Policy Networks and EC Environmental Policy: A Case Study of the Implementation of the Drinking Water Directive in the UK

Donald McGillivray

Lecturer in Environmental Law

Kent Law School

Eliot College

University of Kent at Canterbury

Kent CT2 7NS

Tel: 01227 823343 (voicemail); 01227 827636 (office)

Fax: 01227 827831

Email: D.M.McGillivray@ukc.ac.uk

Departmental Web-site: http://snipe.ukc.ac.uk/law/

Prepared for presentation at the panel "Policy Networks and European Integration" at the 1997 European Community Studies Association Conference, Seattle, USA, 29 May - 1 June 1997

This paper is based on work originally conducted with Dr Ian Bache, Sheffield University. The present author gratefully acknowledges the financial support of the British Academy, and of his department, in making attendance at this conference possible.

Introduction

This paper considers the impact of EC legislation on the law, practice and politics of water policy implementation in the UK focusing in particular on the 1980 Drinking Water Directive,[1] a Directive which has prompted Government Ministers and others to question publicly the merits of EC intervention.[2] In our view, implementation is a key stage of the legislative process which cannot be taken as a straightforward administrative follow-on from policy decisions but a stage which can have a significant impact on policy outcomes. Here, we focus on practical rather than formal implementation.

The importance to be attached to implementation is strengthened when applied to the emerging system of governance in the European Union. Here the European Commission, charged with the responsibility of overseeing the implementation of EC policies, is in practice highly dependent on national governments for policy implementation. The implementation stage thus provides Member States with a second opportunity, after agreement in the Council of Ministers, to frustrate EC policy objectives it opposes.

---

[1] Directive 80/778/EEC relating to the quality of water intended for human consumption, OJ L229/11, 30.8.80, henceforth "the Directive" or "the 1980 Directive". In this paper we focus on the impact of the Directive in England and Wales.

[2] At the Environment Council in Autumn 1993, Tim Yeo, then Environment Minister, suggested that the EC should never have legislated on drinking water and would not have done so if provisions relating to subsidiarity had then been in place; see Jewkes, "The principle of subsidiarity: its effect on existing and future EC environmental regulation", 6 Environmental Law and Management (1994), 165-167, at 166.

While national governments have been regularly described as 'gatekeepers' between the EU and their domestic systems,[3] this metaphor has traditionally been applied only to policy bargaining at EU level. Here we extend this metaphor to ask whether, and if so how and to what effect, the UK Government has sought to play the gatekeeper role in relation to EC drinking water law at the implementation stage.

To guide our examination of the implementation process we refer to the 'Extended Gatekeeper' framework.[4] We argue that despite the Directive setting down seemingly firm legal limits for drinking water quality in the EC, the Government has still found it possible to maintain quite tight control over the drinking water sector, not least through retaining a relatively firm hand over the enforcement of drinking water law. The Directive has moved drinking water policy away from the close confines of the professional networks of engineers that previously dominated the sector, enabling new actors to gain prominence. But central government remains the dominant actor, something the Commission's recent proposals for revision of the Directive looks set to consolidate rather than erode.

The Extended Gatekeeper Framework

---

[3] Hoffmann, "Obstinate or Obsolete? The fate of the Nation State and the Case of Western Europe", 95 Daedalus (1966), 862-915; Bulmer, "Domestic Politics and European Community Policy-Making", 21 J. Common Market Studies (1983), 349-363.

[4] As developed by Bache. See *EU Regional Policy: Has the UK Government Succeeded in Playing the Gatekeeper Role over the Domestic Impact of the European Regional Development Fund*, PhD Thesis, University of Sheffield, 1996.

The Extended Gatekeeper framework developed from a study of the implementation of EU structural policy.[5] It is best understood as a response to attempts at a general theory of the EU policy process based largely on EU level decisions.[6] The emphasis on EU level processes in these models and under-theorisation of implementation as an integral part of the policy process provided an incomplete picture of the influence of the actors involved. Yet to provide a general model of EU policy-making which accounted for implementation would be an enormous task, requiring a detailed account of the distribution of power within each of the Member States. In recognition of this, the Extended Gatekeeper approach is concerned with examining the actions of individual governments in response to specific issues or legislative measures. While this approach reduces the possibility of generalisation from case studies, it improves precision. The relevant aspects of the Extended Gatekeeper approach for this study can be summarised as follows.

1. EU policy is made in related stages which link initial policy decision to policy outcome. While in practice it can be difficult to distinguish the point in that process where policy initiation ends and implementation begins, for analytical purposes it is helpful to make a distinction between policy-making at EU level and the implementation process which is largely a domestic matter (albeit supervised by the Commission).

---

[5] Ibid.

[6] See Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmental Approach", 31 J Common Market Studies (1993), 473-524; 1993, Marks, "Structural Policy and Multilevel Governance in the EC", in Cafruny and Rosenthal (eds), *The Maastricht Debates and Beyond*, vol.2 in *The State of the European Community* (1993), 391-410.

2. When a Member State perceives its interests to be threatened by an EU policy development it will defend those interests at *all* stages of the policy process at which the threat is identified, including implementation. This is the notion of the Extended Gatekeeper.[7]

3. EU policy-making involves a process of bargaining at both the EU-level and the implementation stage.

To understand the bargaining process, this approach utilises the policy networks approach, the main features of which are summarised in the paper by George. This paper assesses the impact that EC drinking water law has had on domestic policy networks in the UK, with particular reference to legal issues surrounding its implementation.

