1 Introduction

What is law in European Union integration?

This book discusses relationships between law and integration. It focuses on legal integration in the European Union. By integration I mean:[1]

> the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states.
>
> (Haas, 1958: 16)

This definition recognises the interplay between various dimensions of integration. The shifting of loyalties, expectations and political activities towards a new EU centre also reveals a social aspect to EU integration. Political dynamics are analysed through reference to the building of new EU institutions (Wiener and Diez, 2004: 1). In discussing law and integration relationships this book focuses on the question: what is law in European Union (EU) integration? The book's emphasis is thus on analytical rather than normative issues. It departs from a current emphasis on normative concerns in EU integration studies, framed by lawyers as issues of control, accountability, transparency and legitimacy in the exercise of power in the EU (Armstrong and Shaw, 1998: 148; Wincott, 1995). While the empirical data discussed in this book shed light on these normative concerns, the book's main goal is to advance an understanding of the nature of law in EU integration processes. The book questions conceptualisations of law as formal, instrumental and relatively autonomous from its social contexts. It analyses law and society relationships in the context of EU integration without developing normative claims about how law and society should interact.[2]

The question 'what is law in EU integration?' raises two issues. First, how can we conceptualise law in EU integration processes? What idea of 'law' are we invoking when we say that 'law' is implicated in EU integration? Second, what is the role of law in comparison to other aspects, such as economic, political, technical and social drivers of EU integration processes? Is there a clearly separate legal dimension to EU integration which can be distinguished from political, economic, technical and social dynamics? Answers to the first question will have implications for the second question about links between legal and other dimensions of EU integration.

So why do these questions matter? It is clear that law is central to EU integration. For some analysts legal integration is even the first important form of Europeanisation (Stone Sweet, 2004: 240). Both primary legislation, such as the Treaties establishing the European Union, as well as secondary legislation are crucial to integration. Secondary legislation is particularly central to the EU's capacity to govern, since EU institutional actors only have limited use of other tools of government, such as taxation, redistribution and direct law enforcement. It seems that law is even becoming more important in EU integration, due to the rise in judicial governance by the European Court of Justice and the Court of First Instance (ibid.: 7). Demand for rule clarification, monitoring and enforcement by the European Courts is increasing, also due to the constitutionalisation of the Treaties (ibid.: 238). Juridification and especially judicialisation are often perceived as crowding out the social, political and economic dynamics of EU integration. This book questions this perspective by examining the inclusion of technical, political and economic dynamics in the construction of 'law'. By examining these 'contexts in law', the book seeks to contribute to 'EU law in context' debates. It starts from the idea that law is central to processes of integration in the EU. But it is by no means clear what conception of law can best explain the outcomes of integration. There is as yet no EU state. Hence, traditional, modern conceptions of state law developed in association with the rise of the nation state in Western Europe in the eighteenth and nineteenth century have limited application. Moreover, social actors involved in EU integration processes do not necessarily have a clear, settled view of the nature of EU law. There was lively and controversial debate among German and UK permitting officers who issue licences for plants regulated under the EU Directive on Integrated Pollution Prevention and Control (IPPC), which is at the heart of the book's empirical analysis. There was also debate among engineers in EU

technical working groups, civil servants in national environmental administrations, as well as operators, about the nature and key characteristics of the technology standard imposed by the IPPC Directive. Finally, asking 'what is law in EU integration?' matters because how we conceive law shapes how we think about its role in EU integration. Hence, analysing the nature of EU law, including rendering assumptions about law explicit, can contribute to the development of EU integration theories. But how does the book seek to analyse the nature of law in EU integration?

Law and integration relationships through the prism of the EU Directive on Integrated Pollution Prevention and Control

Key features of the IPPC Directive

This book addresses the question 'what is law in EU integration?' through an analysis of the implementation of the EU Directive on Integrated Pollution Prevention and Control (96/61/EC). The IPPC Directive establishes a pollution control regime that seeks to prevent and minimise emissions in relation to air, water and land from new and existing[3] mainly large industrial[4] operators. The Directive also regulates further environmental impacts through requirements on energy efficiency, waste minimisation, noise, accident prevention and site restoration after installation closure.[5] Control of all of these releases is achieved in an integrated manner through one single IPPC permitting procedure.[6] IPPC permit conditions further specify operators' obligations. They are set with reference to a technology standard. According to Art. 3 of the IPPC Directive member state regulatory authorities shall ensure that operators employ the 'best available techniques' (BAT) in order to prevent emissions to all three environmental media, air, water and land. Art. 2 (11) of the Directive provides only a rudimentary definition of 'the best available techniques':

> BAT shall mean 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.

