European Environmental Law

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1 The Development of European Environmental Law

The first phase

The development of European environmental law can be separated into a number of phases. The first phase began with the entry into force of the original version of the EEC Treaty on 1 January 1958 and continued up to 1972. This was the period during which the European institutions paid no specific attention to the development of an environment policy. Only incidentally were decisions taken which, in retrospect, could perhaps be regarded as environmental measures. For example, in 1967, Directive 67/548[1] relating to the classification, packaging and labelling of dangerous preparations, and, in 1970, Directive 70/157, relating to the permissible sound level and the exhaust system of motor vehicles.[2] Although these were primarily measures taken with a view to the attainment of the common market, environmental considerations undoubtedly played a part.

The second phase

In fact, the true starting signal for the development of a European environment policy was only given in 1972 when, at a European Council Summit meeting, it was declared that economic expansion, which is not an end in itself, must as a priority help to attenuate the disparities in living conditions. It was thought that it must result in an improved quality as well as an improved standard of life. Also, special attention should be paid to non-material values and wealth and to the protection of the environment so that progress could serve mankind. The European Council stressed the value of a European environment policy.[3] Therefore, they requested that the European institutions draw up an action program with a precise schedule before 31 July 1973. This Declaration marked the beginning of the second phase, which lasted until the entry into force of the Single European Act on 1 July 1987. In the Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, we read:

> 'Whereas in particular, in accordance with Article 2 of the Treaty, the task of the European Economic Community is to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion, which cannot be imagined in the absence of an effective campaign to combat pollution and nuisance or of an improvement in the quality of life and the protection of the environment.'

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1 OJ 1967 L 196/1.

2 OJ 1971 L 42/16.

3 Bulletin EC 1972, No. 10.

Although the term 'environmental protection' was not as such found in the objectives enumerated in Articles 2 and 3 of the EEC Treaty in those days, this Declaration did in effect mean that, by an extensive interpretation of 'economic expansion', which is expressly included as an aim in Article 2 EC, environmental protection could become the subject of European decision-making. Henceforth, economic expansion was to be regarded not only in quantitative terms, but also qualitatively. Despite the Declaration, the extent of the competence of the EEC to effect a comprehensive environment policy remained a matter of controversy. Nevertheless, numerous directives and regulations have been adopted on almost every conceivable aspect of environment policy since 1971. One feature of this second phase was that policy which was specifically presented as European environment policy was developed on the basis of a treaty having no specific environmental competences.

In this second phase, decision-making in respect of European environment policy was based primarily on Articles 100 and 235 EEC (now Articles 94 and 308 EC). Examples of environmental measures dating from this period that were based exclusively on Article 100 EEC were:

- Directive 85/210 concerning the lead content of petrol;[4]
- Directive 73/404 relating to detergents;[5]
- Directive 78/1015 on the permissible sound level and exhaust system of motor cycles.[6]

Article 100 EEC could be used where differences in national environmental legislation had a detrimental effect on the common market. This practice was confirmed by the Court of Justice in Case 92/79, in a judgment in which the validity of Directive 75/716 relating to the maximum sulphur content of liquid fuels was raised.[7] In the words of the Court:

> 'It is by no means ruled out that provisions on the environment may be based upon Article 100 of the Treaty. Provisions which are made necessary by considerations relating to the environment and health may be a burden upon undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted.'

Most of the environmental legislation dating from the period before the Single European Act (1987) was based on both Article 100 and Article 235 EEC. Important examples include:

- Directive 76/464 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community;[8]

4 OJ 1985 L 96/25.

5 OJ 1973 L 347/51.

6 OJ 1978 L 349/21.

7 Case 92/79 *Commission* v. *Italy* [1980] ECR 1115.

8 OJ 1976 L 129/23.

- Directive 84/360 on the combating of air pollution from industrial plants;[9]
- Directive 82/501 on the major-accident hazards of certain industrial plants[10] and
- Directive 78/319 on toxic and dangerous waste.[11]

In practice, it was apparent that in the field of environmental protection there was a clear need for an additional legal basis besides the 'old' Article 100 EEC. After all, the objectives of Article 100 EEC, namely the abolishing of measures affecting the functioning of the common market, placed constraints on the use that could be made of that article as a legal basis for environment policy. On the principle that the powers extend only to what has been conferred by the Treaty, Article 100 EEC could not be employed where other or more far-reaching environmental measures had to be taken than were merely necessary for the proper functioning of the common market. Moreover, Article 3(h) EC still provides that the approximation of laws is only possible 'to the extent required for the proper functioning of the common market.'

To remedy this lacuna, the Council would generally invoke Article 235 EEC. This provision could be used 'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers'. It has already been noted that, by extensive interpretation of Article 2 EC, environmental protection was already considered an objective of the EC. This was confirmed by the Court of Justice in 1985 in the *ADBHU* case.[12]

> This case concerned the validity of a directive on the disposal of waste oils. It was contended that provisions imposing a system of permits on undertakings which disposed of waste oils and a system of zones within which such undertakings had to operate were incompatible with the principle of the free movement of goods. The directive in question was based on both Article 100 and Article 235 EEC. This joint legal basis was justified in the preamble to the directive as follows. On the one hand, it was pointed out that any disparity between the provisions on the disposal of waste oils in the various Member States could create unequal conditions of competition, thus necessitating the use of Article 100 EEC as the legal basis for approximation. On the other hand, the Council felt it necessary to accompany this approximation of laws by wider regulations so that one of the aims of the EC, protection of the environment, could be achieved. For this purpose, it invoked Article 235 EEC as an additional legal basis. The Court held as follows: 'In the first place it should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives

9 OJ 1984 L 188/20.

10 OJ 1982 L 230/1.

11 OJ 1978 L 84/43.

12 Case 240/83 *ADBHU* [1985] ECR 531.

of general interest pursued by the Community provided that the rights in question are not substantively impaired. There is no reason to conclude that the directive has exceeded those limits. The directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives.'

The Court continued:

> 'It follows from the foregoing that the measures prescribed by the directive do not create barriers to intra-Community trade, and that in so far as such measures, in particular the requirement that permits must be obtained in advance, have a restrictive effect on the freedom of trade and of competition, they must nevertheless neither be discriminatory nor go beyond the inevitable restrictions which are justified by the pursuit of *the objective of environmental protection*, which is in the general interest. That being so, Articles 5 and 6 cannot be regarded as incompatible with the fundamental principles of Community law mentioned above.' [13]

The significance of this judgment was that the Court had for the first time recognised 'environmental protection' as one of the Community's essential objectives.[14] This meant that Article 235 EEC could be used not only as a supplementary legal basis to Article 100 EEC, but could *itself* form the legal basis for European environment policy. An example of a directive based solely on Article 235 EEC is the Wild Birds Directive.[15] Nevertheless, only a few measures have been based solely on Article 235 EEC, for example, Directive 82/884 on a limit value for lead in the air[16] and Recommendation 81/972 concerning the re-use of paper and the use of recycled paper.[17]

The third phase

The third phase in the development of a European environment policy commenced on 1 July 1987, the date on which the changes to the EEC Treaty brought about by the Single European Act came into force, and continued until the date the Treaty on European Union ('Maastricht') entered into force. Although the case law of the Court of Justice had specifically dealt with environmental protection before then, this phase was notable because, for the first time, the objectives of the environment policy were enshrined in the Treaty. The inclusion in the Treaty of provisions designed specifically to protect the environment, for example Articles 130r, 130s, 130t, 100a(3) and 100a(4) EEC,[18] confirmed the

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[13] Emphasis added by the authors.

[14] This has been confirmed in more recent case law: Case 302/86 *Commission* v. *Denmark* [1988] ECR 4607, para. 8, Case C-213/96 *Outokumpu* [1998] ECR I-1777, para. 32 and Case C-176/03 *Commission* v. *Council* [2005] ECR I-7879.

[15] Directive 79/409 on the conservation of wild birds, OJ 1979 L 103/1.

[16] OJ 1982 L 378/15.

[17] OJ 1981 L 355/56.

[18] Now Articles 174, 175, 176, 95(3) and 95(4) EC.

Community's task in developing a European environment policy. The Treaty incorporated specific powers aimed at the protection of the environment.

In view of these express environmental powers, it was not surprising that the 'old' Article 235 EEC was in that period hardly ever invoked as a legal basis for environmental measures. The explicit environmental provisions of the Treaty made this unnecessary. Only in exceptional cases, such as Directive 93/76 to limit carbon dioxide emissions by improving energy efficiency,[19] might there be a need to base environmental measures on this 'catch all' provision.

The fourth phase

The fourth phase of European environmental law started with the entry into force on 1 November 1993 of the Treaty on European Union. In other words, the post-Maastricht phase. For the first time, the term 'environment' was actually referred to in the key Articles 2 and 3 of the EC Treaty, which set out the objectives and activities of the Community. Article 2 referred to 'the promotion, throughout the Community, of a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment', while Article 3(k) stated that one of the activities for attaining this was 'a policy in the sphere of the environment'.[20]

The formulation 'sustainable growth' in Article 2 EC was criticised as being a departure from the more usual formulation 'sustainable development'.[21] From the point of view of environmental protection, the concept of 'sustainable growth' seemed marginally weaker than that of 'sustainable development'. Be that as it may, the incorporation of an environmental objective was certainly of great political significance.

The fourth phase is also distinct in that, for the first time, decisions under the Title on the Environment could be taken by a qualified majority. A further striking change as a result of 'Maastricht' was the status given to the action programmes on the environment. The increased competences of the European Parliament in the adoption of these programmes should also be noted. These programmes could be adopted under what is known as the co-decision procedure, which meant the European Parliament could exercise a veto.

The fifth phase

The fifth phase is the post-Amsterdam and post-Nice phase. The Treaty of Amsterdam (1997) has introduced a number of interesting changes to the legal framework of European environmental policy. In the first place, the constitutional status of 'environmental protection' has been clarified. The text of Article

[19] OJ 1993 L 237/28. Now repealed by Directive 2006/32 on energy end-use efficiency and energy services; OJ 2006 L 114/64.

[20] Acknowledged by the Court in Case C-213/96 *Outokumpu Oy* [1998] ECR I-1801, para. 32.

[21] A reference to 'sustainable growth' in European secondary legislation can be found in the preamble of Directive 94/62 on packaging and packaging waste, OJ 1994 L 365/10: 'the reduction of waste is essential for the sustainable growth specifically called for by the Treaty on European Union'.

2 EC has been improved considerably. It now states that the Community shall have as its task promoting a harmonious, balanced and sustainable development of economic activities. This formulation is much more in line with internationally accepted practice in the environmental policy area.[22]

Sustainable development means the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems, by maintaining natural assets and their biological diversity for the benefit of present and future generations. In other words: to meet the needs of the present generation without compromising those of future generations.[23]

The sustainable development strategy launched in 2001 by the Göteborg summit was composed of two main parts. The first proposed objectives and policy measures to tackle a number of key unsustainable trends, like combat climate change, ensure sustainable transport, address threats to public health, such as chemicals pollution, unsafe food and infectious diseases, manage natural resources more responsibly and stop biodiversity decline, combat poverty and social exclusion, and meet the challenge of an ageing population. The second part of the strategy called for a new approach to policy-making. The central instrument developed for this purpose was the obligation for the Commission to submit each new policy proposal to an Impact Assessment procedure.[24] More recently the EU reviewed its sustainable development strategy.[25]

Being more a guideline to policy action than a normative-legal concept, the political importance of this concept cannot be underestimated. Of course, the text is not entirely satisfactory, because there is still a link in Article 2 EC between the use of the terms 'sustainable development' and 'economic activities' and because we find a slightly different formulation in Article 2 of the Treaty on European Union.[26] Nevertheless, it must be said that as a whole the text really has improved.

As far as the constitutional status of environmental protection is concerned, there was however a second improvement. The Amsterdam Treaty not only

[22] See for a reference to the concept of 'sustainable development' in secondary legislation Article 9 of Directive 96/62 on ambient air quality assessment and management, OJ 1996 L 296/55.

[23] Presidency Conclusions European Council at Göteborg, 15 and 16 June 2001, point 19. At this summit the European Council declared sustainable development to be 'a fundamental objective under the Treaties.' Cf. also the 'classic' definition from the Brundtland report: 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'; World Commission on Environment and Development, *Our Common Future* (Oxford 1987), at 8. See for a more in-depth treatment of the issue of sustainable development and European law, Lee (2005), chapter 2.

[24] Commission's Communication COM (2002) 276 of 5 June 2002 on Impact Assessment.

[25] The text of the Renewed Sustainable Development Strategy is published in the Annex to European Council DOC 10117/06, 9 June 2006.