EC Drinking Water Law

The original proposal for EC legislation to regulate standards of drinking water quality dates back to 1975. Following difficult and protracted negotiations,[8] the Directive was eventually adopted in 1980. Although the Directive was enacted as a trade harmonisation measure under Article 100 of the Treaty of Rome, it has a basis also in Article 235, promoted as an

[7] The definition of a Member State's interests on a particular issue may change over time and may be influenced by a range of actors within and outside government. The Core Executive Studies approach can be applied here; see Dunleavy and Rhodes, "Core Executive Studies in Britain", 68 Public Administration (1990), 3-28.

[8] Involving 52 working group meetings. See Krämer, "The Elaboration of EC Environmental Law", in Winter (ed.), *European Environmental Law: A Comparative Perspective* (1996), pp.297-316, at pp.310-311.

'environmental' measure to secure improved public health and with early origins in the First Action Programme on the Environment of 1973.[9] But while the standards require sources of potable supply to be sufficiently free from contamination to allow inexpensive drinking water treatment,[10] it is also evident, as we discuss below, that the Directive itself has had little *direct* impact on the quality of the natural aquatic environment.[11]

The standards in the Directive are based on, but in some cases exceed, guidelines from the World Health Organisation (WHO) dating from 1970.[12] The Directive lays down 62 different standards (usually Maximum Admissible Concentrations or 'MACs') for water for human consumption or for the purposes of food production, except for natural mineral waters which are covered in other legislation.[13] Non-mandatory guide levels are also set down for 29 of the

[9] OJ C112/1, 20.12.73.

[10] Ward, Buller and Lowe, *Implementing European Environmental Policy at the Local Level: The British Experience with Water Quality Directives. Volume II: Research Report* (1995), p.97.

[11] Directive 75/444/EEC provides for the classification of surface waters used for drinking water supply, and seeks to ensure that supplies are given sufficient treatment according to quality on abstraction (OJ L194/26, 25.7.75). In England and Wales see the Surface Waters (Classification) Regulations 1989, SI 1989 No. 1148. However, this measure has had little impact on improving the quality of water in the natural environment used for potable supply.

[12] World Health Organization, *European Standards for Drinking Water* (1970), 2nd ed.

[13] Directive 80/777/EEC on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters, OJ L229, 15.7.80.

parameters,[14] while Minimum Recommended Concentrations are set for 4 parameters in relation to softness of water. Stricter measures may be imposed by Member States.

That the terms of the Directive exceed the then WHO guidelines can be traced to concerns surfacing at the time in relation mainly to pesticides (especially DDT) and nitrate levels. The Directive itself, though, is silent as to how individual parameters were justified.[15] As Faure remarks in relation to organochlorine pesticides,

> "for practical reasons the standard was set at the minimum concentration ... that could be detected by the analytical methods available at the time ... and there was no evidence that the proposed standard was in danger of being exceeded because for many pesticides the level of analytical detection was not sufficiently sensitive."[16]

[14] It would seem that the UK Government is not greatly interested in the guide levels, although the water suppliers are reported as seeking to stay well within the imperative levels, for example by having operating systems alert concentrations well within the MAC (see Ward et al, op. cit. note 19, p.117). In relation to the Bathing Water Directive (76/160/EEC), the High Court recently heard from the National Rivers Authority that guideline values stated there were "not applied by the UK Government," though ultimately the judge decided that the applicants had failed to prove that the NRA had not had regard to them (see *R.* v. *National Rivers Authority ex parte Moreton*, ENDS Report 250 (1995), 43-44).

[15] Faure, "The EC Directive on Drinking Water: Institutional Aspects", in Bergman and Pugh (eds), *Environmental Toxicology, Economics and Institutions* (1994), 39-87, at 52.

[16] Faure, "Protecting Drinking Water Quality Against Contamination by Pesticides: An Alternative Regulatory Framework", 4(4) RECIEL (1995), 321-326, at 322.

A number of suggestions have been advanced for explaining the willingness with which the UK Government embraced the Directive without internal dissent.[17] Although there were initial concerns about the proposed lead standards and anticipated problems in meeting the nitrate parameter, these did not prevent adoption of a Directive which departed radically from a domestic policy tradition of "hostility" to statutorily prescribed standards.[18]

One suggestion points to the then widely-held view that non-compliance with agreed provisions would present few legal or political difficulties.[19] Alternatively, it has been suggested that "the idea that British water might not be clean enough to pass tests which would also have to be met by continentals with supposedly dirtier water probably did not occur to the British Government."[20] There may be some truth in both views. While the Government saw itself as a leader rather than a laggard in the provision of clean water supply, no problems were anticipated in resisting the European Commission should EC standards not

---

[17] Interview with Lord Clinton Davies, 4 Water Law (1993), 177-179, at 178. More time seems to have been spent contemplating whether water authorities would have sufficient legal powers to enter properties to carry out their monitoring obligations than on how much the Directive would cost to implement: see HC Papers 1975-76, 53-I; 8-xiii; 8-xxxix; and 1978-79, 10-x; and HL Papers 1975-76, 111. At the time, the House of Lords Select Committee on the European Communities looked into the use of Article 100 in questionable areas, for example bathing water and shellfish water quality, but did not question the Directive as being *ultra vires* the powers and objectives of the Treaty of Rome ("Approximation of Laws under Article 100 of the EEC Treaty", Session 1977-78, 22 Report, HL 131, April 1978).

[18] Richardson, Ogus and Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (1982), p.42.

[19] Richardson, "EU Water Policy: Uncertain Agendas, Shifting Networks and Complex Coalitions", 3 Environmental Politics (1994), 139-167, at 143.

