (Community bubble), Luxembourg undertook to cut its emissions by 28 % between 2008 and 2012, compared with the 1990 level.

In May 2000, the Ministry of the Environment presented a paper mapping out a national

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3 M. Elvinger: «***À propos de la réforme du contentieux administratif après l'arrêt Procola***», *Bulletin du Cercle François Laurent n° 1 1996, Luxembourg*. E. Arendt: «***La longue marche des associations de défense de l'environnement au prétoire***», *Revue Européenne de Droit de l'Environnement n° 2 1998, CRIDEAU Limoges.*

4 *Loi 14 février 1900 concernant la création des syndicats des communes,* replaced with the *loi du 23 février 2001 concernant les syndicats de communes, Mémorial A 36 du 26.03.2001, p. 859.*

5 This principle had already been laid down by the National Plan for Sustainable Development (***Plan national pour un développement durable***, *Chapitre 3. Pour une dynamique mobilisatrice*) www.mev.etat.lu/

strategy[6]. The main thrusts of this strategy are:

- the promotion of sustainable energy sources;
- more efficient energy production;
- the reduction of energy consumption;
- the progressive introduction of a green levy on energy;
- a serious slowing down of the increase in road traffic and fuel consumption;
- intensified international co-operation, including implementation of the Kyoto mechanisms.

The Government committed itself to rapid ratification of the Kyoto Protocol, at the latest during 2002 (Rio +10). The relevant bill was actually adopted by the *Chambre des Députés* (Parliament) on 29 November 2001[7]. It seems however, as if the Government suddenly feared the possible consequences of its ambitious objective. In a press briefing, the Prime Minister stated that the agreement was not in accordance with Luxembourg's economic reality. And the Minister for Economic Affairs went even further when he said that the former Minister for the Environment, in agreeing to Luxembourg's ambitious targets, had accepted the risk of taking the country back into the Stone Age! Needless to say, these statements caused uproar amongst environmental NGOs. At present however, it does not seem that Luxembourg wished to renegotiate its reduction rate.

In the course of the period under survey, the action Luxembourg took to combat atmospheric pollution consisted essentially in implementing EC directives, some of which were long overdue:

- Grand-Ducal Regulation of 14 January 2000 on the indication of the consumption of energy by household lamps implements Directive 92/75 on labelling and standard product information;
- Grand-Ducal Regulation of 21 February 2000 relating to a reduction in the sulphur content of certain liquid fuels implements Directive 93/12 with the same aim;
- Grand-Ducal Regulation of 21 February 2000 relating to the quality of petrol and diesel fuels implements Directive 98/70 with the same aim;
- Grand-Ducal Regulation of 6 April 2001 relating to the availability of consumer information on fuel economy and $CO_2$ emissions on respect of the marketing of new passenger cars implements Directive 99/94 with the same aim.

A purely national initiative - the Grand-Ducal Regulation of 22 January 2001 - introduced the grant of budgetary aid to promote motor vehicles with low $CO_2$ emissions. Its success was rather limited because in fact only two makes of car, so-called 3 litre cars, were eligible.

## 2. The liberalisation of electric power

One of the most controversial bills adopted in the course of the last two years concerned implementation of Directive 96/92 concerning common rules for the internal market in electricity[8]. The drafting of the bill, which entered into force more than a year after the deadline, had to be delayed because the Presidency of the EC Council monopolised all the Ministry of Energy's human resources.

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6 ***Strategie nationale de réduction des émissions de gaz à effet de serre**, Luxembourg, mai 2000.*

7 *Loi du 29 novembre 2001 portant approbation du Protocole de Kyoto à la Convention-cadre des Nations Unies sur les changements climatiques, fait à Kyoto, le 11 décembre 1997 - Mémorial A 139 du 14.12.2001, p. 2865.*

8 *Loi du 24 juillet 2000 relative à l'organisation du marché de l'électricité - Mémorial A 79 du 21.08.2000, p. 1896.*

From the outset, environmental NGOs were very sensitive to the consequences which the liberalisation of the market in electricity might have on consumption levels and, consequently, on the reduction of greenhouse gases. They sharply criticised the bill in its final version[9].

The controversy focused on Article 15 on the organisation of access to the grid. Pursuant to paragraph 3, the transport or distribution system operator is only allowed to deny access in the case of insufficient transmission or distribution capacities. In this hypothesis, Article 20 makes it possible for electricity producers, electricity supply undertakings and the eligible customers concerned to use public property owned by the State and the communes for the installation of a direct line. NGOs fear that private enterprises might rely on this clause to appropriate public-owned property and that, in the long term, the result would be an undue proliferation of power lines.