[26] 'a balanced and sustainable development'.

speaks of sustainable development, in Article 2 EC, it also introduced as a task to promote 'a high level of protection and improvement of the quality of the environment'.[27] This 'high level of protection principle' will be dealt with more extensively in section 3.2 of this chapter. It is generally understood that within the objectives laid down in Article 2 EC, there is no hierarchy.[28]

A third improvement is the 'promotion' of the integration principle, Article 6 EC, according to which environmental protection requirements must be integrated into the definition and implementation of other Community policies, as a 'General Principle' of EC law. The legal consequences of this will be discussed in section 2 of this chapter.

With respect to the possibilities of derogation, after harmonisation, from internal market related measures by virtue of environmental protection requirements, it cannot be denied that the text introduced by the Amsterdam Treaty (Article 95(4) to (6) EC) is an improvement, not only from a substantive but also from a procedural point of view. The procedure will be discussed in detail in Chapter 3, section 6.

The provisions of the environmental paragraph, now Articles 174-176 in the EC Treaty, have not been changed by the Amsterdam Treaty in their material, their substantive meaning. Slight changes in the text of Article 175 EC however have been made by the Treaty of Nice (2001). A major change brought about by the Amsterdam Treaty however concerned the decision-making procedures. The co-decision procedure has become the standard decision-making procedure for environmental legislation. Although co-decision does not automatically lead to more environmentally friendly legislation, this change must nevertheless be welcomed. We have come a long way from decision-making by unanimity under the old Articles 100 and 235 EEC to majority voting and a strong role for the European Parliament under an explicit environment paragraph in the Treaty.

The next phase is now almost on us. After the collapse of the Constitutional Treaty[29] the Member States have agreed on a new text, the so called 'Reform Treaty'.[30] Before it can enter into force (2009?), the Reform Treaty must be ratified by all Member States according to the procedure of Article 48 EU. The Reform Treaty contains amendments to the EU Treaty and the EC Treaty. The Reform Treaty will rename the EC Treaty in 'Treaty on the Functioning of the European Union' (FEU) and will renumber some of its provisions.[31] The concept of *European Community* will be replaced throughout the treaties in *European Union*. Therefore, one can say that the European Union will replace and succeed the European Community after the Reform Treaty has entered into force.[32]

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[27] Cf. also Article 3(3) EU after amendment by the Reform Treaty.

[28] Cf. Bär & Kraemer (1998) at 316.

[29] OJ 2004 C 310.

[30] We have made use of the text of the Reform Treaty in CIG 14/07, Brussels, 3 December 2007.

[31] For instance, the Articles 174-176 EC will be renumbered to Articles 191-193 FEU.

[32] The, limited, consequences of the Reform Treaty for European environmental policy will be discussed *infra*, in particular sections 2 and 3.1 of this chapter and in Chapter 2, sections 1-2.

2 General Principles of EC Law in Relation to Environmental Protection

The principle of specific competences

Why is it necessary to concern ourselves with the legal basis of European environment policy? Does it have any practical significance, apart from satisfying academic curiosity? The answer has to be: yes, it does! Establishing the legal basis of a proposed European measure on the environment is important for at least three reasons. In the first place because the institutions do not have the unlimited competences of the national legislators to take whatever measures they please. The institutions' powers extend only to what has been expressly conferred by treaty. As provided in Article 5 EC: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.'[33] In European law, acting without competence results in invalid measures.

Deciding the proper legal basis of a European environmental measure is thus in the first place important in order to determine the extent of the competence in the matter in question, and thus the validity of measures taken on the basis of this competence.

In the second place, deciding the legal basis is relevant for the decision-making procedure to be followed when adopting a particular environmental measure. In Chapter 2, we shall see that European law provides for various decision-making procedures in respect of environmental measures. Some decisions have to be taken using the co-decision procedure, others unanimously and yet others by a qualified majority. The role played by the various participants in the decision-making process (Commission, European Parliament and Council), and thus their means of influencing the environment policy, is different under each of these procedures. It is clear from the Court's case law that the choice of the correct legal basis depends on the main object of the measure.[34] If the centre of gravity of a measure harmonising, for example, environmental product standards is the internal market, Article 95 EC is the appropriate legal basis. If the centre of gravity is protection of the environment, decision-making under Article 175 EC is appropriate.[35]

In the third place, the choice of legal basis affects the extent to which Member States are entitled to adopt more stringent environmental measures than the European standards agreed upon. This important point will be discussed in detail in Chapter 3, section 4.

The subsidiarity principle

The second paragraph of Article 5 EC refers to the principle of subsidiarity in general terms: 'In areas which do not fall within its exclusive competence, the

33 Cf. also Article 5(2) EU after amendment by the Reform Treaty.

34 Case C-155/91 *Commission* v. *Council* [1993] ECR I-939, Case C-187/93 *EP* v. *Council* [1994] ECR I-2857.

35 See on this more in detail Chapter 2, section 4.

Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'[36]

The principle thus contains both a negative criterion (not sufficiently achieved by the Member States) and a positive one (better achieved by the Community) by which to judge European acts. According to the Amsterdam Treaty Protocol on the application of the principle of subsidiarity, European action must meet both criteria to be justified.[37] Any (proposed) legislation must be justified with regard to the principle. Legislation to date in general provides justification in this respect.[38] However, the references in the preamble of European environmental measures do have a somewhat 'standard' and therefore obligatory character.

See for instance the reference to the subsidiarity principle in Directive 2004/101 establishing a scheme for greenhouse gas emission allowance trading, in respect of the Kyoto Protocol's project mechanisms. Point 19 of the preamble reads: 'Since the objective of the proposed action, namely the establishment of a link between the Kyoto project-based mechanisms and the Community scheme, cannot be sufficiently achieved by the Member States acting individually, and can therefore by reason of the scale and effects of this action be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.'

Or take the preamble (point 15) of Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements: 'Since the objectives of this Directive, namely the incorporation of the international ship-source pollution standards into Community law and the establishment of penalties – criminal or administrative – for violation of them in order to ensure a high level of safety and environmental protection in maritime transport, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.'[39]

As far as the likely implications of the subsidiarity principle for environmental law are concerned, the following should be noted. In the first place, the Protocol states that action is justified where the issue under consideration has trans-

36 Cf. also Article 5(3) EU after amendment by the Reform Treaty.

37 Protocol on the Application of the Principles of Subsidiarity and Proportionality.

38 OJ 2004 L 338/18.

39 OJ 2005 L 255/11.

national aspects, which cannot be satisfactorily regulated by action by Member States.[40] This means that European action to prevent cross-border environmental effects satisfies the subsidiarity principle. In view of the territorial limitations of many national powers, unilateral action by Member States is clearly going to be less effective than concerted action where the source of pollution is situated abroad. This would, for example, apply to action to restrict all kinds of transfrontier environmental pollution of a regional (water and air pollution) or global (depletion of the ozone layer, greenhouse effect resulting from CO_2 emissions, maintenance of biodiversity) nature[41] or to the protection of wild fauna and flora.[42]

As early as 1987 the Court held in Case 247/85 that the Wild Birds Directive is based on the assumption that the protection of wild birds is 'typically a transfrontier environment problem entailing common responsibilities for the Member States'.[43] The Habitats Directive[44] also stipulates that it is necessary to take measures at European level to conserve threatened habitats and species, as these form part of the Community's natural heritage and the threats to them are often of a transboundary nature. A further example is provided by Directive 91/676 on pollution caused by nitrates from agricultural sources.[45] Its preamble states that action at European level is necessary because pollution of water due to nitrates in one Member State can influence waters in other Member States. Other examples of directives in which the preamble refers to possible transfrontier effects are Directive 90/219 on genetically modified micro-organisms[46] and Directive 89/369 on the incineration of municipal waste.[47] One of the arguments supporting the conclusion by the EC of the Convention on the protection of the Alps was the cross-border nature of the ecological problems of the Alpine area.[48]

In general, therefore, action by the EU on transfrontier environmental matters would seem to pass the test of subsidiarity.

According to the Protocol, another important element of the application of the subsidiarity principle is whether action by Member States alone or lack

[40] See also Lee (2005) at 10.

[41] See for instance Directive 2001/81 on national emission ceilings for certain atmospheric pollutants, OJ 2001 L 309/22, point 13 of the preamble. It was stated that in accordance with the subsidiarity principle 'limitation of emissions of acidifying and eutrophying pollutants and ozone precursors, cannot be sufficiently achieved by the Member States because of the transboundary nature of the pollution'.

[42] Cf. however Lee (2005) at 12, who makes a distinction between physical spillovers (transnational pollution) and 'psychic' spillovers (protection of the EU's common heritage).

[43] Case 247/85 *Commission* v. *Belgium* [1987] ECR 3029.

[44] Directive 92/43 on the conservation of natural habitats, OJ 1992 L 206/7.

[45] OJ 1991 L 375/1.

[46] OJ 1990 L 117/1.

[47] OJ 1989 L 163/32.

[48] OJ 1996 L 61/32, concluded by Council Decision 96/191, OJ 1996 L 61/31.

of European action would conflict with the requirements of the Treaty, such as the need to correct distortion of competition or avoid restrictions on trade or strengthen economic and social cohesion.[49] As far as the environment is concerned, this could apply in the following situation, for instance. A purely national, product-oriented environmental policy could easily result in restrictions on the import and export of goods, which might harm the environment. Harmonisation of environmental product standards at a European level can ensure that effective environmental policy need not be at the expense of the operation and functioning of the internal market. As the scope of protection pursued by environmental product standards have immediate effects on trade, it is clear that these measures comply with the subsidiarity principle.[50]

More problematic from a subsidiarity point of view is its role in respect of emission and environmental quality standards.[51] On the one hand, it can be said that European standard setting tends to even out competitive differences and avoids 'a race to the bottom'.[52] On the other hand, it deprives Member States of the opportunity of maintaining 'healthy' policy competition. A reasonable balance could be attained here if European environmental rules were mainly cast in the mould of minimum harmonisation. This would allow the provision of a minimum level of protection throughout the EU, without depriving the Member States of the power to adopt more stringent standards for their own territory. Policy competition would then only be made impossible below the European minimum standard.

A third guideline for application of the subsidiarity principle is whether action at European level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States. Here, too, it could be said that the objective of attaining a certain minimum level of protection throughout the EU can only be achieved effectively by European legislation. The objectives set out in Article 174 EC imply this.

An examination of European environmental legislation in the light of the above guidelines would reveal that probably not one environmental directive or regulation would fail to pass the test. It should however be noted that the importance of the subsidiarity principle is above all political. The few judgments of the Court on the subject hardly give the impression that it would be quick to annul a Council decision for non-compliance with the principle of subsidiarity.[53]

49 Cf. Lee (2005) at 11.

50 Cf. Case C-377/98 *Netherlands* v. *EP and Council* [2000] ECR I-6229. The case concerned an application for annulment of Directive 98/44 on the legal protection of biotechnological inventions; OJ 1998 L 213/13.

51 Cf. also Faure (1998) and Revesz (2000).

52 Cf. Revesz (2000), Scott (2000) at 56, Lee (2005) at 11.

53 Cf. e.g. Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453 and Case C-377/98 *Netherlands* v. *EP and Council* [2000] ECR I-6229.

The principle of proportionality

The third paragraph of Article 5 EC continues: 'Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'[54] This is a statement of the principle of proportionality.[55] Here, too, the Protocol to the Treaty of Amsterdam provides several guidelines. All charges, both for the Community and for the national governments must be kept to a minimum and be proportionate to the proposed objective. The European legislature must choose measures, which leave the greatest degree of freedom for national decisions, and the national legal system should be respected. As much use as possible should be made of minimum standards, whereby Member States are free to lay down stricter national standards. Use of the directive is to be preferred above use of the regulation, and the framework directive is to be preferred above detailed measures. Non-binding instruments such as recommendations should be used wherever possible, as well as voluntary codes of conduct.[56]

Examples of such voluntary codes can already be found in various environmental acts. Article 4 of Directive 91/676 on pollution caused by nitrates[57] provides that the Member States must establish codes of good agricultural practice, to be implemented by farmers on a voluntary basis. The purpose of these codes is to reduce the pollution of water caused by nitrates from agricultural sources. Another example is Regulation 1980/2000 on a revised Community Eco-label Award Scheme.[58] This regulation, which regulates a Community eco-label award scheme, operates on a wholly voluntary basis. Where a product meets the applicable environmental criteria, the Community eco-label may be used. What is remarkable here is that the various interest groups (industry, retailers, environmental organisations etc.) must be consulted for the purpose of defining the criteria that should apply. In the same vein is the Eco-audit Regulation 761/2001 (EMAS).[59] The eco-management and audit scheme is a management tool for companies and other organisations to evaluate, report and improve their environmental performance. Participation is completely voluntary.

A similar development is the growing interest in the use of voluntary environmental agreements.[60] Environmental agreements between public institutions and industry are increasingly used to implement environmental policies. A first

54 Cf. also Article 5(4) EU after amendment by the Reform Treaty.

55 Cf. in general on proportionality Jans et al. (2007), Chapter V, section 4.

56 See Council Resolution on the drafting, implementation and enforcement of Community environmental law; OJ 1997 C 321/1. Cf. Winter (1996) and Verschuuren (2000).