[20] Haigh and Lanigan, "Impact of the European Union on UK Environmental Policy Making", in Gray (ed.), *UK Environmental Policy in the 1990s*, pp.18-37, at p.22.

be met on time. In the context of its time, this anticipation was perfectly logical, with policy implementation - as against legislative adoption - remaining low on the Commission's agenda during the first ten years of EC environmental policy.[21] Moreover, the five-year period eventually agreed for practical implementation of the 1980 Directive allowed until July 1985 for adjustments, while further room for manoeuvre was given by the possibility of delays and derogations contained within the Directive.

Implementing the 1980 Directive: the UK Experience

Formal compliance with the Directive was required by July 1982. In September 1982 the UK Government informed the Commission it would implement the Directive through Department of the Environment Circular 20/82. This provided, with reference to minimum standards required under the Directive, the first quantified definition of the term 'wholesome', used to describe water of acceptable drinking quality. Previously, disputes between suppliers and local authorities over the definition of wholesome had been referred to the Secretary of State for judgement. Thus, for the first time, quality standards were prescribed in legally-binding terms to facilitate compliance with the Directive by the then water authorities and existing private water companies in relation to supply, and local authority in relation to monitoring.[22]

---

[21] Ibid., p.19. See OJ C127, 14.5.84.

[22] Under the Water Act 1973, section 11. This development is an important part of what Macrory identifies as the new policy formalism pervading UK environmental law, "Environmental Law: Shifting Discretions and the New Formalism", in Lomas (ed.), *Frontiers of Environmental Law* (1991), pp.8-23.

The provisions of the Directive were later incorporated into the Water Supply (Water Quality) Regulations 1989, made under the Water Act 1989.[23]

No account of the impact of the Directive would be complete without discussion of practical compliance. As noted earlier, an assessment of practical compliance is essential in testing the notion of the Extended Gatekeeper in the drinking water sector. We consider the key issues in regard to actual litigation below, but before this it is necessary to consider the impact of EC water law generally on the UK Government's attempt to privatise the water industry in England and Wales. The episode is instructive, serving to illustrate the crucial role of EC law and institutions in national decision-making. But at the same time it also shows the continuing importance of central government, both in negotiating the privatisation legislation with the Commission and in the residual power it has sought to maintain in domestic legal provisions.

Privatisation and the Drinking Water Directive

[23] SI 1989/1147 (as amended in 1989 and 1991), made under s.52, Water Act 1989. See also the Drinking Water in Containers Regulations 1994 (SI 1994, No. 743), made under the Food Safety Act 1990. Note, however, the important difference between the legal obligation to supply "wholesome" water, and the offence under s.70 of the Water Industry Act 1991 of supplying water "unfit for human consumption". The latter is a smaller category. Unlike pollution of water in the natural environment (see s.85(6) Water Resources Act 1991), there is no 'technical' offence of breaching drinking water quality limits. There is, in any event, a 'due diligence' defence in relation to drinking water which there is not with water more generally.

"The requirement formally to comply with the Directive had a considerable impact on the Government's plans to privatise the ten water authorities in England and Wales."[24]

In its White Paper of 1986, the Government had proposed the transfer of water authorities into the private sector complete with environmental regulatory powers.[25] However, the threat of legal action before the Court of Justice under an Article 177 reference, challenging the proposed status of private water companies as 'competent authorities' for certain water Directives, was of an obvious threat to a successful floatation.[26] Indeed, civil servants at the Department of the Environment informally approached the then Director of the Council for the Preservation of Rural England - a prominent pressure group which had sought leading counsel's opinion in the matter[27] - to assess the likelihood of such an action being brought.[28] The high political salience attached to privatisation forced the Government in 1987 to revise its proposals, resulting in the eventual establishment of the National Rivers Authority (NRA), responsible for the quality of water in the natural environment, and the Drinking Water Inspectorate within the Department of the Environment to audit drinking water quality.[29] In

---

[24] Haigh, *Manual of Environmental Law* (looseleaf, updated), 4.4-6.

[25] *Privatisation of the Water Authorities in England and Wales*, Cmnd 9734 (1986).

[26] See OJ L129/23, 18.5.86.

[27] Jacobs and Shanks, *Joint Advice. Re: Water Authority Privatisation* (unpublished opinion).

[28] Private correspondence referred to in Maloney and Richardson, *Managing Policy Change in Britain: the Politics of Water* (1995), p.67, who also note that the Department of the Environment did not concede their view on the 'competent authority' question until late May 1987 (p.68).

[29] As from 1 April 1996, the National Rivers Authority became part of the Environment Agency for England and Wales.

effect, the privatisation programme had been slimmed-down in response to EC requirements, with only water supply and sewerage services transferred to the private sector. Moreover, the episode signalled the arrival of the Commission as a significant actor in UK water policy, a position confirmed by the Government's decision to consult with the Commission over those aspects of its privatisation legislation relating to the enforcement of drinking water standards, "probably the first occasion since Britain's accession to the Community that a UK government had entered into direct negotiations with the Commission on the proposed details of a major item of its domestic legislation."[30]

But consultation with the Commission may have failed to produce a satisfactory outcome.[31] Discussions led directly to the more stringent measures in relation to water company compliance now contained in sections 18-22 of the Water Industry Act 1991 in place of rather weaker agreements entered into either with the Secretary of State or OFWAT, the economic regulator established at the time of privatisation.[32] In particular, water companies would only avoid enforcement action if they entered into legally-binding undertakings with the Secretary of State, rather than weaker agreements which the Water Bill originally provided for.

---

[30] Haigh, op. cit. note 33, 4.4-6.

[31] Haigh, id, 4.4-9, notes that "the negotiations were thus highly unusual, involving the Commission and a Member State in a joint endeavour to arrive at a new implementation timetable for a Directive whose legally-binding compliance date had long since passed." The authors use "may" here because of the uncertainty which will only be resolved by the Court of Justice; see below.