Though their basic motivations might differ, ecologists and enterprises nonetheless agree that the Government must establish, in accordance with Article 22 of the Directive, a strong and independent control body, in order to maintain public service and to prevent any form of predatory behaviour. Moreover, NGOs are requesting a labelling system giving customers the possibility of choosing freely the energy source from which they want to buy electric power.

3. The promotion of sustainable energy sources

While discussing the bill on the organisation of the market in electricity the *Chambre des Députés* adopted several motions asking the Government to set up the appropriate environment for better market access for sustainable energy sources in the production of electric power. One of the leading environmental NGOs, the *Mouvement écologique*, was very satisfied with the MPS' initiative. It stressed the importance of redefining the mission of the national energy agency so as to give it responsibility for the promotion of renewable energy sources.

At the opening of the Environment Fair in autumn 2000, the Minister for the Environment and his Secretary of State announced a set of ambitious measures that should give renewables a decisive boost. Their statement was received with a lot of scepticism.

Nonetheless, the Government immediately got down to the task and on 17 July 2001 adopted a Grand-Ducal Regulation introducing an aid scheme for the promotion of the rational use of energy and the valorisation of renewable energy sources. The following investments are eligible for financial assistance:

- heating networks;
- connection to a heating network;
- condensing boilers;
- replacement of an electric boiler or an electric heating;
- heat pumps;
- combined heat and power systems;
- controlled ventilation;
- fuel cells.

The amount of aid varies between 500 € for the replacement of an electric boiler and 75,000 € for combined heat and power production by fuel cells.

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9 The initial proposal of the *Chambre des Députés* (Parliament) had hardly provoked discussion. It was the amendements of the Council of State, and particularily those concerning the dispute settlement in the case of refuse of access, that caused the annoyance of the NGOs, especially the *Mouvement écologique*.

On the legal basis of the 1993 Act concerning the rational use of energy, the Government also introduced an incentive premium for electricity produced by wind energy, hydropower, solar power, energy from biomass and from biogas[10]. In order to make investments profitable, the premium, which is calculated on the kilowatt-hour injected into the distribution net may be allocated for a period between ten and twenty years, depending on the source used. In the 2001 budget, 500,000 € was earmarked for this purpose.

## III. NATURE CONSERVATION

In order to establish future special conservation areas, an analysis of the existing data on fauna and flora in Luxembourg was made between 1993 and 1997. At present, the NATURA 2000 network takes up approximately 14.6 % of the national territory. The Government decided to rely mainly on contractual and voluntary measures agreed with landowners in order to preserve biological diversity in the areas covered by the network. Only in the case of failure to reach the aim through these measures, or if the latter proved insufficient, could parts of the network be declared protected areas for reasons of national interest. As such, they would fall under the more restrictive national provisions.

Those primarily concerned by these measures are farmers and foresters. The new Government wished to create the appropriate financial instruments to compensate for harvest waste and to remunerate them for their supplementary efforts to maintain a high level of protection. Although responsibility for the protection and maintenance of natural habitats is still with the Ministry of the Environment, it is now up to the Ministry of Agriculture to allocate about 80 % of the budgetary provision for aid in this field. The Environment Ministry kept responsibility only for subsidies helping to promote biodiversity in aquatic and urban environments. Two of the main NGOs in the field of the environment, the *Mouvement écologique* and the *Ligue nationale pour la protection de la nature et des oiseaux*, which argued that there was nothing left apart from «some scraps for ecological measures in built-up areas and in duck ponds» left the Supreme Council for the Protection of Nature and the Natural Resources.

A draft regulation based on Articles 33 and 35 of the Act of 11 August 1982 relating to nature protection and the protection of natural resources set up an aid scheme for the implementation of measures to safeguard natural habitats and endangered wild fauna and flora. In its opinion of 30 Mai 2000 the *Conseil d'État* stated that these provisions were not sufficiently precise for the purpose. The gap was subsequently filled by the Act of 24 July 2001 relating to support for rural development[11]. Chapter 10 makes explicit provision for a set of Grand-Ducal Regulations aimed at promoting agricultural practices in harmony with the natural environment and preserving biodiversity. Two Grand-Ducal Regulations laying down the details for the allocation of aid[12] are based on this Act. In order to appease the environmental defence associations, it has been decided