57 OJ 1991 L 375/1.

58 OJ 2000 L 237/1. Cf. also the 'old' Regulation 880/92, OJ 1992 L 99/1.

59 OJ 2001 L 114/1.

60 See the Commission's Communication Environmental Agreements at Community Level; COM (2002) 412 final. Cf. Lee (2005) at 231-237.

example at the EU level was the 1998 agreement between the Commission and the European car industry (ACEA).[61] A more recent example concerns environmentally friendly plastic.[62] Agreements can also be used, under certain conditions, to implement provisions of environmental directives.[63]

The EU's environment policy can also be said to comply with the guidelines in terms of its use of the directive. From the start it has been customary to use the directive for action in the field of the environment. Regulations have been used in only a few cases, above all in those sectors where a more uniform regime is indeed necessary, for example, to implement international agreements or to regulate international trade. Examples are Regulations 338/97 on the protection of species of wild fauna and flora by regulating trade therein,[64] 348/81 on imports of whales and other cetacean products[65] and 1013/2006 on shipments of waste.[66] These all regulate the trade in certain goods or products with third countries. A more or less uniform regulation is required at the external frontier of the EU in order to avoid deflections of trade. In these cases, a regulation is a more appropriate instrument than a directive, because of its direct applicability. However, regulations are used not only to regulate international trade. They are also used when it is necessary to grant certain rights directly to manufacturers, importers or even particular companies, or to impose obligations on them. The element of uniformity and identical application of rules throughout the EU was also the primary reason to opt to use this instrument for the measures on the EC eco-label and eco-management and audit schemes.[67]

As far as the preference for minimum harmonisation expressed in the guidelines is concerned, minimum standards have regularly been utilised in European environmental law. The principle is even stated in so many words in the Treaty itself, in Article 176 EC.[68] In the vast majority of European environmental legislation, for example, the measures to combat water and air pollution, rules are laid down for the fixing of emission limit values, without going as far as complete harmonisation. There is in general no need for complete harmonisation.

It should be noted that the phenomenon of framework legislation can already be found in European environmental law, for example, in the EU Water Frame-

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61 See Commission Recommendation of 5 February 1999 on the reduction of CO2 emissions from passenger cars; OJ 1999 L 40/49.

62 Commission press release IP/05/170, 14 February 2005.

63 Commission Recommendation 96/733 concerning environmental agreements implementing Community directives, OJ 1996 L 333/59 and Council Resolution on environmental agreements, OJ 1997 C 321/6. See for a more detailed discussion Chapter 4, section 2.4.

64 Regulation 338/97, OJ 1997 L 61/1.

65 OJ 1981 L 39/1.

66 OJ 2006 L 190/1. Regulation 1013/2006 will repeal Regulation 259/93 (OJ 1993 L 30/1) with effect from 12 July 2007.

67 Regulations 1980/2000, OJ 2000 L 237/1 and 761/2001, OJ 2001 L 114/1.

68 See on this more in detail Chapter 3, section 5.

work Directive,[69] Directive 91/156 on waste[70] and Directive 96/62 on ambient air quality assessment and management.[71]

The case law of the Court shows that the Court is in principle willing to review European legislation in the light of the proportionality principle. In the *Standley* case, the Court considered the Nitrates Directive.[72] It was argued that this directive gave rise to disproportionate obligations on the part of farmers, so that it offended against the principle of proportionality. The Court was not impressed. After a careful study of the Nitrates Directive, it came to the conclusion:

> 'that the Directive contains flexible provisions enabling the Member States to observe the principle of proportionality in the application of the measures which they adopt. It is for the national courts to ensure that that principle is observed.' In general the Court, in its assessment of the proportionality of an EC measure, will apply the so called 'manifestly inappropriate' test: 'the legality of a measure adopted [...] can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.[73]

The conclusion in *Standley* that the flexible provisions of the directive enables the Member States to observe the principle of proportionality will be applicable to most, if not all, European environmental legislation.

The integration principle

One of the most important principles of EC law of relevance for environmental protection is the integration principle stated in Article 6 EC:[74] 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.'

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[69] Directive 2000/60 establishing a framework for the Community action in the field of water policy ; OJ 2000 L 327.

[70] OJ 1991 L 78/32.

[71] OJ 1996 L 296/55.

[72] Case C-293/97 *Standley* [1999] ECR I-2603. Cf. also Case C-102/97 *Commission* v. *Germany* [1999] ECR I-5051, para. 42. The same approach can also be found in the Court's judgment in Case C-6/99 *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651, on the precautionary principle; See below section 3.2 of this chapter.

[73] Case 331/88 *Fedesa* [1990] ECR I-4023. Cf. also more recently Case C-189/01 *Jippes* [2001] ECR I-5689, para. 83 and Case C-27/00 *Omega Air a.o.* [2002] ECR I-2569, para. 72. In the latter case, concerning threshold levels for noise produced by airplanes, the Court did not find that the Council committed a manifest error of assessment even if alternative measures could have been taken which would have been economically less damaging. Cf. also, with respect to the Waste Oils Directive, Case C-15/03 *Commission* v. *Austria* [2005] ECR I-837, para. 38 in particular and Case C-92/03 *Commission* v. *Portugal* [2005] ECR I-867.

[74] Cf. Article 11 FEU after the entry into force of the Reform Treaty.

The importance of the integration principle is reaffirmed in the Sixth Environment Action Programme, which stipulates that 'integration of environmental concerns into other policies must be deepened' in order to move towards sustainable development.[75] This refers to what is known as external integration, in other words, the integration of environmental objectives in other policy sectors. The principle was introduced into the Treaty by the Single European Act. There it was provided that 'Environmental protection requirements shall be a component of the Community's other policies.' It is notable that the current version of the Treaty is worded more forcefully and refers explicitly to implementation of the Community policies. Moreover, the general formulation makes it clear that the operation of the integration principle extends to the entire EC Treaty. New is the introduction of the clause 'in particular with a view to promoting sustainable development.' This has given the concept of 'sustainable development' some legal 'weight' and therefore cannot be seen as merely stating a policy objective to be achieved.[76]

The first question which presents itself is what precisely has to be integrated. The Treaty refers to 'environmental protection requirements'. What should this be taken to mean? Certainly, it would seem to include the environment policy objectives of Article 174(1) EC. It also seems likely that it includes the principles referred to in Article 174(2) EC, such as the precautionary principle and the principle that preventive action should be taken. And finally integration of the environment policy aspects referred to in Article 174(3) EC should not *a priori* be excluded, though it is true that the Treaty does not state that these aspects have to be integrated, but only that they should be taken into account. This wide interpretation of the integration principle in effect leads to a general obligation on the European institutions to reach an integrated and balanced assessment of all the relevant environmental aspects when adopting other policy.

The next problem concerns the question of whether the integration principle implies that the EU's environment policy has been given some measure of priority over other European policy areas. Probably, it has not, at least if by priority it is meant that, in the event of a conflict with other policy areas, environment policy has a certain added value from a legal point of view.[77] The text of the Treaty does not support such a conclusion. The integration principle is designed to ensure that protection of the environment is at least taken into consideration, even when commercial policy is involved or when other decisions are being taken and have to be worked out in detail, for example in the fields of agricul-

75 Decision 1600/2002 laying down the Sixth Community Environment Action Programme, OJ 2002 L 242. Cf. also Communication from the Commission 'A partnership for integration: a strategy for integrating the environment into EU policies', COM (1998) 333 and Commission working document 'Integrating environmental considerations into other policy areas – a stocktaking of the Cardiff process' COM (2004) 394.

76 Cf. Bär & Kraemer (1998) at 316-318.

77 See for a discussion of this issue Bär & Kraemer (1998) at 318-319.

ture, transport,[78] energy,[79] development aid,[80] trade and external relations,[81] internal market[82] and competition policy, regional policy, etc.[83] However, the manner in which potential conflicts between protection of the environment and, for example, the functioning of the internal market should be resolved cannot be inferred from the integration principle as such. Such conflicts should be resolved against the background of the body of case law established by the Court of Justice in respect of the principle of proportionality. If European legislation for the protection of the environment, which the Court has already designated as one of the essential EC objectives in the *ADBHU* case, results in restrictions of trade, this is regarded as permissible as long as the measures are not discriminatory and do not entail restrictions that go beyond what is strictly necessary for the protection of the environment.[84] The principle of proportionality may also prove a useful guide in relation to other areas of policy in which conflicts flowing from the integration principle are involved.

At the same time, it should be noted that when interpreting Article 33 EC, in the context of the common agricultural policy, the Court also has to weigh various objectives against each other. The institutions of the EC have wide discretionary powers when harmonising policy in relation to the various objectives contained in Article 33 EC (increasing productivity, ensuring a fair standard of living for the agricultural community, stabilising markets, assuring the stability of supplies and ensuring supplies reach consumers at reasonable prices). One or more of these objectives may (temporarily) be given priority, as long as the policy does not become so focused on a single objective that the attainment of other objectives is made impossible. This approach could also be employed in respect of the environment. It would then be arguable that, if a given objective could adequately be achieved in a variety of ways, the integration principle would entail a choice for the least environmentally harmful.

Now that the question of the priority has been addressed, the problem of the legal enforceability of the integration principle looms large. The following comments are called for. The Court's judgments clearly show that the contention that the integration principle is of no value whatsoever is not correct. For example, the principle fulfils an important function in the choice of the proper legal basis of environmental measures and has been used by the Court to justify 'environmental' legislation under legal bases other than Article 175 EC.

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78 Mahmoudi (2005).

79 Dhondt (2005).

80 Williams (2005).

81 See Marín Durán & Morgera (2006).

82 Cf. for instance with respect to the freedom to provide services the Services Directive, Directive 2006/123 on services in the internal market (OJ 2006 L 376/36), which states in its preamble at point 7: 'This Directive also takes into account other general interest objectives, including the protection of the environment'.

83 Cf. Dhondt (2003) and Vedder (2003).

84 Case 240/83 *ADBHU* [1985] ECR 531.

In the *Chernobyl I* case, the issue was whether Regulation 3955/87 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl power station was rightly based on Article 113 (now Article 133) rather than Article 130s (now Article 175).[85] The Court held that the 'the principle whereby all Community measures must satisfy the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements.' In the *TiO2* case,[86] the Court confirmed this.

A second legal consequence of the integration principle, closely connected with the above, is the following. The principle broadens the objectives of the other powers laid down in the Treaty and thus limits the role of the specific powers doctrine in environmental policy.

The *Chernobyl I* case and the *TiO2* case demonstrate that environmental objectives can be pursued in the context of the common commercial policy and its internal market policy. The principle has been used also in the interpretation of Directive 90/50 on public service contracts, leading to the conclusion that this does not exclude the possibility of using environmental criteria in identifying the economically most advantageous tender.[87] Without the integration principle, it is debatable to what extent environmental objectives, for example in connection with the approximation of laws for the attainment of the internal market, could be taken into account by the Council.

It was not without reason that most European environmental measures in the period prior to the Single European Act were based on a combination of the old Articles 100 and 235 EEC Treaty. The powers of approximation are limited in Article 3(h) 'to the extent required for the proper functioning of the common market'. And because the requirements of a properly functioning common market were not always and automatically synonymous with the requirements of environmental protection, it was necessary to invoke the additional legal basis supplied by Article 235 EEC. The integration principle makes such artificial devices unnecessary. Not only does it extend the objectives of the internal market policy and the common commercial policy, but environmental objectives can also be taken into account in other policy areas without the attributed powers doctrine interfering.

[85] Case C-62/88 *EP* v. *Council* [1990] ECR I-1527. In the *TiO2* case (Case C-300/89 *Commission* v. *Council* [1991] ECR I-2867), the Court confirmed this, stating: 'That principle implies that a Community measure cannot be covered by Article 130s [now Article 175 EC, authors] merely because it also pursues objectives of environmental protection.'

[86] Case C-300/89 *Commission* v. *Council* [1991] ECR I-2867.

[87] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, para. 57.

Thus in *Pinaud Wieger*, the Court held that the achievement of freedom to provide services in the transport sector can only be attained in an orderly fashion in the context of a common transport policy 'which takes into consideration the economic, social and ecological problems'.[88] And with respect to competition law, we argue that the impact on the environment must be taken into account in assessing whether agreements between undertakings violate Article 81 EC and is relevant to the Commission's when deciding whether or not to approve state aid under Article 87(3) EC.[89] Here, too, the environmental consequences can now be taken into account.[90]

Another aspect which is important when evaluating the legal status of the integration principle is whether the legitimacy of actions of the Council and Commission can be reviewed by the Court in the light of the principle. Can the validity of a directive or regulation, for example in the field of transport or agriculture, be questioned on the grounds that the decision has infringed the environmental objectives of the Treaty? In other words, the question as to the legal enforceability of the integration principle is in fact a question as to the legal significance of the objectives, principles and other aspects referred to in Article 174(1), (2) and (3) EC. It has already been noted that the present version of the principle has been formulated more forcefully than under the Single European Act. In principle, the review of European measures in the light of the environmental objectives should therefore be regarded as possible.