[32] Briefly, these impose a duty on the Secretary of State to make an enforcement order against a company contravening its legal obligations to supply wholesome water unless he is satisfied that the contravention is trivial, that his general environmental and other obligations preclude him from doing so, or the company has given, and is complying with, an undertaking.

Following this re-draft, the Government announced that outstanding differences with the Commission were settled: they were not. A further opportunity to meet the terms of the Directive in the form of a House of Lords amendment seeking to require water companies to comply with the Directive no later than 1 September 1993 was overturned by the Government in the Commons.[33]

In October 1989 the Commission began proceedings under Article 169 against the Government and in November 1992, the Court of Justice upheld the Commission's complaints. The Government was found in breach of its obligations under the Directive by failing to ensure that water used for food production purposes was covered by the 1989 implementing Regulations,[34] and by failing to comply with the MAC for nitrate in 28 supply zones in England.[35] This was the first time that the UK had been found to be in breach of an 'environmental' Directive, but was equally important for its finding in relation to practical compliance, an area until then "not fully explored by the Court's jurisprudence."[36] The Court of Justice held that practical compliance is an absolute obligation, subject only to those derogations allowed in the Directive which the Government was, in any case, time-barred from relying upon.[37]

---

[33] Ibid., 4.4-6.

[34] Case C-337/89, [1993] Water Law 59; see also comment by Holder and Elworthy at [1994] CML Rev 123-135. This omission was rectified by the Food Safety Act 1990.

[35] The Government avoided an adverse ruling in relation to lead levels at 17 supply zones in Scotland because of the lack of precision over the obligation in this respect.

[36] Somsen, 4 Water Law (1993), 59-62, at 62.

[37] Directive, Articles 9, 10 and 20.

While the privatisation programme was in part responsible for the Government's reluctance to implement the Directive, it was the threat posed to privatisation by the Directive that ultimately furthered UK compliance. On the one hand, the financial costs of implementation threatened successful privatisation. The soon to be privatised water authorities were already committed to a multi-billion pound investment programme. This made the spreading of capital costs over time, to bring drinking water up to EC standards, a priority wherever possible. On the other hand, the risk that legal action over non-compliance might delay and ultimately frustrate privatization secured Government acceptance of the Commission's view of sampling for MACs in the Directive, an interpretation previously seen by the Department of the Environment as scientifically indefensible.[38]

The Legal Impact of the Directive

The prescription of mandatory standards for drinking water in the UK has both provided information and encouraged debate on the issue. Beyond this, however, the possibility of actions in both public and private law have opened up. Concerned individuals and organisations have been able to bring actions in public law to seek compliance with standards imposed under the Directive, which the European Court of Justice in *Commission v UK*[39] clearly found as being directly effective. *Francovich*-type actions against the UK for

[38] ENDS Reports 154 (1987), 9-10 and 155 (1987), 19-20, cited by Maloney and Richardson, op. cit. note 37, p.66).

[39] Op. cit., note 43.

damages consequent to infringement of rights following improper implementation would also seem possible, though causation may be difficult to establish.[40]

However, a legal action by Friends of the Earth highlights the present state of the law in relation to public law challenges over alleged non-compliance with EC drinking water standards. Subsequent to *Commission v. UK*, Friends of the Earth sought judicial review of the decision of the Secretary of State to accept undertakings from the water companies concerned, rather than bring enforcement action.[41] Despite the earlier ruling of the Court of Justice on the breach by the UK of its *primary* obligations under the Directive, however, the Court of Appeal held that the *secondary* duty to comply with the judgment of the ECJ was not absolute but could be qualified by practical considerations. The Court was not persuaded that the Government's obligations extended further than securing the agreement of the water companies to the undertakings entered into, for example by overriding existing planning legislation. However, as Hilson points out, less drastic measures might have been contemplated, for example the designation of water protection zones under section 93 of the Water Resources Act 1991 or other, perhaps fiscal, measures for reducing nitrate levels to prescribed maxima in supplies.[42] The Court of Appeal accepted that meeting EC requirements remained the Government's policy objective and it would ultimately comply with the obligations of the Directive. Perhaps especially at first instance, there was

---

[40] Elworthy and Holder, "Blue Babies, Gastric Cancers and Green Ponds: The Law's Response to the Nitrate Problem", 1 Int J Biosciences L (1996), 69-90.

[41] See text accompanying note 41.

[42] See 5(3) Water Law (1993), 79, and further comment by Hilson, 32 CML Rev (1995), 1461-1475, at 1467.

insufficient evidence to support the argument that compliance could be achieved faster than as provided for through undertakings.[43] Although speedier implementation was essentially a matter of political will, the decision essentially leaves the compliance timetable in the control of the Secretary of State, subject to action by the Commission under Article 171 (Maastricht amendments to which have empowered the Commission to set Member States a timetable for compliance with their legal obligations, backed by possible financial penalties). However, as Hilson notes, there are "no signs" as yet of the Commission taking this path:

> "At a time when the legitimacy of the Community order has been under close scrutiny and relations between the UK and the rest of the Community delicate, it would be understandable if, whilst the Commission felt safe in securing a one-off Article 169 judgement against the UK, it was not tempted to use Article 171 to order politically controversial action to achieve full compliance with Community drinking water standards."[44]

Disputes over domestic arrangements for complying with EC standards are therefore likely to remain a feature of the implementation process. This is true not only for the UK, but also in most other Member States where nitrates and pesticides are used, to varying degrees, to maximise agricultural productivity.

---

[43] Hilson, id., at 1466.