So, how are 'the best available techniques' defined in practice? The BAT standard is further specified at the EU, member state and local

permitting level. At the EU level Art. 16 (2) of the IPPC Directive requires the Commission to organise an 'exchange of information' on what constitute 'the best available techniques':

> The Commission shall organize an exchange of information between member states and the industries concerned on best available techniques, associated monitoring, and developments in them. Every three years the Commission shall publish the results of the exchanges of information.[7]

The IPPC Directive does not specify how this information exchange is to be organised. The EU Commission has therefore developed its own procedure (Emmott et al. 2000). It has set up Technical Working Groups (TWGs), one for each of the industrial sectors covered by the IPPC Directive.[8] These TWGs comprise representatives from member states' environmental administrations, often from permitting authorities, such as chemists and engineers with experience in licensing industrial installations. TWGs also include industry representatives, such as staff from the Confederation of European Business (UNICE),[9] or sector-specific EU-wide trade associations,[10] and sometimes representatives drawn directly from large industrial operators. According to Art. 16 (2) IPPC Directive member states and industry representatives participate in the information exchange. But upon its own initiative the Commission also invites environmental NGOs to participate in TWGs. The Commission has also set up and chairs the Information Exchange Forum (IEF). In terms of composition this forum nearly mirrors the TWGs. It comprises member states' representatives from the higher levels of their environmental administrations, such as national environmental ministries, as well as industry and environmental NGO members. While the TWGs are to focus on specific technical issues, the IEF is meant to deal with wider EU policy decisions in the determination of 'the best available techniques'. The results of this information exchange are published by the Commission[11] as BAT reference documents (BREFs).[12] There is one 'vertical' BREF for each industrial sector covered by the IPPC Directive, such as the production of non-ferrous metals, inorganic chemicals, cement and lime as well as iron and steel, to name a few of the sectors covered by the IPPC Directive.[13] All vertical BREFs are structured in six chapters which report the same type of information for the different sectors.[14] While the first chapter contains 'General Information' about the industry, including its size, economic constraints, markets and production sites, the second chapter reviews 'Applied Processes and Techniques' in the industry. The third chapter

reports the emissions as well as raw material, energy and water consumption which are associated with the production and pollution control techniques under review in the BREF. The fourth chapter then narrows down the range of techniques which have been considered in the third chapter to just those techniques which will be considered in the determination of BAT.[15] The fifth and main BREF chapter presents the BAT conclusion. This consists of a recommendation of one or several techniques which are considered to constitute 'the best available techniques' for the sector. This chapter also provides information about the emissions which are associated with the use of these techniques.[16] A final sixth chapter identifies 'emerging techniques'.[17] According to Art. 2 (11), last sentence and Annex IV No. 12 of the IPPC Directive local member state permitters have to take into account these BREFs when determining BAT for specific plants, but are not bound by them.

Amendments of the IPPC Directive

The IPPC Directive was passed on 24 September 1996. It was published on the 10 October in the Official Journal of the EU and came into force on the 30 October 1996.[18] It has been amended twice. In order to consolidate and clarify the Directive text the EU Commission has now put forward a proposal for the codification of the Directive. This integrates the two amendments into the text of the IPPC Directive.[19] The Public Participation Directive 2003/35/EC required member states to ensure that members of the public are given 'early and effective opportunities' to participate in IPPC permitting.[20] It also added Annex V to the IPPC Directive which lists a range of criteria governing public participation. The public must now also be consulted in relation to *draft permits*. This enhances citizens' opportunities for input into the permitting process. Before this amendment the public only had a right to comment on *permit applications*. The possibility for citizens to comment on draft permits opens up what is often a closed process of permit negotiation between regulators and operators. Moreover, para. 2 of Annex V strengthens and extends citizens' rights of access to a range of information used in IPPC permitting. It also supports rights of access to justice, thus enabling challenges before the courts to decisions made under the IPPC Directive.[21] The second amendment of the IPPC Directive occurred through Directive 2003/87/EC on emissions trading. This Directive establishes that for installations regulated both under the IPPC and the EU Emissions Trading Directive no emission limit values will be imposed for greenhouse gases traded under Directive 2003/87/EC.[22]

Moreover, member states will not be required to impose energy efficiency requirements for installations within the jurisdiction of both the IPPC and the EU Emissions Trading Directive. This potentially weakens the IPPC Directive's contribution to combating climate change (ENDS Report No. 319, August 2001: 17).

Last but not least, as required by Art. 16 (3) of the IPPC Directive, the EU Commission is now reviewing the Directive. It has started a consultation process with member states, industry and other interested groups to discuss revisions. The Commission is considering a more harmonised approach to setting emission limit values in IPPC permits, also through more detailed requirements in the Directive text.[23] The review also addresses how to clarify interactions between the IPPC Directive and possible EU or national emissions trading schemes for nitrogen oxides and sulphur dioxide emissions from large industrial operators. The Commission review includes a search for tools which could stimulate plant operators to go beyond 'mere compliance' with the Directive and to further improve the environmental performance of their installations. A final report of this ongoing review process is expected in 2007. Having outlined key features of the IPPC Directive, including its amendments, I now turn to a discussion of its implementation in the UK and Germany.