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[10] *Règlement grand-ducal du 28 décembre 2001 instituant une prime d'encouragement écologique pour l'électricité produite à partir de l'énergie éolienne, hydraulique, solaire, de la biomasse et du biogaz, Mémorial A 167 du 31.12.2001, p. 3615.*

[11] *Loi du 24 juillet 2001 concernant le soutien au développement rural, Mémorial A 90 du 02.08.2001, p. 1840.*

[12] *Règlement grand-ducal du 9 novembre 2001 instituant une prime à l'entretien du paysage et de l'espace naturel et à l'encourgement d'une agriculture respectueuse de l'environnement* and *Règlement grand-ducal du 9 novembre 2001 instituant un régime d'aides favorisant les méthodes de production agricole compatibles avec les exigences de la protection de l'environnement et de l'entretien de l'espace naturel - Mémorial A 135 du 23.11.2001, p. 2672* resp. *p. 2680.*

that the aid scheme will be carried out in close collaboration with the Ministry of the Environment.

Special protected areas (SPAs) pursuant to the Wild Birds Directive are also integrated into the NATURA 2000 network. They are accorded similar legal treatment to the areas covered by the Habitats Directive.

In its reasoned opinion of July 1997, the Commission argued that the surface area covered by SPAs was insufficient in Luxembourg. Consequently, the Minister for the Environment decided to include on the list every potential habitat. After a meeting in 1999, the Commission gave its consent to temporarily suspend the referral to the ECJ. However, progress did not come up to its expectations and, in March 2002, the Commission again addressed a reasoned opinion to Luxembourg. It criticised the failure to designate a number of bird sites as SPAs, as required under the Directive, and doubted whether the designated SPAs would benefit from a legal regime providing adequate protection.

In January 2000, the Commission had asked Luxembourg, by means of a reasoned opinion, to adopt the necessary legislative, regulatory and administrative provisions to implement the Habitats Directive correctly in its national legal system. Considering that the measures Luxembourg had proposed were not sufficiently clear and precise and that it had failed to prove beyond any doubt that the Directive was completely and correctly transposed into its national legislation, the Commission decided on 5 July to refer the matter to the ECJ.

In order to comply with its Community obligations, the Government tabled on 16 March 2001 a bill the aim of which is to replace the 1982 Act on nature protection and protection of the natural resources[13]. Notably article 1. extends the scope of the provisions, beyond the protection of the natural environment and the natural resources, also to the preservation of the biological diversity and the improvement of the biological equilibrium. Chapters 5 and 6 lay down provisions for the establishment of protected areas of Community interest (NATURA 2000 network) and protected areas of national interest. Chapter 7 establishes the procedure for the communes that intend to declare protected area part of their estate.

The bill has not yet been adopted by the *Chambre des Députés*, but it will in any case come too late to be taken into account in the pending proceedings concerning a Member State's failure to fulfil its obligations. In his opinion, delivered on 29 January 2002, the Advocate General proposed that the Court should declare that Luxembourg has failed to fulfil its obligations under the EC Treaty.[14]

## IV. WASTE MANAGEMENT

As a result of its booming national economy and high standard of living, Luxembourg is currently faced with a serious waste management problem. Because of the continuous rise in prices for development sites and growing public awareness of ecological problems, it is becoming more and more difficult to plan new landfills or incinerators.

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13 *Projet de loi portant : a) transposition en droit national de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages et de la directive 79/409/CEE du Conseil, du 2 avril 1979, concernant la conservation des oiseaux sauvages; b) modification de la loi du 11 août 1982 concernant la protection de la nature et des ressources naturelles - Chambre des Députés n° 4787.*

14 Case C-75/01, Commission v. Grand-Duchy of Luxembourg.

The «Haebicht» case is symptomatic of this kind of difficulty. The Federation of Luxembourg Industrialists (FEDIL) had complained for a long time that Luxembourg had no proper facilities of its own for the disposal of industrial waste. After different studies carried out by the Ministry of the Environment, a site that seemed appropriate to receive a national landfill for industrial waste was finally found: «Haebicht», a large piece of land close to a motorway, not far from the Belgian border. The people of the surrounding villages[15] rallied against the project and ordered studies refuting the project's alleged innocuousness for the environment and demonstrating that the quantity of potential waste had been greatly overestimated. The Government as well as FEDIL had at last to admit that better prevention and recycling policies would help to reduce waste substantially and that the remaining amount of waste did not justify the specified size of the project. Finally, on 17 July 2001, the *Chambre des Députés* adopted a law repealing the Act of 1993 relating to the creation of an industrial area of national importance at «Haebicht»[16]. NGOs and the public use the failure of this undertaking to oppose other landfill projects. Consequently, it has become virtually impossible to find a commune willing to accept even a tip for construction waste.