[44] Hilson, id, 1473. Significantly, recent action by the Commission in bringing out of abeyance proceedings against the UK in relation to breaches of the pesticide parameter - a Reasoned Opinion was issued in July 1993 - suggest that such a course of action may well now be in the contemplation of the Commission (see note 66 below) since, as Hilson notes (id, 1474), an Article 169 action in relation to pesticides is, following *ex parte Friends of the Earth*, "somewhat redundant" unless taken as a necessary preliminary to action under Article 171.

The possibility of actions in private law pursuant to the Directive is best illustrated in *Cambridge Water Co.* v. *Eastern Counties Leather.*[45] There, the plaintiffs were forced to relocate an abstraction point for potable supply after the coming into force of the Directive made it impossible for supplies to comply with quality standards. Although ultimately unsuccessful in nuisance, negligence and the rule in *Rylands v Fletcher*, due to the absence of foreseeability of damage at the time the chemicals were spilled at the defendant's tannery, the House of Lords did establish damage on the basis of the parameters of the Directive. Moreover, the ensuing litigation also contributed to significant advancements in scientific understanding of the pathways of chemicals below ground.[46]

However, *Cambridge Water* also provides a good example not only of how actions can be brought in tort further to the Directive, but also the limitations both of what is essentially a product quality directive and existing private law in securing environmental improvement. Had the water company succeeded in its action, damages sufficient to pay for the costs of relocation of its borehole would have been awarded, leaving the groundwater as contaminated as it was before private legal action was begun.

Also, while the principal legal obligation under the Directive is merely to supply water of an acceptable standard up to the stopcock, this may not in itself be sufficient to avoid successful

[45] [1994] 1 All ER 53.

[46] Ibid., p.65.

claims in negligence.[47] This may be particularly important in relation to exceedences of the revised lead parameter where this is due to customers' lead pipes.

Private prosecutions, however, are in principle ruled out by the Water Industry Act 1991 which assigns the right to prosecute for breaches of drinking water quality to the Secretary of State or the Director of Public Prosecutions. This compares with the general right to bring a private prosecution, under the Water Resources Act 1991, for pollution of water in the natural environment, and sheds light on the role of the Drinking Water Inspectorate. Despite the Government having originally recommended that "on balance" its functions should be transferred to the Environment Agency, the decision eventually taken was to leave it within the Department of the Environment. There, it remains a small unit without any legislative identity, responsible for auditing the water companies monitoring and reporting functions, and overseeing undertakings entered into to secure compliance. In doing so it has exceeded that which is required under the Directive, its Annual Reports being "invaluable resources,

[47] *Read* v *Croydon Corporation* [1938] 4 All ER 631. It might be argued, following *Budden and Albery v. BP Oil* [1980] JPL 586, that an action in negligence must fail where the defendant has acted in accordance with statutory standards. There, two oil companies were sued for using lead in petrol. Regulations prescribing the lead content in petrol had validly been made by the Secretary of State in 1976. The court held that, if the companies were liable and subject to injunctions limiting the lead content in their petrol to a level below that set under the Act then "The courts would thus necessarily be, in effect, laying down a permissible limit which would be of universal application and inconsistent with the permissible limit prescribed by Parliament. That would result in a wholly unacceptable constitutional anomaly. The authority of Parliament must prevail." The statutory standard therefore set the common law standard in negligence. This case may be subject to criticism because it is not apparent from the enabling legislation (Control of Pollution Act 1974, s.75) that Parliament intended to give a statutory defence to air polluters in respect of their common law liabilities. The point seems to turn on whether the Directive applies to the quality of water at the stopcock or at the customers tap, a matter that has yet to come before the Court of Justice.

not only to environmental pressure groups with an interest in water quality issues, but also to the water industry, public policy makers and the research community".[48] However, the Inspectorate may only recommend enforcement action to the Secretary of State, giving enforcement a more 'political' quality than, for example, the prosecution by the Environment Agency of a privatised water company for breaching water pollution provisions of the Water Resources Act 1991. At the time of writing, only two prosecutions had been brought in relation to drinking water quality, one 'technical' offence under the 1989 Regulations and one prosecution under section 70 of the Water Industry Act 1991 for supplying water "unfit for human consumption". Despite evidential problems in proving, epidemiologically, that the water is "unfit for human consumption", it might be queried whether this approach to enforcement would have been followed had responsibility been exercised by a body more detached from the Department of the Environment. In any event, the enforcement provisions established in the Water Act 1989 are themselves revealing of Government policy in this area.

Practical Implications of the Directive

The EC approach to drinking water regulation expressed through the Directive has changed long-standing British practice. Tightened regulatory controls over water supply companies have been required, with more stringent regulatory powers to be sought by the Commission in forthcoming proceedings.[49] A number of developments have raised not only the quality of

[48] Ward et al, op. cit. note 19, p.124.

[49] Supra note 53.

drinking water but also its political salience: the shift from negotiated definitions of water quality to precise quantifiable definitions based on MACs; improvements in sampling methods; publicising of water quality data; and improvement programmes for pesticide and nitrate levels in drinking water. In relation to the last of these, the Directive not only raised the profile of an issue which had previously been off the political agenda,[50] but has made information available to those keen to see the issue resolved.[51]

In addition to these, there has been a substantial financial cost to implementing the Directive in the UK. Although the precise cost is unclear, one estimate placed the amount spent on improvement programmes agreed since 1989 and due to be completed by 1995 at around £2 billion.[52] While some of this spending was a result of under-investment before privatisation, EC legislation has at least influenced the nature and pace of new investment, the Directive contributing to the range of water directives which, together, have necessitated investment programmes of around £30 billion since privatisation.[53]

It would be difficult to justify such measures without environmental benefit, and there is general acceptance that the Directive has played an important part in raising the quality of drinking water in the UK. The latest report of the Drinking Water Inspectorate, for example,

---

[50] Hill, Aaronvitch and Baldock, "Non-decision Making in Pollution Control in Britain: Nitrate Pollution, the EEC Drinking Water Directive and Agriculture", 17 Policy and Politics (1989), 227-240.