Indeed, in its judgment in the *Chernobyl I* case, the Court speaks in just such strong terms ('must satisfy the requirements of environmental protection'). In the *Betatti* case, in which the lawfulness of Ozone Regulation 3093/94 was disputed, the Court was also prepared to examine the compatibility of a measure with the environmental objectives and principles of the Treaty.[91] It observed that Article 174 EC 'sets a series of objectives, principles and criteria which the Community legislature must respect in implementing [Community environmental] policy.' However, it should be borne in mind that the institutions have wide discretionary powers as to how they shape the Community's environment policy, and will have to balance the relative importance of the environmental objectives and other Community objectives as they proceed. The Court expressed this in the following terms: 'However, in view of the need to strike a balance between certain of the objectives and principles mentioned in Article 130r and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the Council, by adopting the Regulation, committed a

88 Case C-17/90 *Pinaud Wieger* [1991] ECR I-5253. See also Case C-195/90 *Commission* v. *Germany* [1992] ECR I-3141.

89 Cf. Community Guidelines on State aid for environmental protection, OJ 2001 C 37/3 containing a clear reference to the integration principle. See also Chapter 7 extensively.

90 Cf. Chapter 7, section 7.3.3.

91 Case C-341/95 *Gianni Bettati* [1998] ECR I-4355.

manifest error of appraisal regarding the conditions for the application of Article 130r of the Treaty.'

The conclusion that can be drawn from these judgments seems to be that only in very exceptional cases will a measure be susceptible to annulment (or being declared invalid) because certain environmental objectives seem not to have been taken sufficiently into account.[92] Another factor which will probably also have to be taken into account is that the degree to which measures are open to judicial review may differ depending on whether the objectives of Article 174(1) EC, the principles of Article 174(2) EC or the policy aspects of Article 174(3) EC are involved. As far as the latter are concerned, the Treaty states that the Community shall 'take account of' these aspects, which is not the same as observing them. Besides this, Article 174(2) EC states that the Community shall 'aim' at a high level of protection. The conclusion must surely be that the application of the integration principle is amenable to judicial review, but that the extent of that review is limited and may differ from one case to the next.

Perhaps more important than the possibility of relying on the principle before the Court of Justice is the following legal consequence. In our opinion, secondary European legislation can – and indeed must – be interpreted in the light of the environmental objectives of the Treaty, even outside the environmental field.

For example it has emerged as an important factor in justifying the application of the precautionary principle outside of the environmental sphere.[93]

Another example can be found in *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* where the Court assessed if the precautionary principle was taken into account in Directive 99/220 on the deliberate release into the environment of genetically modified organisms.[94] Another example can be found in the *ARCO Chemie Nederland* case.[95] In that case, the Court of Justice ruled that the concept of 'waste', in view of the prevention and precautionary principle, cannot be interpreted restrictive. This is, as it were, a special form of the generally accepted method of interpreting European law so as to be compatible with the Treaty.[96] Furthermore, one could argue that the Treaty itself, for instance the provisions on the free movement of goods, has to be interpreted in the light of the

92 See also the *Standley* case discussed above in the context of the proportionality principle; Case C-293/97 *Standley* [1999] ECR I-2603.

93 In particular in relation to the protection of public health. See Joined Cases T-74, 76, 83, 85, 132, 137, 141/00 *Artegodan GmbH a.o.* v. *Commission* [2002] ECR II-4945, para. 183.

94 Case C-6/99 *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651. The legal basis of the directive is Article 100a EEC.

95 Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland* [2000] ECR I-4475. See also Case C-270/03 *Commission* v. *Italy* [2005] ECR I-5233, para. 12.

96 Case 172/82 *Inter-Huiles* [1983] ECR 555.

environmental objectives and principles mentioned in Article 175 EC.[97] In Chapter 6, we will see that the principle has been key in justifying recourse to the mandatory requirement relating to environmental protection to justify a directly discriminatory barrier to trade.[98]

Finally, we would like to refer to the Court's case law on the Waste Directive. It is settled case law that the concept of 'waste' cannot be interpreted restrictively in view of the environmental principles of Article 174 EC.[99]

A final question that should be discussed in connection with this principle is that of the possible consequences for Member States. In principle, in view of the fact that the text of the Treaty expressly refers to 'Community policies and activities', the integration principle should have no direct legal consequences for the Member States. Of course, there will be indirect effects, in the sense that the Council and the Commission will observe the principle in their legal acts, which are often addressed to the Member States. As these are often integrated regulations and directives, the Member States will also be required to observe a certain degree of integration. Also one could argue that where Member State exercise some discretion under a EU policy (e.g. the choice of trans European networks) the integration duty might apply directly to them.

On the other hand, it seems unlikely that the Member States will be bound by the environmental objectives and principles of the Treaty in areas that have not been harmonised, other than by the general obligation contained in Article 10 EC. They are not directly applicable.[100]

In the *Peralta* case, the lawfulness of Italian environmental legislation was disputed, *inter alia* because of alleged incompatibility with Article 130r (now Article 174) EC.[101] The Court rejected this claim and observed that this provision is confined to defining the general objectives of the European legislature in the matter of the environment. Responsibility for deciding what action is to be taken is conferred on the Council by Article 175. Moreover, Article 176 states that the protective measures adopted pursuant to Article 175 are not to prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaty. Article 174 does not therefore preclude legislation of the kind in question in the main proceedings.

[97] See for instance Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, para. 48.

[98] Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

[99] Cf. for instance Case C-1/03 *Van de Walle a.o.* [2004] ECR I-7613, para. 45.

[100] Cf. Krämer (2007) at 6. This lack of direct applicability prompted the Avosetta group of European environmental lawyers to suggest adding the following provision in the EC Treaty: 'Subject to imperative reasons of overriding public interests significantly impairing the environment or human health shall be prohibited.' See for more details: www.avosetta.org.

[101] Case C-379/92 *Peralta* [1994] ECR I-3453.

In the same vein, we may point at the *Deponiezweckverband Eiterköpfe* case.[102] In that case, the Court decided that national measures that exceed the minimum level of protection of the Directive on the landfill of waste need not be reviewed in light of the principle of proportionality.

The scarce national case law on the subject also points in the same direction. In *Duddridge*, the English High Court held that the precautionary principle did not as such impose obligations on Member States.[103]

The integration principle is also reflected in the Charter of Fundamental Rights of the European Union.[104] Article 37 of the Charter contains a text similar, but not identical, to Article 6 EC. 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.' A difference is, for instance, that Article 37 Charter only refers to EU 'policies' and not to EU 'activities'. Furthermore, Article 6 EC refers more broadly to 'environmental protection requirements', whilst the Charter requires only 'a high level of environmental protection and the improvement of the quality of the environment' to be integrated.

Fundamental rights and the environment

According to Article 6 EU, the EU shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as general principles of Community law.[105] It is well known that this provision is a codification of the case law of the Court of Justice.[106]

Although this is not the place to give a treatment of the case law of the European Court of Human Rights relevant to the protection of the environment, environmental issues nowadays do play a more important role than ever before.

The following *Öneryildiz* case is just to illustrate the importance of this case law.[107] Öneryıldız is a Turkish national who, along with twelve members of his family, was living in a shantytown of Hekimbaşı Ümraniye near Istanbul. This town was

[102] Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753. See also Chapter 3, section 5.

[103] High Court, Queen's Bench Division (Smith L.J. & Farquharson L.J.) 3 October 1994, *R.* v. *Secretary of State for Trade & Industry*, ex parte *Duddridge & others* [1995] 3 C.M.L.R. 231. See also the judgment of the Dutch Den Haag District Court in the *Waterpakt* case, 24 November 1999 *Waterpakt* [2000] *MR* 1, which ruled in the same manner.

[104] OJ 2000 C 346/1. This charter was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000. After the entry into force of the Reform Treaty, according to the 'new' Article 6(1) EU, the provisions of the Charter 'shall have the same legal value as the Treaties'.

[105] Cf. Article 6(3) EU after amendment by the Reform Treaty.

[106] Case 29/69 *Stauder* [1969] ECR 419.

[107] ECHR 18 June 2002 *Öneryildiz* v. *Turkey* – 48939/99 [2002] ECHR 496.

nothing more than a collection of slums built on land surrounding a rubbish tip which had been used jointly by four district councils since the 1970s and was under the authority and responsibility of the main City Council of Istanbul. An expert report drawn up on 7 May 1991 at the request of the Üsküdar District Court drew the authorities' attention to the fact that no measure had been taken with regard to the tip in question to prevent a possible explosion of the methane gas being given off by the decomposing refuse. On 28 April 1993, a methane gas explosion occurred on the waste-collection site and the refuse erupting from the pile of waste buried eleven houses situated below it, including the one belonging to Öneryıldız, who lost nine members of his family. Criminal and administrative investigations were carried out into the case, following which the mayors of Ümraniye and Istanbul were brought before the courts. On 4 April 1996, the mayors in question were both convicted of 'negligence in the exercise of their duties' and sentenced to a fine of 160,000 Turkish liras (TRL) and the minimum three-month prison sentence provided for in Article 230 of the Criminal Code, which was, moreover, commuted to a fine. The court ordered a stay of execution of those fines.

Subsequently, the applicant lodged, on his own behalf and on the behalf of his three surviving children, an action for damages in the Istanbul Administrative Court against the authorities whom he deemed liable for the death of his relatives and the destruction of his property. In a judgment of 30 November 1995, the authorities were ordered to pay the applicant and his children TRL 100,000,000 in non-pecuniary damages and TRL 10,000,000 in pecuniary damages (the equivalent at the material time of approximately 2,077 and 208 euros respectively), the latter amount being limited to the destruction of household goods. The applicant complained, under Article 2 (right to life) of the ECHR, that the accident had occurred as a result of negligence on the part of the relevant authorities. He also complained of the deficiencies in the administrative and criminal proceedings instituted subsequently under Article 6 § 1 (right to a fair hearing within a reasonable time) and of Article 13 (right to an effective remedy). The Court held that there had been a violation of Article 2 (right to life) on account of the death of the applicant's relatives and the ineffectiveness of the judicial machinery; that there had been a violation of Article 1 of Protocol No. 1 (protection of property); and that there was no need to examine the applicant's other complaints.

From the case law of the European Court of Human Rights, it is clear that in particular Article 2 (protection of life), Articles 6 and 13 (access to court), Article 8 (privacy), Article 10 (freedom of expression) and Article 1 Protocol 1 (property) can be of some importance for the protection of the environment.[108]

Broadly speaking European environmental legislation probably meets the minimum requirements of the European Convention, with one possible excep-

[108] Cf. Daniel García San José, *Environmental protection and the European Convention on Human Rights* Council of Europe Publishing 2005.

tion[109] and that concerns the limited remedies available to third parties desiring to challenge decisions of the Commission affecting the environment. The arguments of the Court of Justice to the effect that these limited remedies do not violate Articles 6 and 13, in particular, of the European Convention are not very convincing.[110]

In this section, some reference is also necessary to the Charter of Fundamental Rights of the European Union.[111] We already mentioned Article 37 of the Charter containing a text similar to Article 6 EC. Although the Charter is, at present, as such not legally binding, the ECJ seems to be willing to acknowledge some sort of legal effect of the Charter in particular where a directive makes a reference to the Charter.[112] However, this will change after the Reform Treaty has entered into force. Article 6(1) of the new EU Treaty will read: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000 [...], which shall have the same legal value as the Treaties.'[113]

> In few environmental directives we find a reference to the Charter. For instance in the preamble of Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading we read at point 27: 'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.'[114]

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[109] Cf. in a more general sense European Court of Human Rights 30 June 2005 *Bosphorus Airways* v. *Ireland* 45036/98 [2005] ECHR 440. The Court found that the protection of fundamental rights by EC law can be considered 'equivalent' to that of the Convention system.

[110] See on this extensively Chapter 5, section 4.

[111] OJ 2000 C 346/1.

[112] Case C-540/03 *EP* v. *Council* [2006] ECR I-5769, para. 38. See also Case T-377/00 *Philip Morris International* v. *Commission* [2003] ECR II-1, para. 122: 'Although this document does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order.'

[113] See however for the 'special' position of Poland and the UK, Protocol 7 to the Reform Treaty 'On the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom'.

[114] OJ 2003 L 275/32. See for another example Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements, OJ 2005 L 255/11. Point 16 of the preamble reads: 'This Directive fully respects the Charter of fundamental rights of the European Union; any person suspected of having committed an infringement must be guaranteed a fair and impartial hearing and the penalties must be proportional'. Cf. also the annulled Framework Decision 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ 2005 L 255/164); Case C-440/05 *Commission* v. *Council*, judgment of 23 October 2007, n.y.r. in the ECR.

3 Article 174 EC[115]

3.1 The Objectives of European Environment Policy

The environmental objectives to be pursued by the EU are formulated in the first paragraph of Article 174 EC.[116] They are:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or world-wide environmental problems.