In 1999, a national waste management plan was drawn up with the co-operation of an external research bureau. The plan, which refers explicitly to Directive 75/442 of 15 July 1975 on waste, lays down the guidelines on which waste management should been based in future. It is made up of different sectoral plans depicting the actual situation and outlining the possible strategies for the various fields of waste management. The preliminary draft has been submitted to all those directly or indirectly concerned by waste management as well as to the European Commission. The final draft includes the various opinions, and it has been discussed in detail with the circles concerned. It was finally adopted by the *Conseil de Gouvernement* on 15 December 2000. A planned national information campaign should increase public awareness.

Nonetheless, the Commission held that Luxembourg failed to fulfil its obligations under Directive 75/442/EEC and Decision 94/3 establishing a list of wastes pursuant to Article 1a of the Directive (European Waste Catalogue - EWC). The EWC was incorporated into Luxembourg Law by a circular of the Minister for the Environment of 20 November 1998[17]. According to the Commission, the Decision was not correctly implemented by means of a ministerial circular which is binding on the administration but not on third parties. The Commission also criticised the introduction alongside the EWC of a purely national nomenclature differing from the EWC and having the effect of excluding the use of the EWC for a large number of operations. The ECJ regarded the Commission's action as well-founded and consequently found Luxembourg guilty of not complying with Community law[18].

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15 The citizens' action group (*Biergerinitiativ*), formed with the aim of opposing decisions of national or local authorities, has a long tradition in Luxembourg. The most famous of them, the *Biergerinitiativ Museldall*, wrecked the plans of the then Governement to build a nuclear power plant in the Mosel Valley. Every road project of a certain size, every planned landfill and most industrial projects have their *Biergerinitiativ.* This brought the Minister for Home Affairs to state that one had to decide whether the land-use planning was decided by the sum of the 118 *Biergerinitiativen* or if it depended of some other structure.

16 *Loi du 17 juillet 2001 portant abrogation de la loi du 27 juillet 1993 concernant - la création de la zone industrielle à caractère national Haebicht; - la création et la gestion de la décharge nationale pour déchets non ménagers et assimilés - Mémorial A 87 du 31.07.2001, p. 1780.*

17 *Circulaire ministérielle du 20 novembre 1998 portant introduction d'une nomenclature des déchets - Mémorial A 108 du 22.12.1998, p. 2548.*

18 Case C-196/01, Commission v. Grand-Duchy of Luxembourg.

## V. WATER PROTECTION

### 1. Urban wastewater treatment

A Grand-Ducal Regulation of 13 May 1994 implementing Directive 91/271/EEC concerning urban wastewater treatment classifies the whole national territory as an area sensitive to eutrophication[19]. This means that for agglomerations of more than 10,000 p.e. collection systems had to be provided by 31 December 1998 at the latest. Moreover, discharges from urban wastewater treatment plants must be subject to more stringent treatment. Of the existing ten plants, only two are already up to standard, and the Government is making a great deal of effort to remedy this situation.

In Luxembourg, responsibility for the treatment of wastewater lies with the public authorities. The Water Protection Act of 29 July 1993 and the Grand-Ducal Regulation of 13 May 1994 prohibit the discharge of wastewater - even after it has been treated in a sewage treatment plant - into surface or ground waters without ministerial authorisation. The Minister for Home Affairs, who is also responsible for water management and water protection, systematically refuses to grant authorisation to private bodies. In practice, it falls to local authorities to build the infrastructures that are necessary for the treatment of urban wastewater. Under the previous Government, the costs of construction and/or modernisation of water treatment facilities was co-financed up to 90 % through an environmental protection fund. After the transfer of responsibility[20] for water management to the Ministry of Home Affairs, it also became necessary to adapt the relevant legal framework. The Act of 24 December 1999 establishing the State budget for 2000 set up a water management fund modelled on the environmental protection fund that is under the authority of the Minister for Home Affairs. A specific law approving a construction project becomes necessary each time the co-financing of the State exceeds 7.5 million Euros.