[51] Ward et al, supra note 19, p.106.

[52] Reference cited id. at 111-114.

[53] See, for example, Haigh, op. cit. note 33, 4.1-5.

notes that 99.5% of all samples taken complied with EC standards, as well as additional standards set at national level.[54] This compares favourably with results of monitoring in previous years,[55] with increases in non-compliance with certain parameters such as Polyaromatic hydrocarbons accounted for by additional and more focused monitoring. Other than one-off or trivial breaches, most failures are subject to water company improvement programmes. However interest groups, notably Friends of the Earth, continue to assert that a substantial proportion of British consumers are drinking water that does not meet EC standards, highlighting those areas where individual parameters - notably nitrates and pesticides - are exceeded rather than overall compliance.[56] This has recently received support from the Commission, which has described official composite UK statistics as "not a useful figure."[57]

Concerns over nitrate levels have been met in part by provision for Nitrate Sensitive Areas, originally under the Water Act 1989, and a positive British response to the Nitrates Directive

---

[54] Department of the Environment/Welsh Office, *Drinking Water 1995: A Report by the Chief Inspector, Drinking Water Inspectorate* (1996).

[55] The first report of the Drinking Water Inspectorate for 1990 found compliance to be 99%, a figure which dropped slightly in 1991 before improving steadily since then.

[56] See, for example, Observer, "Poison on tap: The first region by region guide to your drinking water", *The Observer Magazine*, 6th August 1989. The latest report of the Drinking Water Inspectorate states that 85.4% of water supply zones complied with the total pesticides standard, with 69.4% compliance for individual pesticides; op. cit. note 63, p.189.

[57] "EU Lands Court Challenge on British", Reuters Press Release, 28 June 1996. Certain methodological and legal difficulties also exist. No allowance is made in the statistics for breaches of standards which are subject to derogations under Regulation 4 of the 1989 Regulations implementing Articles 9 and 10 of the Directive (see [1993] Water Law 192-193).

1991.[58] However, the Government has been criticised for implementing the Nitrates Directive only in relation to areas linked to drinking water supplies and not, as the Directive envisages, to all inland water where nitrate concentrations are likely to exceed the agreed levels. Thus, 68 Nitrate Vulnerable Zones (NVZs) have been designated to contribute to the lowering of nitrate levels in drinking water, in contrast to, for example, the Netherlands and Denmark where the whole country is designated as a NVZ on the grounds also of preventing environmental harm through eutrophication.[59] In effect, as Elworthy and Holder remark, the Government has treated the Nitrates Directive "solely as a drinking water directive."[60]

It is doubtful whether the Nitrates Directive would have been agreed when it was, without the prominence of contamination of water supplies by nitrates given by the 1980 Directive. Prior to the 1980 Directive, nitrate levels in UK drinking water supplies were inadequately measured, problems were neither widely recognised nor their severity appreciated, and there was little policy response. The Directive thus defined a problem otherwise unacknowledged, leading in time to further action beyond nitrate levels in water for human supply.[61] However, as Ward et al note, compliance with MACs has largely been through the blending of supplies

---

[58] Directive 91/676/EEC on the protection of waters against nitrate pollution from agricultural sources, OJ L375/1, 31.12.91. See now The Protection of Waters Against Agricultural Nitrate Pollution (England and Wales) Regulations 1996 (SI 1996, No. 888), and also SI 1996, No.908.

[59] See 7(2) Water Law (1996), 71-73, at 72.

[60] Supra note 49, at 86. This may be explicable by the relatively low incidence or severity of eutrophication in the UK compared to other Member States, but Holder and Elworthy suggest a better explanation is a compartmentalised approach to public health and environmental protection that has yet to be broken down.

[61] Hill, Aaronvitch and Baldock, supra note 59.

from sources of high and low levels of key parameters (especially nitrate) and the opening up of new sources of supply.[62] In their detailed field study in the area of South West Water, they noted that the Directive "has not stimulated any major regulatory moves to improve the quality of raw water sources."[63] It may be argued, therefore, that the Directive has had little *direct* impact on the quality of water in the natural environment. It has, however, raised the visibility of certain pollutants in the environment, contributing in no small measure to further EC legislation of a more preventive nature in relation to nitrates and pesticides.[64]

Political Impact of the Directive

EC drinking water law has had a number of impacts on the policy networks through which water policy is made in the UK. In particular, EC legislation has brought new issues on to the political agenda, brought new actors into the networks, affected the distribution of resources within the networks, and increased the information available to non-governmental actors. Public awareness of drinking water quality issues in particular has increased.
Whereas 'non-decision making' was a regular feature of the UK water policy making process before EC involvement, legislative proposals for directives now "accelerates the arrival of

[62] Ward et al, op. cit. note 19. The *Cambridge Water* case is a good example of this, see note 54 above.

[63] Ward, et al, op. cit. p.135.