Implementation of the IPPC Directive in the UK and Germany

The practical implementation of the IPPC Directive is not without problems. The Commission has started infringement proceedings under Art. 226 EC Treaty against a number of member states.[24] The EU Commission brought a successful case against the UK for failure to implement the IPPC Directive in time – by 30 October 1999 – in Northern Ireland and in Great Britain in relation to off-shore installations (ENDS Report No. 326, March 2002). But an EU Commission report on progress with implementing the Directive across the EU – four years after the expiry of the 30 October 1999 deadline – noted that so far only the UK had incorporated correctly all aspects of the Directive (COM (2003) 354).[25] The EU Commission is now seeking to speed up implementation of the Directive. It has issued guidance to member states advising on the interpretation of certain key provisions of the Directive, such as the capacity thresholds in Annex I to the Directive which specify what production capacity a plant has to have in order to be regulated by the Directive. The Commission has also set indicators measuring the number of permits issued for existing installations, in

order to monitor progress of member states in meeting the deadline of 30 October 2007 by which existing installations must also comply with the requirements of the IPPC Directive (First Report on the implementation of the IPPC Directive, 3 November 2005, COM (2005) 540 final, p. 8). But how have Germany and the UK actually implemented the IPPC Directive so far?

Implementation of the IPPC Directive in Germany

Key actors

Key policy decisions about the implementation of the IPPC Directive in Germany were taken by the federal environmental ministry.[26] It provided the draft for the Artikelgesetz which implements the IPPC Directive into German national law, by amending the main federal air immissions control statute, the *Bundesimmissionsschutzgesetz* (BimSchG), the main federal water pollution control statute, the *Wasserhaushaltgesetz* (WHG) and the major federal waste management statute, the *Kreislaufwirtschafts- und Abfallgesetz* (KrW-/AbfG). In accordance with para. 48 BimSchG the German federal environmental ministry also presented to the upper chamber of the German Parliament, the Bundesrat,[27] a revised version of the technical instructions for air, the TA *Luft*. These flesh out the meaning of the BAT technology standard in German environmental law, especially for installations with significant emissions into the air. For discharges into water there is secondary legislation, the *Verordnung über Anforderungen an das Einleiten von Abwasser in Gewässer*[28] which specifies in forty-five appendices 'the best available techniques' for specific areas of industry. There are also technical instructions (TA) which develop BAT standards for waste management facilities dealing with hazardous wastes (TA *Abfall*). There are also separate technical instructions listing BAT measures for installations which reuse, treat or dispose of household wastes (TA *Siedlungsabfall*). Furthermore, there are technical instructions which deal with noise emissions (TA *Lärm*).

In contrast to the UK there is no single unified regulator in Germany responsible for permitting IPPC installations. Different sections of the various environmental administrations in the relevant *Bundesland* issue permit conditions relating either to emissions to air, water or land. Hence, Germany has taken advantage of Art. 7 of the IPPC Directive which states that an 'integrated approach to permitting' only requires coordination of the conditions and procedure for the granting of IPPC

permits, where more than one competent authority is involved. Para. 13 of the BimSchG provides a so-called limited 'concentration effect',[29] according to which a range of other relevant permits for the construction and operation of an IPPC installation, such as planning permission,[30] are included in the IPPC permit issued under para. 4 BimSchG. German IPPC permits include conditions in relation to releases to air and land. But discharge consents for emissions to surface waters under the WHG and to sewers are issued separately and thus are not included in this limited concentration effect under para. 13 BimSchG. Under para. 10 (5), second sentence, the German IPPC licensing authority has to ensure, however, a 'full coordination' of the media-specific licensing procedures and the conditions affecting different environmental media in an IPPC licence.[31] But this does not grant a right to the IPPC licensing authority to override or impose its view of what amounts to appropriate coordination of licence conditions in the case of differing views held by the licensing authority and the water authority (Kloepfer, 2004: 1278). Hence, Germany's implementation of the IPPC Directive is an example of an approach to permitting which is not fully integrated.

Who exactly becomes involved in permitting German IPPC installations varies according to the particular *Bundesland*[32] in which the plant is situated.[33] The administrative structures, including the environmental administration, varies between the different *Bundesländer*. The *Bundesland* in which the empirical research was carried out has a three-tier administrative structure. The first tier of the environmental administration consists of the *Landesumweltministerium*, the *Land* environmental ministry, which is part of the *Land* government.[34] Especially in the case of large, politically significant operators, the *Land* environmental ministry can become indirectly involved in the IPPC permitting process.[35] District governments[36] are the second administrative tier in most of the German *Länder*.[37] In the *Land* in which the research was carried out the district government is responsible for licensing IPPC installations. City authorities[38] and communes[39] constitute the third and lowest level of the administration. They can be consultees in IPPC licensing procedures.