### 2. Rainwater collection

Frequent flooding, especially in spring and autumn, drinking water shortages in summer and the growing cost of water denitrification have heightened awareness of the need for better water management. In order to promote the substitution of drinking water by rainwater for all uses where drinking water is not essential, the Government introduced budgetary aid for private individuals for the installation of infrastructure for collecting rainwater[21]. The Minister for Home Affairs refused to renew the subsidy after the expiry of the regulation on 31 December 2000. His arguments were in particular the risk of a microbiological contamination of drinking water, the lack of a conclusive proof about actual saving of drinking water, and the difficulty of taxing wastewater in accordance with the polluter-pays principle. The parliamentary committee on home affairs refuted these arguments on the basis of a scientific opinion commissioned by the *Mouvement écologique* and asked the Minister to reverse his decision. At the present time, no decision has yet been taken in this respect.

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19 Règlement grand-ducal du 13 mai 1994 relatif au traitement des eaux urbaines résiduaires - Mémorial 1994 A, p.931.

20 See supra I. 2.

21 *Règlement grand-ducal du 6 mai 2000 concernant l'allocation d'une aide budgétaire aux particuliers pour la mise en place d'une infrastructure de collecte des eaux de pluie - Mémorial A 42 du 02.06.2000, p. 960.*

## VI. LAND USE

Right from the beginning of its industrialisation, at the end of the 19th century, Luxembourg's economy depended on foreign labour. Successive waves of immigrants settled close to their workplaces, mainly in the south and the centre of the country. After the decline of the iron and steel industry the economy was directed towards the tertiary sector: banking, insurance, IT, consulting, etc. Because of the sector's rapid development, the reserve of skilled local labour was soon exhausted and employers either hired workers from the border regions or, in the case of company transfers, brought their staff with them. The consequence of the latter was a rapid increase in population, whereas the former is responsible for an ever-growing stream of commuters. Foreigners make up about 37.5 % of the current population of around 450,000. In addition, some 90,000 frontier dwellers from France, Germany and Belgium travel to their workplace in Luxembourg every day. Both phenomena are the cause of intensive construction activity: accommodation, offices and new roads have a dramatic impact on land use, especially in the areas around the capital.

The Act of 1999 concerning land-use planning[22] is supposed to help solve the problem. It is aimed at achieving its goal by means of general, regional and sectoral guidelines for spatial planning, as well as by means of land-use plans. The land-use programme establishes the general orientations and the Government's top priorities with regard to the sustainable development of the standard of living of the population, the enhancement of human and natural resources and the development of economic activities. One may however doubt whether these aims can be achieved. At least as far as the sustainable development of natural resources is concerned, it seems as if the Government had no clear ideas about this matter.

In order to maintain the current economic growth, the population will have to increase continuously. Triggered by the former Minister for Economic Affairs, who compared Luxembourg's population density with the far higher one of the German Land of Saarland, the debate over 700,000 or more inhabitants was relaunched by the Prime Minister during the discussion of the funding of the national pension scheme. At the present time, the Government still owes an explanation on how this vision fits in with the National Plan for Sustainable Development, upon which the coalition program of the current political majority is based[23].

The case of the motorway link between the South Distributor Road and the German road network discussed below illustrates the difficulties Luxembourg will have to face in the future.

## VII EIA IN CASE LAW

Luxembourg, like most Member States, encounters serious difficulties in implementing Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA). National authorities in particular are reluctant to stick to the stipulated procedure. The public, too, still has little awareness of these provisions, which are split between several laws and regulations. Although one NGO tried several times to draw the Commission's

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22 *Loi du 21 mai 1999 concernant l'aménagement du territoire - Mémorial A- 61 du 03.06.1999, p. 1401.*

23 «With regard to the environment, the principle of sustainable development shall guide the Government in all its actions.» - Coalition Agreement between the Christian Social Party (CSV) and the Democratic Party (DP) of August 1999, Chapter 8 - Ministry of the Environment.

attention to road projects that it believed were being carried out in infringement of the Directive, its complaints did not give rise to an investigation, at least not immediately.

1. The motorway link with Saarland

Things changed dramatically when the State attempted to expropriate a farmer in order to use his land to build a motorway link with Saarland. Since the owners refused to sell their plots of land situated on the route of the future motorway, the State instituted expropriation proceedings before the *Tribunal d'Arrondissement de Luxembourg*. In defence, the respondents contended in particular that Articles 5(1) and 6(2) of the Directive had not been complied with in that the project had not been preceded either by an environment impact study or by a public inquiry, as required by the Directive. The *Tribunal* suspended proceedings and referred the matter to the ECJ for a preliminary ruling under Article 177 (now 234) of the EC Treaty[24].