[64] Further measures are proposed in relation to the marketing of biocides; see COM(93)570, on which the Council reached a common position on 26 June 1996.

their subject on to the political agenda, even where the proposal is relatively invisible and so not the source of public disquiet and pressure."[65] Moreover, in relation to network change, Rhodes had previously characterized the water sector as a professionalized network "wherein the constraints on water engineers seem particularly weak."[66] But increased participation has now complicated matters:

> "water policy is now more complex and less predictable and water policy is characterized by numerous cross-sectoral linkages. The number of policy actors who might participate in some aspect of water policy is now potentially in the hundreds rather than the tens."[67]

The task of evaluating the impact of EC legislation on drinking water policy networks in England and Wales is complicated by the impact of other processes which have overlapped, the most important of these being privatisation. However, EC legislation has been instrumental in empowering interest groups within the policy networks, an important source of network change. The incorporation into UK law of the European regulatory approach of setting standards for drinking water quality has provided all actors with new informational resources, but in particular this development "has opened up the issue to greater scrutiny by environmental pressure groups and the adversarial style of political debate they bring."[68]

---

[65] Haigh and Lanigan, supra note 29, p.29.

[66] Rhodes, op. cit. note 10, pp.78-9.

[67] Maloney and Richardson, op. cit. note 37, p.161.

[68] Ward, et al, op. cit. note 19, p.124.

Consequently, "the traditional British approach to environmental management, characterised by flexibility, pragmatism and closed policy communities, has been on the wane."[69]

By monitoring the implementation of EC law, environmental interest groups have become an important force at the implementation stage of the UK water policy process. By 1990, for example, one-third of all complaints made to the Commission about breaches of environmental directives were originating from the UK.[70] Interest groups were establishing their own monitoring systems, providing the otherwise "information-starved DG XI officials"[71] with data on breaches about which it would otherwise have remained ignorant.[72]

In addition to monitoring implementation, interest groups have a significant role in shaping the policy agenda, both at national and particularly EC level. Again, EC involvement is clearly important here with the environment being "perhaps the classic example of an issue having higher priority in Europe than in Britain and of the EC's agenda being influenced by certain enthusiastic actors."[73] In short, interest groups are now consulted more widely on

---

[69] Ibid.

[70] Haigh and Lanigan, supra note 29, 26.

[71] Id. at 29.

[72] Friends of the Earth were instrumental in reporting breaches of the Directive to the Commission, for example in relation to the Government's failure to implement the Directive in relation to private water supplies. This prompted an Article 169 letter from the Commission in June 1987, leading eventually to the Private Water Supplies Regulations 1991, SI 1991/2790. Following the decision of the Court of Justice in Case C-42/89, *Commission* v. *Belgium* [1992] 1 CMLR 22, the Regulations are no longer applied to private supplies serving only a single dwelling.

[73] Mazey and Richardson, "British Pressure Groups in the European Community", 45 Parliamentary Affairs (1992), 92-107, at 99.

legislative proposals, monitor policy implementation and respond to breaches of directives by informing the Commission and, where necessary, through legal action.

In carrying out this role, interest groups both inform and feed off public opinion on environmental matters. Here also, the Directive has been important. By prescribing explicit quantitative standards, raised in political salience by privatization, the Directive brought under the spotlight not merely issues in relation to the benefits of cleaner water, but as importantly the costs of supplying such water and on whom such costs should fall.[74]

The Directive has therefore contributed towards shifting water policy making away from the closed confines of the professionalized network, placing it in a policy arena which is more open to scrutiny and to participation. As Maloney and Richardson put it, "Making policy in a goldfish bowl is a more accurate analogy than the old description of water policy as the private management of public business."[75]

Recent Developments

For some, EC water policy "has become some kind of litmus test in the debate between federalists and anti-federalists as they battle over the future of the Union".[76] As part of the

---

[74] See, for example, Office of Water Services, *Paying for Quality: The Political Perspective* (1993).

[75] Maloney and Richardson, op. cit. note 37, p.168.

[76] Richardson, supra note 28, at 140.

move towards revision of Community environmental directives in line with its commitment to the principle of subsidiarity,[77] the Commission hosted a conference on the 1980 Directive in September 1993 to discuss revisions in the light of improved technical knowledge and scientific understanding.[78] When published in early 1995, Commission proposals for a revised directive allayed initial fears that the Directive might be wholly 'repatriated' to Member States.[79] Under the draft directive, to be adopted under Article 130s as an environmental measure for the protection of human health, the number of mandatory parameters is to be reduced from 62 to 44, allowing Member States to set standards for additional parameters or higher standards for existing ones, subject to Commission oversight. While the existing standards for nitrates and individual pesticides would remain, the cumulative standard for all pesticides would be removed. Moreover, the proposed five-fold reduction in the permitted lead level would account for the overwhelming majority of the 70 billion ECU estimated total cost to Member States of compliance. The cost of compliance in the UK has been estimated at around £8 billion, spread over fifteen years.[80]

The draft directive would give Member States greater scope for derogations from chemical parameters. Although derogations would still not be able to constitute a potential danger to

---

[77] Cross refer to chapter by Freestone in this collection ?

[78] Richardson, supra note 28, 152.

[79] COM(94)612 final, OJ 1995, C131/5. The Government's pre-draft position was set out in a "non-paper" leaked to Friends of the Earth in 1993 (ENDS Report 224 (1993), 37-38; see also [1993] Water Law 190-191.

[80] *Drinking Water*, House of Lords Select Committee on the European Communities, Session 1995-96, 4th Report, HL 1995-96, Paper 31.

human health, it would no longer be necessary to show, as the UK failed to do before the Court of Justice, that derogations were necessary because of "situations arising from the nature and structure of the ground," from "exceptional meteorological conditions" or in "times of emergency."[81] Instead, under Article 10 of the draft directive, the Member State at most need only specify the reason for its derogation. This proposal was welcomed by the Department of the Environment and would give central government and the water companies greater flexibility in organising programmes for water quality remediation.[82]

The Commission's proposals have been backed by the House of Lords Select Committee on the European Communities. But central government continues to object to much of the detail, questioning in particularly the justification for many chemical parameters and citing support for the most recent WHO guidelines which, in many instances, are more flexible than those provided for in the Commission's proposals.[83] Even if more flexible individual parameters are not eventually adopted, it may be that the new Article 10 will provide the UK Government with greater flexibility in implementing measures than it enjoyed under the original Directive. Moreover, while timetabled plans for remedial work are required, the draft directive does not stipulate maximum periods within which work must be completed, calling into question the strictness of the dates for practical compliance given.