Key procedures

In contrast to the UK, Germany has not issued national 'best available techniques' guidance documents to permitting authorities. Instead, fairly media specific regulations, which are binding upon permitters,

have been revised, also in order to incorporate the IPPC Directive into national law. Key among these are the revised technical instructions on air emissions, the so-called TA *Luft* of 24 July 2002. There are also technical instructions on noise, waste water, land, waste and household waste.[40]

Permitting of new IPPC installations is carried out in Germany under para. 4 of the BimSchG. Regulations issued under the BimSchG,[41] the so-called 4. BimSchV, list all the installations which are covered by the German IPPC regime.[42] Existing plants are brought under IPPC control through amendments of their existing BimSchG permits under para. 17 BimSchG.[43] According to para. 6 (1) BimSchG, once operators demonstrate in their permit application that they can fulfil the requirements of para. 5 BimSchG – which replicates the 'basic obligations of the operator' from Art. 3 of the IPPC Directive – the German regulatory authority *has to grant* the IPPC permit. Hence, once the operator complies with the requirements of Art. 5 BimSchG he has a *right* to the IPPC permit. This also strengthens the operator's bargaining position in permit negotiations with the regulatory authority. In contrast to this – and potentially closer to the text of the IPPC Directive – the UK regulator exercises discretion under Reg. 10 (2) of the PPC Regs. (England and Wales) 2000 when deciding whether to grant or refuse the operator's application for an IPPC permit. This is the case even if the operator has fulfilled all the duties arising from Art. 3 of the IPPC Directive.

The BAT technology standard from the IPPC Directive is implemented in German national law through para. 5(2) BimSchG. It requires IPPC installations to prevent detrimental impacts on the environment in particular through employing 'the best available techniques' ('Stand der Technik').[44] The term 'Stand der Technik' referred also to the technology standard required under the BimSchG before the implementation of the IPPC Directive. Hence, use of the same term – 'Stand der Technik' – for the new and slightly different IPPC BAT technology standard builds a degree of continuity between the previous and the new German IPPC pollution control regime. Some commentators perceive the IPPC BAT standard as less onerous than the previous German technology standard, because the former is considered to provide more scope for cost considerations in the definition of the 'best available techniques' (Winter, 1999: 77; Kloepfer, 1998: 144, 929). Having outlined key elements of the incorporation of the IPPC Directive in Germany, I will now turn to its implementation in the UK.

Implementing the IPPC Directive in the UK

Key actors

Key policy decisions about the implementation of the IPPC Directive in the UK were taken by the Department for the Environment, Food and Rural Affairs (DEFRA) in consultation with the Environment Agency (EA). The Department drafted the two key legal instruments which implement the IPPC Directive in the UK. First, the Pollution Prevention and Control Act 1999[45] provides a basic framework for the implementation of the IPPC Directive in the UK. It is fleshed out through the more detailed provisions of the Pollution Prevention Control (England and Wales) Regulations 2000 (PPC Regs.) made under section 2 of the PPC Act 1999.[46] In the UK the Environment Agency for England and Wales (EA) and the Scottish Environment Protection Agency (SEPA) administer the IPPC system for about 85 per cent of installations regulated through the IPPC Directive, known as Part A (1) installations (Bell and McGillivray, 2006: 774). UK local authorities administer IPPC pollution control for a small number of less polluting IPPC installations, also known as Part A (2) installations.[47]

Initially EA area offices issued licenses for IPPC installations. This, however, was additional work for area officers who otherwise supervise sites and enforce legal regulation. Hence, in order to speed up implementation of the IPPC Directive the EA set up four strategic permitting groups (SPGs) which focus exclusively on the permitting of IPPC sites.[48] New staff have been recruited to these SPGs and area officers have been seconded to them. Moreover, the EA involves environmental consultancies in IPPC permitting work. Consultants prepare draft permits which are checked and finally issued by the EA. The data for the empirical part of the research were collected from one of the four SPGs in England. Having outlined key actors involved in the implementation of the IPPC Directive in the UK I now want to consider the key procedures through which the Directive is applied in the UK.

Key procedures

The IPPC Directive was based upon a UK proposal. In fact it has been considered as an example of the 'British' approach to pollution control, by being 'flexible' and 'pragmatic' and allowing for the adaptation of pollution control standards to specific circumstances in accordance with the concept of BAT (Bell and McGillivray, 2006: 791). Hence, it is not surprising that UK implementation replicates key structures of the