Besides questions on the appraisal of the direct effect of the Directive, the *Tribunal* essentially asked for clarification of the meaning of the terms «specific act of national legislation» and «project», as used in Article 1(5) of the Directive. As a matter of fact, by the same Law, the Luxembourg legislature had simultaneously transposed the Directive in part, by requiring an environmental impact study to be carried out for the construction of certain roads[25], and authorised in principle the construction of the motorway link with Saarland. When the draft Law was voted on, two possible routes (the northern option and the southern option) were still under discussion. By Grand-Ducal Regulation of 21 November 1996 approving plans of parcels of land subject to compulsory acquisition, the Government selected the southern option. The national court asked whether a measure adopted by a parliament after public parliamentary debate is to be regarded as a specific act of national legislation within the meaning of Article 1(5) and whether the Directive is to apply to a motorway-building project, adopted by a decision of parliament after a public parliamentary debate, but without laying down its route.

In its judgment of 19 September 2000[26], the ECJ confirmed one of its earlier rulings[27]. It recalled that Article 1(5) should be interpreted having regard to the objectives of the Directive and to the fact that, since it is a provision limiting the Directive's scope, it must be interpreted restrictively. The justification for the exception is set out in Article 1(5) itself. That provision states that the Directive does not apply «since the objectives of the Directive, including that of supplying information, are achieved through a legislative process». Thus, it is only where the legislature has available to it information equivalent to that which would be submitted to the competent authority in an ordinary procedure for authorising a project that the objectives of the Directive may be regarded as having been achieved through the legislative process.

The ECJ also ruled that a national court, called upon to examine the legality of a procedure for expropriation in public interest, may review whether the national legislature kept within the limits of the discretion set by Directive 85/337, in particular where prior assessment of the environmental impact of the project has not been carried out, the information gathered in accordance with Article 5 has not been made available to the public and the members of the public concerned have not had an opportunity to express an opinion before the project was initiated.

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24 *Jugement civil n° 828/98, numéro 61797 du rôle.*

25 *Loi du 31.07.1995 modifiant et complétant la loi modifiée du 16.08.1967 ayant pour objet la création d'une grande voierie de communication et d'un fonds des routes - Mémorial A 1995, p. 1810.*

26 Case C-287/98, State of the Grand Duchy of Luxembourg v. Linster, 19.09.2000.

27 Case C-435/97 WWF and Others v. Autonome Provinz Bozen and Others.

Shortly before this judgment, the Commission - which had at first been wavering - continued with a complaint lodged by several persons - including the respondents in the Linster case - arguing that the provisions of Directive 85/337 had not been complied with in the case of the construction of the motorway link with Saarland[28]. By letter of 25 July 2000, it addressed a reasoned opinion to Luxembourg stating that the Member State had failed to fulfil its Community obligations by failing to inform and consult the public concerned by the project and, consequently, not taking their views into account prior to the adoption of the project. It requested that Luxembourg comply with the reasoned opinion within two months.

Luxembourg halted the expropriation proceedings. However, it proceeded with the construction work, except on the land that had been the cause of the lawsuit. Concurrently, the relevant ministerial services drew up a new bill relating to the construction of a road link with Saarland that this time had to meet the requirements of Article 1(5) of Directive 85/337[29]. In any case, the law will be a mere *ex post* regularisation, since the objective of Article 6(2), namely that Member States shall ensure that «the public concerned is given the opportunity to express an opinion before the project is initiated», can no longer be achieved.

2. Failure to implement Directive 97/11

Besides the difficulties Luxembourg experiences with the practical implementation of Directive 85/337 in the case of this motorway link, it has also failed to bring into force, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Directive 97/11 of 3 March amending Directive 85/337. Following the opinion of the Advocate General at the sitting on 25 October 2001, the ECJ declared that the Grand-Duchy of Luxembourg had failed to fulfil its obligations under the first subparagraph of Article 3(1) of that Directive and under the EC Treaty[30].