---

[81] Directive, Articles 9.1(a), 9.1(b), 10.1.

[82] House of Lords Select Committee, 4th Report, Further Evidence from the Department of the Environment, p.17.

[83] Department of the Environment, *The Government Response to the Report of the Select Committee on the European Communities on COM(94) 612 Final*, April 1996

Thus, while proposed changes to the Directive would not lead to a repatriation of control over drinking water standards to Member States, there are indications of a loosening of Commission control. As the proposals have yet to be agreed in the Council of Ministers, the precise nature of the revised directive remains uncertain. In any event, the real test of its significance will only be revealed fully at the implementation stage.

Concluding Discussion

A dominant feature of the implementation of the 1980 Directive in the UK has been that of the Government seeking to minimise unwanted regulation while others in the policy network have sought to maximise environmental protection. The main problem for the Government in seeking to play this Extended Gatekeeper role was its own lack of vigilance when the Directive was originally agreed. As Maloney and Richardson put it, "current difficulties are due to lack of foresight by Britain at the policy formulation and policy decision phases of the European policy process."[84]

As we have seen, the Government of the day did not see a threat to its ability to decide and control policy so the Gatekeeper role lay dormant until the real challenge became apparent. By this time, other actors in the network had accumulated resources which constrained the Government's ability to perform this role. Of particular importance were the constitutional-legal resources the Commission was able to use to further compliance -

[84] Maloney and Richardson, op. cit. note 37, p.145.

including the resources of environmental interest groups - despite itself being severely understaffed at the time.[85] That the Directive is relatively precise in its requirements for compliance has been decisive in this. This contrasts with the study of structural policy in which the vagueness of EC regulations facilitated non-compliance.[86] But it also contrasts with many pollution control directives where provision for area designation has often been used as a 'half-way house' between emission limits and environmental quality objectives. In these instances, subject to often stringent judicial oversight,[87] central government has often been able to implement EC legislation within relatively wide parameters.

In addition to contributing to a shift in the balance of constitutional-legal resources away from central government, the Directive has also spread the balance of informational resources more evenly. The main feature of this development has been the empowerment of environmental interest groups at the expense of central government and water companies who must now operate aware that their actions can be effectively monitored.

Central government has also had to concede political resources to other actors, notably the Commission and interest groups, who are now regarded as legitimate players in the UK water

---

[85] Krämer, *Focus on European Environmental Law* (1992), p.219.

[86] Bache, op. cit. note 5.

[87] See, for example, Case C-56/89, *Commission v. UK* [1993] Water Law 168; Case C-355/90, *Commission v. Spain* [1993] Water Law 209. At national level see *R. v. Secretary of State for the Environment ex parte Kingston-upon-Hull City Council*, linked with *R. v. Secretary of State for the Environment ex parte Bristol City Council and Woodspring District Council* [1996] E.L.M. 8(3), 75-76. See now also the decision of the Court of Justice in Case C-44/95, *R. v. SSE ex parte RSPB*, *The Times*, 2 August 1996.

policy sector and whose views must be considered. In this case, the shift in constitutional-legal and informational resources has had a direct effect on the resources of political legitimacy. Combined, the shift of resources away from central government has limited its ability to play the Extended Gatekeeper role over drinking water policy largely to that of delaying the practical implementation of measures rather than blocking them, an approach which may itself be restricted following proceedings before the Court of Justice under Articles 169 and 171.

However, if the relatively precise requirements of the Directive were decisive in tipping the balance of resources sufficiently away from the Extended Gatekeeper sufficiently for policy implementation to be secured, recent developments indicate that national governments have learned from this experience. The subsidiarity principle has been used by Member States as an argument for repatriating some control over water policy and while the draft directive suggests this may be limited, the direction of this proposal is clearly towards greater flexibility for national governments in implementing water policy. Moreover, while it is fair to argue that the 'Europeanisation' of the UK water policy sector has had the general impact of reducing the control of central government, and has been described as the "best example of the erosion of national autonomy,"[88] this process should not be exaggerated. Even without increased flexibility in the revised directive, the Department of the Environment still plays a central role in implementing directives, the central role in the negotiation of new provisions, and retains strong control over the bringing of enforcement proceedings.

[88] Maloney and Richardson, op. cit. note 37, p.169

To summarise, the impact of EC involvement in drinking water policy has had a clear impact in legal, practical and political terms. The most prominent characteristic of this impact has been the erosion of national autonomy. However, the water sector is not insulated from other developments in the EC and in a context in which national governments are attempting to assert more control, it is possible that the near future may be characterised by a shift back towards greater national autonomy. If enacted, the revised Directive may facilitate that process, although at this stage its implications are not clear.

In their study of water policy in the UK Maloney and Richardson concluded that "'Europeanisation' is certain to continue to present a strong challenge to Britain and it seems safe to predict that a continuation of the erosion of national autonomy will continue."[89] While we can endorse the first part of this argument, at this particular stage of uncertainty over drinking water policy specifically and the direction of EC politics more generally, we would be more cautious in predicting that erosion of national autonomy will continue to be a feature of the water sector in the immediate future.

[89] Id. at p.157.