Preserving, protecting and improving the quality of the environment

The first objective formulated in Article 174 EC is fairly general and indeterminate. The term environment is given no further definition in the Treaty itself.[117] On the one hand, this is an advantage in that the objective is sufficiently flexible to be adapted to new developments and new needs for protection.[118] On the other hand, it is impossible to determine with absolute certainty from the Treaty itself what might be understood by a European environment policy. The following problems of interpretation present themselves in connection with the uncertain scope of these environmental objectives.

Does the objective also include protection of nature and landscape values? Having regard to the Habitats Directive, it seems quite clear that it does. The first consideration of the preamble to this directive states that the preservation, protection and improvement of the quality of the environment, 'including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community'. Even the care and accommodation of animals in zoos seem to be covered by this objective.[119] The Zoo Directive illustrates that to a certain extent 'animal welfare' is within the scope of application of Article 174 EC, albeit that animal welfare cannot be regarded a 'general principle of Community law'.[120] In general, however, animal welfare will find its regulatory basis in the Treaty provision on the Common Agricultural Policy (CAP); the Articles 32 *et seq.* EC.[121] It is also possible that

[115] Cf. the renumbered Article 191 FEU after the entry into force of the Reform Treaty.

[116] Although Article 174 EC defines the objectives to be pursued in the context of environmental policy, Article 175 EC constitutes the legal basis on which Community measures are adopted; Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, para. 43.

[117] Cf. also the European Council's Declaration on the environmental imperative of 15 June 1990, Bulletin EC 1990 No. 6, at 16-20.

[118] Cf. Krämer (2007) at 2 who refers to an all-embracing concept.

[119] Cf. Directive 1999/ 22 relating to the keeping of wild animals in zoos, OJ 1999 L 94/24.

[120] Case C-189/01 *Jippes a.o.* [2001] ECR I-5689, paras. 71-79. See in general on animal welfare: the Amsterdam Treaty Protocol on protection and welfare of animals, OJ 1997 C 340/110. Cf. Krämer (2007) at 2-3.

[121] For instance Directive 1999/74 laying down minimum standards for the protection of laying hens, OJ 1999 L 203/53. See on CAP also Chapter 2, section 7.1.

certain aspects of animal welfare are integrated in secondary legislation. For instance, Article 4 (1)(b)(iii) of the Pesticide Directive 91/414 stipulates that a plant protection product is not authorised unless 'it does not cause unnecessary suffering and pain to vertebrates to be controlled'.[122]

Not only measures which result *directly* in the improvement of the environment fall under this objective, but also those which *result* in the improvement of the environment in a more indirect fashion fall within its scope.

> In the preamble to Directive 2003/4 on public access to environmental information, it is stated that 'increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making *and, eventually, to a better environment.*'[123] More generally, it is arguable that decision-making in respect of the non-substantive or procedural aspects of environmental legislation, such as issues of legal protection, authorisation procedures and even measures concerning the administrative organisation of the environment sector, is also within its compass.

A political 'hot potato' was dealt with by the Court in Case C-176/03 *Commission* v. *Council*.[124] The concerned the question to what extent, if any, Article 175 EC can or even must be used as legal basis to harmonise national criminal law. Based on Title VI of the EU Treaty, in particular, Articles 29 EU, 31(e) EU and 34(2)(b) EU the Council adopted Framework Decision 2003/80 on the protection of the environment through criminal law.[125] In essence, this framework decision laid down a number of environmental offences, in respect of which the Member States were required to introduce criminal penalties. The Commission challenged the Council's choice of Title VI EU as the legal basis for the framework decision. It submitted that the purpose and content of the latter are within the scope of the Community's powers on the environment, as they are stated in Articles 174 to 176 EC. The Court of Justice started its findings by pointing at Article 47 EU, which provides that nothing in the EU Treaty is to affect the EC Treaty and that it is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the EU Treaty do not encroach upon the powers conferred by the EC Treaty on the Community. The Court acknowledged that the framework decision did indeed entail partial harmonisation of the criminal laws of the Member States and that as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. However, the Court followed by noting that this 'does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an

[122] Cf. Case T-229/04 *Sweden* v. *Commission*, judgment of 11 July 2007, n.y.r. in the ECR.

[123] OJ 2003 L 41/26, emphasis added by the authors. Cf. Lee (2005) at 69-73.

[124] Case C-176/03 *Commission* v. *Council* [2005] ECR I-7879. See on European environmental criminal law in general Comte (2005) and Comte & Krämer (2004).

[125] OJ 2003 L 29/55.

essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers *necessary* in order to ensure that the rules which it lays down on environmental protection are fully effective.' [emphasis added] The framework decision had as its main purpose the protection of the environment (and not harmonising criminal law as such) and therefore could have been properly adopted on the basis of Article 175 EC.

> The Commission, in the aftermath of Case C-176/03, made a proposal for a Directive on the protection of the environment through criminal law.[126] The proposed directive establishes a minimum set of serious environmental offences that should be considered criminal throughout the EU when committed intentionally or with serious negligence. The scope of liability of legal persons is defined in detail. For offences committed under certain aggravating circumstances the minimum level of maximum sanctions for natural and legal persons is subject to approximation, too. It is in particular this part of the proposal, which goes well beyond the level of harmonisation of the annulled Framework Decision in Case C-176/03. In view of the ECJ judgment in Case C-440/05, to be discussed *infra*, it is questionnable whether the Council and European Parliament are competent to accept this proposal under Article 175(1) EC alone.

The judgment in Case C-176/03 was confirmed in Case C-440/05 *Commission v. Council*.[127] In that case the Commission was seeking annulment of Council Framework Decision 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.[128] However, the Court made it in that case perfectly clear that 'the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence'. In sum: whenever criminal penalties are essential for combating serious offences against the environment Article 175 EC provides for the correct legal basis to require Member States to introduce such penalties, but it does not provide a legal basis to determine the *type* and *level* of criminal penalties. This would require legislative measures under the Third Pillar of the EU Treaty. However, this debate on the use of correct legal basis for harmonising environmental criminal will become, more or less, obsolete after the entry into force of the Reform Treaty. In general, the 'depillarisation' undertaken by the Reform Treaty will cause that the 'ordinary legislative procedure' is applicable for both European environmental law as for European criminal law.

In the pre-Maastricht period, the territorial limitation of the environmental objectives was a matter for discussion. In other words, can the the European legislature act not so much to protect its own environment, but to preserve the environment outside the EU, to address global and regional environmental prob-

[126] COM (2007) 51 final.

[127] Judgment of 23 October 2007, n.y.r. in the ECR.

[128] OJ 2005 L 255/164.

lems, or even the environment of other states? Since 'Maastricht' this problem of interpretation has largely been resolved now the fourth objective of Article 174 EC explicitly includes 'promoting measures at international level to deal with regional or worldwide environmental problems.' This objective will be discussed in slightly more detail below.

An entirely different matter is the question whether the EU is entitled to concern itself with local and regional environmental problems. Would, for instance, the European legislature have a competence to maximise the allowed noise level caused by local bars and nightclubs? As Article 174 EC does not contain any such restriction, this must be regarded as a possibility.[129] Of course, the principle of subsidiarity would have to be taken into consideration here, which might require restraint in this respect. Article 2(3) of the Habitats Directive is relevant in this context. Protective measures taken pursuant to this directive must explicitly take account of 'regional and local characteristics.'

The last problem of interpretation that must be discussed concerns the formulation 'preserving, protecting and improving'. This is also broadly and flexibly worded. It affords possibilities to take environmental measures of a preservative, curative, repressive, precautionary and active nature. There is no question of a restriction to a certain type of measure.

> A reference to 'preserving, protecting and improving the quality of the environment' can, for example, be found in the preamble to Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies and Directive 2006/7 concerning the management of bathing water quality.[130]

Protecting human health

The most important question of interpretation in respect of this objective is whether 'protecting *human* health' is a wider concept than protecting *public* health. The answer must be that it is. Protection of public health indicates measures required to protect the *collective* health interests of people in a given society. However, the wording of Article 174 EC makes action possible even when it is not so much a collective interest that is at stake as the interest of certain individuals or groups in society.[131] Of course, the principle of subsidiarity must be taken into account in such cases.

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[129] Cf. however Case C-309/96 *Annibaldi* [1997] ECR I-7493 where the Court ruled that as the law stands at present, regional legislation, which establishes a nature and archaeological park in order to protect and enhance the value of the environment and the cultural heritage of the area concerned, applies to a situation which does not fall within the scope of Community law. The case concerned the authorities' refusal to grant Annibaldi permission to plant an orchard of 3 hectares within the perimeter of a regional park.

[130] OJ 2006 L 264/13 and OJ 2006/64/37.

[131] See for a reference to '*personal* health' point 2 of the preamble of Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment

It should be noted that the distinction between the two concepts has become somewhat blurred in the judgments of the Court of Justice, for example, in the *Fumicot* case, where the applicability of Article 30 EC to measures restricting the importation of plant protection products was at issue.[132] This provision does in fact talk of the protection of health and life of humans, animals or plants, and not of 'public health'. However, in its judgment (at paragraph 13), the Court equates the two concepts: 'In that respect, it is not disputed that the national rules in question are intended to protect public health and that they therefore come within the exception provided for in Article 36 [now Article 30, authors].'

A second problem of interpretation concerns the fact that the article only refers to human health. Does this therefore mean that the protection of animal health and flora and fauna must be regarded as lying outside the scope of the objective? On the other hand, it has been shown above that the protection of flora and fauna may be included within the first objective mentioned in Article 174 EC. The restriction of the second objective to the protection of human health does not therefore seem essential.

Various references to this objective can, for example, be found in Directive 2001/18 on the deliberate release into the environment of genetically modified organisms.[133] According to Article 1 of the Directive its objective is 'to protect human health and the environment'. A similar reference can be found in Article 1 of the new Bathing Water Directive.[134]

Prudent and rational utilisation of natural resources

It is understood that according to international law, states have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies.[135] It is also understood that to achieve sustainable development states should reduce and eliminate unsustainable patterns of production and consumption.[136] In the Sixth Environment Action Programme, a prudent use of natural resources has been acknowledged as a condition for sustainable development.[137] However, what precisely should be understood by 'natural resources' is not entirely clear.[138] From an international law point of view, Princi-

(OJ 2003 L 156/17): 'Community environmental legislation includes provisions for public authorities and other bodies to take decisions which may have a significant effect on the environment as well as on personal health and well-being'.

[132] Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277.

[133] OJ 2001 L 106/1.

[134] Directive 2006/7 concerning the management of bathing water quality OJ 2006 L 64/37.

[135] Cf. Principle 2 of the so called Rio Declaration on Environment and Development.

[136] Principle 9 of the Rio Declaration.

[137] Decision 1600/2002, OJ 2002 L 242/1. Cf. also the reference in Article 21(f) EU after amendment by the Reform Treaty.

[138] Cf. the Communication from the Commission 'Thematic Strategy on the sustainable use of natural resources', COM (2005) 670 final.

ple 2 of the Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration)[139] may offer some assistance. Here natural resources are taken to mean: 'natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems [...]'. The following natural resources can assumed to be included: wood, minerals, water, oil, gas and chemical substances. Sevenster mentions the following policy items which might give some indication as to what might fall under the management of natural resources: nature conservation, soil protection, waste disposal (encouraging re-use), policy on urban areas, coastal areas and mountainous areas, disaster policy, water management, an environmentally friendly agricultural policy and energy-saving.[140] On the basis of the above, it can be concluded that this objective also has a wide scope.

> References to this objective can be found in e.g. Directive 91/676 on nitrates[141] (protection of living resources), in Regulation 2422/2001 on a Community energy efficiency labelling programme for office equipment[142] (rational use of energy), Directive 1999/94 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars[143] and the Water Framework Directive (surface waters and groundwater).[144]

The inclusion of this objective in the Treaty at the time of the Single European Act was accompanied by the following declaration in the Final Act: 'The Conference confirms that the Community's activities in the sphere of the environment may not interfere with national policies regarding the exploitation of energy resources.'[145] In our opinion only limited value must be attached to this declaration. Firstly, because in legal terms such declarations derogate but little from the express text of the EC Treaty and, secondly, because it refers only to the *exploitation* and not the *use* of energy resources.

Regional or worldwide environmental problems

At the time of the Single European Act, the question of to what extent the environmental objectives were limited in a territorial sense was a matter of discussion. In the present version of the Treaty, it has at any rate become clear that Article 174 EC does in principle allow room for extraterritorial environmental objectives. By the inclusion of 'promoting measures at international level to

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[139] *ILM* 1972, at 1416.

[140] Cf. Sevenster (1992) at 100. Cf. also Krämer (2007) at 14.

[141] OJ 1991 L 375/1.

[142] OJ 2001 L 332/1.

[143] OJ 1999 L 12/16.

[144] Directive 2000/60 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1. Cf. also Directive 2006/7 concerning the management of bathing water quality OJ 2006 L 64/37.