3. The national airport case

The provisions of Directive 85/337 were also of importance in another case, this time before the *Tribunal administratif* (Administrative Court)[31]. The Act of 5 June 1981 authorised the Government to carry out extension work at the national airport. The main runway was extended from 2,830 m to 4,000 m. At that time, the extension work had been declared of public utility and exempted for that reason from the public consultation procedure provided for by the Act of 1979 relating to dangerous, unsanitary and nuisance-causing establishments. The Act of 11 July 1996 authorised the Government to extend the air terminal buildings so as to be able to receive an increased number of passengers. When the *Chambre des Députés* voted on that Act, it also carried a motion calling on the Government to present a global impact assessment and to carry out a procedure pursuant to the 1990 Law on dangerous, unsanitary and nuisance-causing

28 Complaint 97/4773.

29 *Loi du 16.11.2001 relatice à la construction d'une liaison avec la Sarre - Mémorial A138 du 07.11.2001, p. 2732.* The Act is composed of four articles to which are added four appendices describing the project in detail. The conditions and implementing measures of these appendices are adopted by way of Grand-Ducal Regulation - *Règlement grand-ducal du 7 décembre 2001 portant exécution de l'article 4 de la loi du 16 novembre 2001 relative à la construction d'une liaison routière avec la Sarre - Mémorial A 171 du 31.12.2001, p.3814.*

30 Case C-366/00, Commission v. Luxembourg, 19.02.2002.

31 *Tribunal administratif, 14 mars 2001, n° 11940.*

establishments[32].

The public works administration requested authority to erect several buildings at the airport and to extend the tarmac in the immediate vicinity of the new buildings. A public inquiry was carried out in two of the four communes close to the airport.

The plaintiffs argued that the procedure was incomplete insofar as the request confined itself to the compatibility of the buildings with the relevant Law and did not give any information on the nuisances generated by airport activities as a result of the changes. It therefore did not comply either with the motion of the *Chambre des Députés*, or the Law of 9 May 1990, or to the Community obligations in that field, namely those stipulated by Directive 85/337.

The court held that the extension of the air terminal with the aim of receiving an increased number of passengers would necessarily lead to more intense airport activity. Because of the drawbacks for the public as a result of more frequent takeoffs and landings, the alterations to the existing infrastructures must be considered to be substantial and, consequently, an impact assessment for the whole of the airport has to be made.

4. Case involving several horizontal measures

The case discussed below is particularly interesting, since it treats concepts which feature in various Directives.

For its power supply, Luxembourg depends largely on imports from Germany and, to a lesser extent, also from Belgium. National power production is rather insignificant. In the early 1970s, the then Government wanted to remedy this situation by building a small nuclear power plant on the Moselle[33]. The citizens' action group opposed to these plans rallied later with French, Belgian and German opponents to the construction by the French EDF of four large nuclear power plants on the French bank of the Moselle. This protest movement gave birth to an environmental NGO, *Jeunes et Environnement*, later renamed *Mouvement Écologique*. The anti-nuclear origins of this NGO explain its commitment to alternative energy production, and the combined heat and power system was one of its most favoured solutions. It therefore welcomed the decision of the then Minister for Energy to meet the growing demand of the steel industry, which had just converted to all-electric smelting, by building a power station with a combined gas and steam turbine system producing electric power, process steam and heat - hereafter referred to as a GST station, close to the steel mills.

Greenpeace, which was in principle also a supporter of the combined heat and power system, criticised however the dimension of the project, i.e. 350 MW of electrical output. It pointed out that there was as yet no potential customer for heat and process steam in the vicinity and that, anyway, it would be difficult to find a buyer for the quantities produced by such a large power station. It therefore argued that the construction of several smaller plants would permit a more efficient use of heat and process steam. The Minister for Energy defended the choice, arguing that every MW of power generated by the GST station would save the same amount of nuclear power and that, anyway, a large plant was more cost-effective than a smaller one. In order to verify the latter point, the NGO invoked the Act of 10 August 1992 introducing into Luxembourg law Directive EEC 90/313 on the freedom of access to information on the environment, so as to request an economic survey, which was carried out by KPMG consulting. The Minister refused to

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[32] *Loi du 09.05.1990 relative aux établissements dangereux, insalubres ou incommodes - Mémorial A 1990, p.310*. This Act implemented partially Directive 85/337. It was subsequently replaced by *Loi du 10.06.1999 relative aux établissements classés - Mémorial A 100 du 27.07.1999, p. 1904*.

[33] See *supra* footnote 15.

comply under the pretext that the document in question did not contain environmentally relevant information and that it had not been commissioned by the Ministry but by the promoter of the project, which is a private body.

Greenpeace challenged the refusal before the *Tribunal administratif*. It also instituted proceedings before this court against the Minister for Labour and Employment and the Minister for the Environment for having authorised *S.A. Énergie et Environnement*, acting on behalf of S.A. TWINERG, to build and operate a power station with a combined gas and steam turbine system.

In the first case[34] the *Tribunal administratif* ruled that the fact that the survey had been carried out on behalf of a private body did not automatically rule out the possibility of handing it over to the applicant. Since the Government had acknowledged being in possession of a copy, it was up to it to comply with the request. It also held that the right of access to environmental information was the rule and that commercial and industrial confidentiality, including intellectual property[35], was the exception. Consequently, it ordered the Ministry to hand the disputed survey over to Greenpeace.

In the case concerning authorisation, Greenpeace argued that since neither the heat nor the process steam would be used, CO2 emissions would not be reduced as far as possible. Consequently, the GST station, in its present state, could not be considered to be the best available technology. By decision of 12 July 2000, the *Tribunal administratif* suspended proceedings and asked two experts to carry out an appraisal of whether the projected plant would generate electric power according to the best available technology without leading to excessive production costs.

In substance, the experts concluded that the overall efficiency of 75 % did not correspond to the best available technology. 85 % efficiency is well within the range of stations of this kind. Nonetheless, as far as electric power alone is concerned, 57 % efficiency is the best result that any power plant can attain.

Greenpeace argued that the term «best available technology» must be given an autonomous interpretation within the meaning of Directive EC 96/61 concerning integrated pollution prevention and control . Article 2(11) defines the term «best available techniques» as follows: «The most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and the impact on the environment as a whole».

The defendant referred to the experts' appraisal stating that 57 % efficiency for electricity is the best result a power plant can attain and argued that the court could not be used as a forum for discussing the appropriateness of a political choice.

In its judgment[36], the court recalls that considerations relating to a political or economic choice do not fall within its jurisdiction. And it goes on: «One might rightly regret the decision of the operator not to use all the potential performances of the power plant, which is a waste from an economic as well as a political viewpoint. Nevertheless, the actual operation of the plant, though deficient in absolute terms, constitutes the best available technology by comparison with other stations with the same [electrical] output.»

Greenpeace appealed against this decision. It rejects the hypothesis of the court of first instance, according to which the choice is an economic or political one and thus does not fall within its

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34 *Tribunal administratif, 10 novembre 1999, n° 11147*.

35 Directive ECC 90/313 on the freedom of access to information on the environment, article 3(1), dash 4.

36 *Tribunal administratif, 10 décembre 2001, n°11322*.

jurisdiction. According to the NGO, the Luxembourg legislature must take into account the provisions of Directive EC 69/61, as Article 22 stipulates that this directive comes into force on the twentieth day following its publication, e.g. 31 October 1996. It suggests that the Court of Appeal ask the ECJ whether a power plant whose developer has given the public concerned the opportunity to express an opinion on three possible operating modes and has opted for the least efficient choice, corresponds to the best available technology, as stipulated in Directive EC 69/61.

## CONCLUSION

In a world where small is no longer beautiful, Luxembourg, with its 2,600 square kilometres and its 450,000 inhabitants, is faced with serious problems in achieving its goals with regard to sustainable development and in discharging its Community obligations properly. In spite of synergies in various fields with neighbouring regions and notwithstanding its successful attempts to focus efforts on a restricted range of key activities, the country's human resources are no longer sufficient to cope with the tasks nowadays incumbent on a sovereign State.

With regard to sustainable development, Luxembourg has the choice between Scylla and Charybdis: either it uses its limited natural resources sparingly in order to preserve them for coming generations, or it tries to ensure that its economy keeps the critical mass it needs to survive in a more competitive global environment. The third pillar of sustainable development, social security in the broad sense of the term, causes another headache. The constellation of an ageing population with a high standard of living means that this pillar competes strongly with the other two. Unless Government as a whole makes ecological problems one of its priorities and convinces the public that considerable efforts will be necessary to preserve at least part of what is left of natural wealth, sustainable development will perhaps be achieved, but most probably without its environmental dimension.

The current tendency towards ever increasing economic concentration is pushing small countries into an almost inextricable situation where they must keep consumption of their resources under control while simultaneously trying to keep pace with general developments. Luxembourg is an example for other EU Member States in that, if the actual prevailing trend persists, they also sooner or later risk reaching the boundaries of their possibilities. The setback of the post-68 ecological movement in the nineties, when social insecurity and unemployment plagued European society, has clearly shown what takes priority when economic or social factors compete with environmental needs. Thus, the acknowledgement that «Trees have neither standing nor a lobby» is still relevant.

FURTHER READING

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