[145] Cf. in general Wägenbauer & Wainwright (1997).

deal with regional or worldwide environmental problems', existing practice has been confirmed.[146]

An important part of European environment policy is not concerned primarily with protecting the EU's own environment, but the environment outside the EU. The Sixth Environment Action Programme stresses the need for a positive and constructive role of the European Union in the protection of the global environment.[147] The carrying capacity of the global environment is even regarded as one of the Community's objectives to be pursued at the international level. The following legislative measures are examples of its concern and responsibility for the environment outside the EU:

- Regulation 3254/91 prohibiting the introduction of pelts;[148]
- Regulation 348/81 concerning the protection of whales;[149]
- Directive 89/370 concerning the importation of skins of seal pups;[150]
- the measures in Regulation 259/93 concerning the export of waste to countries outside the EC;[151]
- Regulation 338/97 on the protection of species of wild fauna and flora by regulating trade therein;[152]
- Regulation 2493/2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries;[153]
- Regulation 2494/2000 on measures to promote the conservation and sustainable management of tropical forests and other forests in developing countries.[154]

However, even some directives that are primarily designed to protect the EU environment contain references to 'the global environment' or the environment of 'third countries'.

For example, the overall objective of Directive 99/31 on the landfill of waste refers to measures to prevent negative effects on the environment, 'and on the global

[146] Cf. Krämer (2007) at 3. The Reform Treaty will amend this objective by adding 'and in particular combating climate change' at the end of the sentence. Cf. also Article 3(5) EU after the entry into force of the Reform Treaty: the Union 'shall contribute to [...] the sustainable development of the Earth'.

[147] Decision 1600/2002 laying down the Sixth Community Environment Action Programme, OJ 2002 L 242/1.

[148] OJ 1991 L 308/1.

[149] OJ 1981 L 39/1.

[150] OJ 1989 L 163/37.

[151] OJ 1993 L 30/1. Cf. the 'new' Regulation 1013/2006 on shipments of waste, OJ 2006 L 190/1. Regulation 1013/2006 will repeal Regulation 259/93 with effect from 12 July 2007.

[152] Regulation 338/97, OJ L 61/1.

[153] OJ 2000 L 288/1. This regulation also stresses that sustainable development in particular relies on the integration of the environmental dimension into the development process.

[154] OJ 2000 L 288/6.

environment, including the greenhouse effect'.[155] Another example is provided by Article 1 of Directive 94/62 on packaging and packaging waste.[156] The directive specifically aims to protect the environment of all Member States as well as of third countries.

In addition, the EC is a party to several multilateral conventions which have an extraterritorial objective, such as the 1985 Vienna Convention for the protection of the ozone layer and the 1987 Montreal Protocol, the 1989 Basel Convention on the control of transboundary movements of waste, the 1992 Framework Convention on Climate Change and subsequent Protocols[157] and the 1992 Convention on Biological Diversity.[158] All implementing measures of the EC are of course also directed to the global or extra-territorial objectives of the agreements.

Although there is ample practice of European legislative measures aiming to protect the environment outside the EU, the phrase 'regional or worldwide environmental problems' is still unclear in several respects. For example, is it intended to exclude unilateral measures? A large part of the EU's present extraterritorial environment policy has in fact been created by means of such measures. Nor is it clear whether, by referring only to 'regional or worldwide' problems, action to protect the environment of only one or a few third states is excluded. Take, for example, a prohibition on imports of tropical hardwood that has not been sustainably produced. It is highly debatable whether this would amount to a regional or worldwide environmental problem. In general, this kind of case will involve specific consequences for the environment in one state or a number of states.

For the time being, there is a lot to be said in favour of not interpreting Article 174 EC too narrowly. Nor should unilateral environmental measures or environmental measures directed at protecting the environment in only one state or a few states *a priori* be excluded, even though the problem of the international law constraints of such measures is at its most pronounced in this very case. Article 174 EC leaves room to seek to attain extraterritorial protective objectives, though this power should be interpreted in accordance with principles of public international law. Support for this view can be found both in the Treaty and in the case law of the Court of Justice.

With respect to the Treaty, we may point to Article 299 EC, which provides that the Treaty applies to the states named in the article. According to general

[155] Article 1 of Directive 1999/31, OJ 1999 L 182/1. Other measures aimed at reducing emissions causing global warming include, e.g., Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ 2003 L 275/32.

[156] See, for example, Directive 94/62 on packaging and packaging waste, OJ 1994 L 365/10. The directive aims to protect the environment of all Member States *as well as of third countries* (Art. 1).

[157] OJ 1994 L 33/13.

[158] OJ 1993 L 309/1.

principles of international law, this means that the Treaty in any event binds the parties with respect to the entire territory over which they are sovereign, unless the Treaty itself allows exceptions or applies special rules. As Article 299 EC does not contain any reference to the territory of the Member States, it cannot be regarded as limiting the territorial scope of the Treaty to territory which falls under the sovereignty (or full jurisdiction) of the Member States. The scope of the Treaty and other European law may indeed extend beyond that territory, to the extent international law allows the Member States to exercise a limited functional jurisdiction.

Directive 2001/81 on national emission ceilings for certain atmospheric pollutant provides a rare example of an environmental measure explicitly expanding its scope beyond the 'territory' of the Member States.[159] Article 2 states: 'This Directive covers emissions in the territory of the Member States *and their exclusive economic zones* from all sources of the pollutants referred to in Article 4 which arise as a result of human activities.'[160] With respect to the Habitats Directive, we may also refer to an English High Court judgment applying that directive to the UK's Continental Shelf.[161]

Examples outside the environmental sector are the competence of Member States in respect of the Continental Shelf, the fishery zones and any exclusive economic zones. Being able to exercise such powers outside the direct territory of the EU Member States is conditional on the subject matter of the functional jurisdiction falling within the material sphere of operation of the relevant Treaty provisions, and on the provisions themselves not containing any restriction limiting the territorial sphere of operation to the territory of the Member States. This view finds support in the case law of the Court, and particularly in the *Kramer* case.[162] One of the matters at issue was to what extent the authority of the EC extended to fishing on the high seas. After the Court had established that the European legislature had internal competence to adopt measures for the conservation of the biological resources of the seas, it continued 'it follows [...] from the very nature of things that the rule-making authority of the Community *ratione materiae* also extends – in so far as the Member States have similar authority under public international law – to fishing on the high seas.' This judgment was confirmed by the Court in the *Drift-Net* case, in which a prohibition on the use for fishing of drift-nets longer than 2.5 km was held to be valid.[163] The validity of the measure was disputed on the grounds that the EC was not competent to take measures to preserve fish populations in the open sea. The Court dismissed this line of reasoning here, too.

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[159] OJ 2001 L 309/22.

[160] Emphasis added.

[161] English High Court, Queen's Bench Division (Maurice Kay J) 5 November 1999 *Regina* v. *Secretary of State for Trade and Industry*, ex parte *Greenpeace* [2000] Env. L.R. 221. Cf. Case C-6/04 *Commission* v. *UK* [2005] ECR I-9017, para. 119.

[162] Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279.

[163] Case C-405/92 *Etablissements Armand Mondiet* v. *Société Armement Islais* [1993] ECR I-6133.

A translation of the judgments in the *Kramer* and *Drift-Net* cases in terms of environmental law leads to the following conclusion. In so far as the Member States are competent under international law to protect the environment outside their own territories, the EC must also be regarded as being competent to take such measures, at least to the extent the subject matter of the measure falls within the scope of application of Article 174 EC. Action to protect the environment extraterritorially cannot therefore be regarded as being confined to international agreements or to those sectors where regional or global problems are at issue. The fourth indent of Article 174(1) EC should not be interpreted restrictively. In view of the transboundary nature of the environment, this follows – to quote the *Kramer* judgment – 'from the very nature of things'.[164] However, it should be remembered that extraterritorial environmental powers must be exercised in accordance with international law, including the provisions of the WTO.[165] In exercising its extraterritorial powers in respect of the environment, the EC has to act with regard to international law constraints. As has been stated, any interpretation of Article 174 EC, which would bring the EC into conflict with its obligations under international law, must be rejected.

3.2 The Principles of European Environment Policy

Article 174(2) EC sets out the principles on which European environment policy is based.[166] These are:

- the high level of protection principle;
- the precautionary principle;
- the prevention principle;
- the source principle;
- the polluter pays principle and
- the safeguard clause.

European environmental legislation will have to translate these principles into concrete obligations for the Member States. It will then be possible to interpret directives and regulations in the light of these principles. In this chapter, section 2, we have discussed in the context of the integration principle the question to

[164] English High Court, Queen's Bench Division (Maurice Kay J) 5 November 1999 *Regina* v. *Secretary of State for Trade and Industry*, ex parte *Greenpeace* [2000] Env. L.R. 221 which ruled, relying *inter alia* on the *Kramer* case that the Habitats Directive is also applicable outside the territorial waters of the UK.

[165] See in a general sense the Court's judgment in Case C-286/90 *Anklagemindigheden* v. *Poulsen and Diva Navigation* [1992] ECR I-6019. See also Article 9 of Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements: 'Member States shall apply the provisions of this Directive without any discrimination in form or in fact against foreign ships and in accordance with applicable international law, including Section 7 of Part XII of the 1982 United Nations Convention on the Law of the Sea [...].' Cf. Wiers (2002) and Montini (2005) with respect to the WTO.

[166] Cf. in general De Sadeleer (2005) and on the way national courts apply the European environmental principles Macrory (2004).

what extent these principles are legally enforceable. We concluded that only in very exceptional cases would a measure be susceptible to annulment because the environmental principles of Article 174(2) EC were not sufficiently taken into account.

High level of protection

Article 174(2) EC provides that a European environment policy shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. This high level of protection principle is one of the most important substantive principles of European environment policy. It is stated at various places in the EC Treaty. It was the Treaty of Amsterdam which ensured that the principle was included in the general objectives of the EC Treaty. Under Article 2 EC, it is a task to promote 'a high level of protection and improvement of the quality of the environment'. Nevertheless, it should be quite clear that a high level of protection is not the same thing as the *highest* possible level of protection.[167]

As such, this 'high level of protection' principle is of course not new. The 'old' Article 100a(3) EEC, included in the Treaty by the Single European Act, provided that the Commission, in its internal market proposals in the field of environmental protection would take as a base a high level of protection. This proposal was criticised as being directed only at the Commission and that the Council, as the ultimate decision-making body, could depart from the Commission's proposals. It was also doubtful to what extent the obligation in the article was open to review by the courts. Suppose the Council were to have taken its decision in conformity with the Commission's proposal. Could it then have been argued before the courts that the decision was invalid if it did not take as a base a high level of protection? It seemed hardly conceivable. As amended by the Amsterdam Treaty the Article 95(3) EC now reads as follows:

> 'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.'

This provision makes it quite clear that the high level of protection principle is directed not only at the Commission, but also at the European Parliament and Council in their legislative capacity. However, the 'seek to achieve' formulation still makes it doubtful indeed whether this principle is subject to review in a

[167] Cf. Case C-284/95 *Safety Hi-Tech Srl* v. *S. & T. Srl* [1998] ECR I-4301, para. 49: 'whilst it is undisputed that Article 130r(2) of the Treaty requires Community policy in environmental matters to aim for a high level of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be the highest that is technically possible.'

court of law to challenge the legality of the measures adopted by the Council.[168] Krämer however argues that where a Commission proposal is not based on high level of environmental protection, the European Parliament has right of action against the Commission under Article 230 EC. We fail to see however how a proposal of the Commission can be regarded as an 'act' in the meaning of Article 230 EC.[169]

That the enforceability of the principle is limited is also apparent from the text of Article 174(2) EC. European policy 'shall aim' at a high level of protection 'taking into account the diversity of situations in the various regions of the Community.' In fact this addition is totally unnecessary, as a similar formulation is also included in Article 174(3) EC, second indent. It is now stated twice.

An explicit reference to this principle can, for instance, be found in Directive 96/61 concerning integrated pollution prevention and control, the so-called IPPC Directive.[170] Its aim is to achieve integrated prevention and control of pollution 'in order to achieve a high level of protection of the environment taken as a whole.' Other examples of legislation containing such references in their preambles include Regulation 1013/2006 on shipments of waste and Directive 2002/49 relating to the assessment and management of environmental noise.[171] Also the, current, Sixth Community Environment Action Programme contains various references to this principle.[172]

The precautionary principle[173]

Since 'Maastricht' the Treaty has stated that Community policy on the environment shall be based on the precautionary principle. This principle has its roots in what is described in German environmental law as the *Vorsorgeprinzip*.[174] This means that, if there is a strong suspicion that a certain activity may have environmentally harmful consequences, it is better to act before it is too late rather than wait until full scientific evidence is available which incontrovertibly shows the causal connection.[175] In other words, the principle of precaution may therefore justify action to prevent damage in some cases even though the causal link cannot be clearly established on the basis of available scientific

[168] Cf. Van Caltster & Deketelaere (1998) at 15 and Krämer (2007) at 11-12.

[169] Krämer (2007) at 13.

[170] OJ 1996 L 257/26.

[171] OJ 2006 L 190/1 and OJ 2002 L 189/12.

[172] Decision 1600/2002 laying down the Sixth Community Environment Action Programme, OJ 2002 L 242/1.

[173] Cf. in general, Trouwborst (2006), De Sadeleer (2006) and Lee (2005) at 97 *et seq.*

[174] Cf. Marr & Schwemer (2003).

[175] Cf. also Principle 15 of the Rio Declaration: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

evidence.[176] Its objective is to avoid potential risks.[177] Or as some authors have put it: *in dubio pro natura*.[178] Another implication of the precautionary principle, at least according to the Commission, is that the EC has the right to establish the level of protection of the environment, human, animal and plant health, that it deems appropriate.[179]

According to the Commission guidelines the precautionary principle is all about risk-management which does not mean that all risks must be reduced to zero. Judging what is an acceptable level of risk for society is a political responsibility. Where action is deemed necessary, measures based on the precautionary principle should be proportional to the chosen level of protection, non-discriminatory in their application, consistent with similar measures already taken, based on an examination of the potential benefits and costs of action or lack of action and subject to review in the light of new scientific data.

In the meantime, the precautionary principle has been applied by the Court of Justice in its case law. Where there is uncertainty as to the existence or extent of risks to human health, the *institutions* may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.[180] This case law show the consequences of the precautionary principle for the interpretation of the first sentence of Article 174(3) EC, which provides that in preparing its policy on the environment, the EC shall take account of 'available scientific and technical data'. In the 'old' days, this could easily have been used by the EC as a ground for not acting until there was absolute proof of the causes of certain undesirable environmental effects. Such an interpretation would now be at odds with the precautionary principle.

With respect to the Member States, the Court acknowledged the importance of the precautionary principle in applying so called 'safeguard clauses' in directives.[181]

With respect to the safeguard clause of Article 12(1) of Regulation 258/97,[182] the Court of Justice ruled that:[183]

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[176] The Communication of the Commission Single Market and the Environment, COM (99) 263. Cf. Heyvaert (2006).

[177] Case T-229/04 *Sweden* v. *Commission*, judgment of 11 July 2007, n.y.r. in the ECR, para. 161.

[178] Backes & Verschuuren (1998) at 43.

[179] COM (2000) 1, containing Commission guidelines on how to apply the precautionary principle.

[180] Cf. Case C-157/96 *National Farmers' Union a.o.* [1998] ECR I-2211, para. 63 and Case C-180/96 *UK* v. *Commission* [1998] ECR I-2265, para. 99. Cf. also Joined Cases T-125/96 *Boehringer* [1999] ECR II-3427.

[181] See on safeguard clauses this chapter, section 3.2 in particular.

[182] Which reads: 'Where a Member State, as a result of new information or a reassessment of existing information, has detailed grounds for considering that the use of a food or a food ingredient complying with this regulation endangers human health or the environment, that Member State may either temporarily restrict or suspend the trade in and use of the food or food ingredient in question in its territory. It shall immediately inform the other Member States and the Commission thereof, giving the grounds for its decision.'

[183] Case C-236/01 *Monsanto* [2003] ECR I-8105.

> 'protective measures may be taken pursuant to Article 12 of Regulation No 258/97 interpreted in the light of the precautionary principle even if it proves impossible to carry out as full a risk assessment as possible in the particular circumstances of a given case because of the inadequate nature of the available scientific data [...].
>
> Such measures presuppose, in particular, that the risk assessment available to the national authorities provides specific evidence which, without precluding scientific uncertainty, makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available and the most recent results of international research that the implementation of those measures is necessary in order to avoid novel foods which pose potential risks to human health being offered on the market.'

Indeed, the inadequate nature of available scientific data does not preclude a Member State or the EC institutions from taking protective measures. However, the Court of Justice is not giving a *carte blanche* either in the sense that the burden of proof is reversed unreservedly.[184] Nor will mere hypothetical risks suffice for taking action.[185] Protective measures can be adopted only if a risk assessment has first carried out which is as complete as possible given the particular circumstances of the individual case, from which it is apparent that, in the light of the precautionary principle, the implementation of such measures is necessary in order to ensure that there is no danger for the human health and the environment.

The case law on safeguard clauses in directives is also relevant with respect to the application of Article 95(5) EC. This provision requires 'new scientific evidence' in order to accept Member States' introducing environmental legislation derogating from internal market measures. Article 95 EC should be interpreted in the light of the precautionary principle.[186] Of course, this does not mean that the precautionary principle implies that the conditions for application of that provision do not have to be met at all.[187] Finally, it is the authors' opinion that the Member States' powers under Article 30 EC and the 'rule of reason' must be interpreted in the same manner.[188]

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[184] See, for instance, Case C-314/99 *Netherlands* v. *Commission* [2002] ECR I-5521, where the Court annulled Section 3 of the Annex to Commission Directive 1999/51 (tin, PCP and cadmium). The Commission acknowledged in that case that it did not possess sufficiently reliable scientific information for the measures taken.

[185] Case T-229/04 *Sweden* v. *Commission*, judgment of 11 July 2007, n.y.r. in the ECR, para. 161. This case concerned the annulment of Commission Directive 2003/112 to include paraquat as an active substance ex Article 5 of the Pesticide Directive 91/414.

[186] Cf. Commission Decision 1999/832, OJ 1999 L 329/25 (*Dutch creosote*). See also Chapter 3, section 6.

[187] Joined Cases T-366/03 and T-235/04 *Land Oberösterreich and Austria* v. *Commission* [2005] ECR II-4005, para. 71.

[188] See Chapter 6, section 5.3.

A fine example of the precautionary principle in secondary law can be found in Directive 98/81 on the contained use of genetically modified micro-organisms (GMMs).[189] Article 5(4) states that where there is doubt as to the appropriate classification of GMMs, the more stringent protective measures shall be applied unless sufficient evidence, in agreement with the competent authority, justifies the application of less stringent measures.

Another example can be found in Annex IV of Directive 96/61 (the IPPC Directive).[190] Annex IV contains considerations to be taken into account when determining best available techniques 'bearing in mind the likely costs and benefits of a measure and the principles of precaution and prevention'. One of the considerations is formulated as 'the need to prevent or reduce to a minimum the overall impact of the emissions on the environment and the risks to it'. With respect to definition of 'waste', it is also clear that this concept has to be interpreted in the light of the precautionary principle.[191]

With respect to the Habitats Directive, Article 6(3) must be mentioned. According to the first sentence of it, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The ECJ has held that the requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned.[192]

The prevention principle

European policy on the environment shall be based on the principle that preventive action should be taken. The principle of preventive action was included in the Treaty by the Single European Act. Put simply, prevention is

[189] OJ 1998 L 330/13. See also Article 1 of Regulation 1946/2003 on transboundary movements of genetically modified organisms, OJ 2003 L 287/1. Cf. also Case C-6/99 *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651, in which the French *Conseil d'Etat* asked the Court for a ruling on whether the precautionary principle permits national authorities to refuse market access for transgenic products, where the Commission has already approved the grant of such an authorisation. The Court said they could not, stating that observance of the precautionary principle was observed in Directive 90/220 itself.

[190] OJ 1996 L 257/26. See on this directive Chapter 8, section 5.

[191] E.g. Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paras. 22 and 23. See also Chapter 8, section 15.1.

[192] Case C-6/04 *Commission* v. *UK* [2005] ECR I-9017, para. 54. Cf. also Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee* [2004] ECR I-7405, para. 58. The Court ruled 'that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle'.

better than cure. The prevention principle allows action to be taken to protect the environment at an early stage. It is no longer primarily a question of repairing damage after it has occurred. Instead the principle calls for measures to be taken to prevent damage occurring at all.

This is demonstrated by Directive 94/62 on packaging and packaging waste.[193] The directive makes it quite clear that the best means of preventing the creation of packaging waste is to reduce the overall volume of packaging. Article 9 of the directive requires Member States to ensure that packaging may be placed on the market only if it complies with all essential requirements defined by the directive. The prevention principle must not be confused with the precautionary principle, which is in essence more far-reaching (see above).[194]

Pollution prevention is of course also the key word in the IPPC Directive.[195]

The Third Environmental Action Programme focused strongly on the prevention principle.[196] Prevention rather than cure was the central theme of this programme. According to the programme the following conditions must, *inter alia*, be met, if the prevention principle is to have full effect:

- the requisite knowledge and information must be improved and made readily available to decision-makers and all interested parties, including the public;[197]
- it is necessary to formulate and introduce procedures for judgment which will ensure that the appropriate facts are considered early in the decision-making processes relating to any activity likely to affect the environment significantly. The Environmental Impact Assessment (EIA) Directive should be noted in this connection.[198] The preamble to the EIA Directive, referring to the first three Environmental Action Programmes, states 'that

[193] OJ 1994 L 365/10.

[194] See for another example in the waste sector the 'Community Strategy for Waste Management' COM (96) 399 final. This states that, as regards the prevention principle, the following measures should be particularly developed promotion of clean technologies and products, reduction of the hazardousness of wastes, the establishment of technical standards and possibly EC-wide rules to limit the presence of certain dangerous substances in products, the promotion of reuse and recycling schemes, the appropriate use of economic instruments, eco-balances, eco-audit schemes, life-cycle analysis and actions on consumer information and education as well as the development of the eco-label system. Cf. also Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland* [2000] ECR I-4475, paras. 39-40 in which the Court of Justice relied on the prevention principle to interpret the concept of 'waste' of the Waste Framework Directive. Cf. also Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, where the Court used the precautionary principle and the prevention principle to interpret certain aspects of Annex II of the Waste Framework Directive.

[195] Directive 96/61 concerning integrated pollution prevention and control, OJ 1996 L 257/26.

[196] OJ 1983 C 46/1.

[197] See, for example, Directive 2003/4 on public access to environmental information, OJ 2003 L 41/26.

[198] Directive 85/337, OJ 1985 L 175/40.

the best environment policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects'. For the same reason, account should be taken of the consequences of planning and decision-making processes for the environment at as early a stage as possible. Environmental impact assessment is an excellent example of an instrument in which the principle of prevention plays a vital role;

- the implementation of adopted measures must be monitored to ensure their correct application and their adaptation if circumstances or new knowledge should so require. Relevant in this respect are provisions in directives concerning the adaptation of technical standards to technical and scientific progress.[199]

Another example is Directive 80/68 on the protection of groundwater.[200] This directive imposes extensive monitoring and survey requirements on Member States. Before the competent authorities may grant an authorisation to discharge substances, a detailed investigation of the effects on the environment must have been carried out.

Finally, we can mention Regulation 842/2006 on certain fluorinated greenhouse gases which contains various references to the prevention and minimisation of emissions of fluorinated greenhouse gases.[201]

The source principle

European policy on the environment shall be based on the principle that environmental damage should as a priority be rectified at its source. According to the source principle, damage to the environment should preferably not be prevented by using end-of-pipe technology. This principle also implies a preference for emission standards rather than environmental quality standards, especially to deal with water and air pollution. Environmental directives requiring the Member States to reduce the emissions is not dependent on the general environmental situation of the region in which the emissions occur.[202] This preference becomes abundantly clear if the water quality legislation is examined.[203]

Other references to the source principle can be found in Directive 2002/96 on waste electrical and electronic equipment[204] (WEEE Directive) and in the EIA Directive 85/337.

[199] For example, Article 13 of the Sewage Sludge Directive 86/278, OJ 1986 L 181/6.

[200] OJ 1980 L 20/43.

[201] OJ 2006 L 161/1.

[202] Cf. Case C-364/03 *Commission* v. *Greece* [2005] ECR I-6159, para. 34 with respect to emissions of sulphur dioxide and nitrogen oxide under Directive 84/360,

[203] Directive 2006/11 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community; OJ 2006 L 64/52. See also Chapter 8, section 10.3.

[204] OJ 2002 L 37/24

The principle was given an unexpected dimension in the *Walloon Waste* case, where the Court of Justice applied it in determining to what extent Walloon measures restricting imports of foreign waste were discriminatory.[205] The Court held that the principle means that every region, municipality or other local authority must take those measures which are necessary to ensure the reception, processing and removal of its own waste. The waste must be disposed of as close as possible to the place of production in order to limit its transport as far as possible. Consequently, the Court held that, in view of the differences between the waste produced at various locations and the connection with the place of its production, the Walloon restrictions could not be considered discriminatory. In this case, the source principle was thus equated with what is known as the proximity principle in waste law.[206]

In the waste case *Sydhavnens Sten & Grus*, the Court seems to be willing to apply the source principle in a more direct manner.[207] In that case, the Court ruled that the source principle could not serve to justify *any* restriction on waste exports, but only when the waste in question is harmful to the environment. By implication the Court acknowledged that Member States are entitled to impose export restrictions on waste if this is necessary for the protection of the environment. Moreover, the concept of protection of the environment is to be interpreted in the light of the source principle.

The polluter pays principle

Action is based on the principle that the polluter should pay. This principle was one of the cornerstones of a European environment policy even before it was incorporated into the Treaty. It was referred to as a principle of Community environment policy in the First Action Programme on the Environment.[208] In simple terms: this is the principle that the costs of measures to deal with pollution should be borne by the polluter who causes the pollution.

The polluter pays principle is set out in a Communication from the Commission to the Council in 1975 regarding cost allocation and action by public authorities on environmental matters.[209] As far as we know, the 1975 communication is still the guiding principle for policy in that respect. The communication is not as such binding. The Council has however recommended that Member States conform to the principles contained in the communication. Both the communication and the recommendation were prompted by the consideration that the costs connected with the protection of the environment against pollution should be allocated according to the same principles throughout the EU.

This is, on the one hand, to avoid distortions of competition affecting trade, which would be incompatible with the proper functioning of the common

[205] Case C-2/90 *Commission* v. *Belgium* [1992] ECR I-4431.

[206] See Chapter 8, section 15. See also Case C-422/92 *Commission* v. *Germany* [1995] ECR I-1097.

[207] Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, para. 48.

[208] OJ 1973 C 112/1. Cf. on the polluter pays principle in general Vandekerckhove (1994).

[209] OJ 1975 L 194/1.

market, and on the other, to further the aims set out in the First Action Programme on the environment. This programme is based on the principle that charging polluters the costs of action to combat the pollution they cause will encourage them to reduce that pollution and endeavour to find less polluting products or technologies. This would enable a more rational use to be made of scarce environmental resources. Apart from the use of charges, the principle can also be implemented by imposing environmental standards. Companies, which are required to observe environmental standards, will have to make various investments in their production process if they are to comply with the statutory standards. Setting standards in this way also helps ensure the polluter bears the cost of pollution.

The EU must therefore ensure, especially by laying down standards, environmental charges or creating a system of environmental liability,[210] that persons who are responsible for pollution in fact bear the cost. In other words, environmental protection should not in principle depend on policies which rely on grants of aid and place the burden of combating pollution on society. On the other hand, the polluter pays principle also seems to require that a European measure must avoid putting burdens on persons and undertakings for the elimination of pollution to which they have not contributed.[211]

The polluter pays principle is of particular relevance with respect to the Guidelines on state aid for environmental protection.[212] According to the Commission, the costs associated with protecting the environment should be internalised by firms just like other production costs. Aid control and environmental policy must, in the Commission's view, also support one another in ensuring stricter application of the polluter pays principle.[213]

Several references to the polluter pays principle can be found in EC secondary legislation. Article 15 of Directive 75/442 on waste[214] states that, in accordance with the polluter pays principle, the cost of disposing of waste must be borne by:

- the holder who has waste handled by a waste collector or by an undertaking authorised to carry out waste disposal activities or
- the previous holders or the producer of the product from which the waste came.

[210] Cf. Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 L 143/56. Article 1 reads: 'The purpose of this Directive is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage.'

[211] Case C-293/97 *Standley* [1999] ECR I-2603.

[212] OJ 2001 C 37/3. See Chapter 7, section 7.3.

[213] See, for example, the Commission Decision in the *Cartiere del Garda* case, OJ 1993 L 273/51, where the Commission directly examined a national aid measure in the light of the polluter pays principle. In that case the Commission concluded that the proposed aid 'does not meet the polluter pays principle'. For a discussion of this case see Chapter 7, section 7.1.

[214] OJ 1975 L 194/47.

Article 14 of Directive 75/439 on the disposal of waste oils[215] provides that indemnities may be granted to collection and/or disposal undertakings for services rendered. These indemnities may be financed by a charge imposed on products, which after use are transformed into waste oils, or on waste oils. The financing of indemnities must be in accordance with the polluter pays principle (Article 15). According to the Court of Justice in the *ADBHU* case, provisions like these do not conflict with the Treaty rules on state aid.[216]

Outside environmental law, in view of the integration principle, a reference can be found in Directive 2006/38 on the charging of heavy goods vehicles for the use of certain infrastructures.[217] A fairer system of charging for the use of road infrastructure, for instance through the variation of tolls to take account of the environmental performance of vehicles, was felt necessary by the European legislature in order to encourage sustainable transport in the EU.

The safeguard clause

Harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures; for non-economic environmental reasons, subject to a European inspection procedure.

This clause is clearly of a different order from the above principles. It is debatable whether its place in the Treaty, next to the true principles, is well chosen. The second paragraph of Article 174(2) EC provides that a directive or regulation may include a safeguard clause allowing Member States to take measures to protect the environment in cases of urgency.

In practice, there are many examples where this kind of safeguard clause is actually embodied in the legislative act in question. For example, Article 11 of Directive 91/414 concerning the placing of plant protection products on the market[218] provides that, where a Member State has valid reasons to consider that a product which is authorised under the directive constitutes a risk to human or animal health or the environment, it may provisionally restrict or prohibit the use and/or sale of that product on its territory.

Another example of such a safeguard clause can be found in Article 32 of the Biocides Directive: 'Where a Member State has valid reasons to consider that a biocidal product which it has authorised, registered or is bound to authorise or register pursuant to Articles 3 or 4, constitutes an unacceptable risk to human or animal health or the environment, it may provisionally restrict or prohibit the use or sale of that product on its territory. It shall immediately inform the Commission and the other Member States of such action and give reasons for its decision. A decision shall be taken on the matter within 90 days'.[219]

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[215] OJ 1975 L 194/31.

[216] Case 240/83 *ADBHU* [1985] ECR 531. See also XXIVth Competition Report, point 388.

[217] OJ 2006 L 157/8.

[218] OJ 1991 L 230/1.

[219] Directive 98/8, OJ 1998 L 123/1.

Similar safeguard provisions can be found particularly in those environmental directives where there is a strong link with the functioning of the Internal Market. It is the authors' opinion that these safeguard clauses must be interpreted in line with the precautionary principle.[220]

3.3 The Policy Aspects to be Taken into Account

According to Article 174(3) EC the Community shall, in preparing its policy on the environment, take account of:

- available scientific and technical data;
- environmental conditions in the various regions of the Community;
- the potential benefits and costs of action or lack of action;
- the economic and social development of the Community as a whole and the balanced development of its regions.

By comparison with the formulation of, for instance, the integration principle in Article 6 EC ('must be integrated'), the language of this paragraph ('take account of') is much less forceful. Account shall be taken of the policy aspects referred to in it. The Treaty does not therefore prescribe observance of these criteria in all cases. It is true that inclusion of these policy aspects does not imply that the environmental objectives of Article 174(1) EC are in a legal sense subordinate to them. However, in practice, Member States will no doubt seize on them to delay environmental policies that do not suit them.

Available scientific and technical data

It is said that the function of this criterion under the Single European Act was to ensure the EC would only act when sufficient scientific data was available to prove that a given activity or product – for example, CFCs in aerosols – would have a harmful effect on the environment – in this case depletion of the ozone layer. As has already been shown in the discussion of the precautionary principle, a different interpretation would now seem more appropriate.[221] Indeed, all kinds of provisional, indicative and tentative scientific data may now be sufficient to require protective measures and action by the EC.

[220] See this chapter, section 3.1.

[221] See this chapter, section 3.1. See for an example of connecting the precautionary principle with this policy aspect: Annex II of Directive 2001/18 on the deliberate release into the environment of genetically modified organisms (OJ 2001 L 106/1). According to this annex the environmental risk assessment to be carried out prior to a release of GMOs should be carried out 'in accordance with the precautionary principle' 'in a scientifically sound and transparent manner based on available scientific and technical data'.

References to 'available scientific and technical data' can, *inter alia*, be found in the Bathing Water Directive and in the Water Framework Directive.[222] The Nitrates Directive, for instance, requires in Article 5 that the action programmes be established in respect of so-called 'vulnerable zones'. The action programmes shall take into account 'available scientific and technical data, mainly with reference to respective nitrogen contributions originating from agricultural and other sources'.[223]

The case law of the Court shows that decisions based on inadequate scientific and technical data can result in an annulment.[224]

Environmental conditions in the various regions

Application of this criterion entails a differentiated environmental policy based on the quality of the environment in a given region.

A good example can be found in the Nitrates Directive. The action programmes to be established in respect of vulnerable zones have to take into account 'environmental conditions in the relevant regions of the Member State concerned'. With respect to recovery of costs for water services the Water Framework Directive requires (Article 9) 'have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected'.

This criterion may also give rise to the assumption that there is a preference for environmental quality objectives rather than emission limits. After all, the quality of the receiving environment would then determine the extent of emission of pollutants. However, from the point of view of the source principle, there is a preference for emission standards rather than environmental quality standards. It is up to the European legislature to consider in more depth the relative merits of these different aspects.

On the other hand, the criterion could also be applied differently. Additional protective measures might well be called for precisely in order to conserve those areas in which the environmental quality is high.

See, for example, the 'old' air quality directives of the 1980s.[225] These directives enable Member States to lay down more stringent air quality standards than those set out in the directives, for zones, which in the view of the Member State, require

[222] Directive 2006/7 concerning the management of bathing water quality, OJ 2006 L 64/37 and Directive 2000/60 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1.

[223] Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ 1991 L 375/1.

[224] E.g. Case C-3/00 *Denmark* v. *Commission* [2003] ECR I-2643. See also Chapter 3, section 6.

[225] See for instance Article 4(2) of Directive 85/203 on air quality standards for nitrogen dioxide (OJ 1985 L 87/1): 'In zones which the Member State concerned considers should be afforded special environmental protection, it may fix values which are generally lower than the guide values in Annex II'.

special protection from an environmental point of view. This approach has been followed in Article 9 of Directive 96/62 on ambient air quality assessment and management, according to which Member States shall draw up a list of zones and agglomerations in which the levels of pollutants are below the limit values.[226] They are required to maintain the levels of pollutants in these zones and agglomerations below the limit values and shall endeavour to preserve the best ambient air quality, compatible with sustainable development.

Potential benefits and costs

This criterion requires that the potential costs and benefits of action be assessed. Besides producing benefits for the environment, environmental action by the EC entails costs for Member States, in the sense of legislation, administrative organisation, enforcement, etc., and for private actors, such as industrial plants which cause pollution, and manufacturers and importers of goods and products which are harmful to the environment. Viewed in this way, the criterion could be seen as prompting application of the principle of proportionality, and thus adding little to what has already been provided in the third paragraph of Article 5 EC.

It is the authors' opinion that the concept of 'best *available* technology/techniques' is clearly related to this criterion.

An 'early' example of this can be found in Article 4 of Directive 84/360 on the combating of air pollution from industrial plants.[227] An authorisation may only be issued when the competent authority is satisfied that 'all appropriate preventive measures against air pollution have been taken, including application of the best available technology, provided that the application of such measures does not entail excessive costs'. The IPPC Directive also provides an example of this in its definition of the term 'best available techniques': '"Available" techniques shall mean those developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, *taking into consideration the costs and advantages*, whether or not the techniques are used or produced inside the Member State in question, as long as they are reasonably accessible to the operator'. [228]

A final example might be Euratom Directive 96/29 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation.[229] One of its basic general principles is the so called 'justification principle' according to which practices resulting in exposure

[226] OJ 1996 L 296/55.

[227] OJ 1984 L 188/20.

[228] Article 2(1) of Directive 96/61, OJ 1996 L 257/26, emphasis added. Reference to this definition can also be found in other environmental directives. E.g. Directive 2006/66 on batteries and accumulators and waste batteries and accumulators, OJ 2006 L 266/1, preamble point 17.

[229] OJ 1996 L 159/1.

to ionizing radiation are justified by their economic, social or other benefits in relation to the health detriment they may cause.

Further references to 'potential benefits and costs' can be found in the preamble of the Water Framework Directive and in the Council Resolution the drafting, implementation and enforcement of Community environmental law.[230]

Economic and social development of the Community as a whole and the balanced development of its regions

In fact this aspect is an elaboration of the more general principle contained in Article 15 EC. Differentiated environmental policies may be adopted, whether or not on a temporary basis, depending on the economic and social development of certain regions. This opens – it goes without saying, in addition to the possibilities provided by the Treaty in the context of 'closer cooperation' under Article 11 EC – the possibility of a multi-speed environmental policy.

An example of such a multi-speed policy was given by Directive 88/609 on the limitation of emissions of certain pollutants into the air from large combustion plants.[231] Article 5 provided that Spain was temporarily entitled to apply less stringent emission standards than those normally laid down by the directive. This was explained in the preamble to the directive by pointing out that Spain considered it needed a particularly high amount of new generating capacity to allow for its energy and industrial growth.

Another example can be found in Directive 94/62 on packaging and packaging waste.[232] Article 6(7) provides that Greece, Ireland and Portugal may, because of their specific situations, namely respectively the large number of small islands, the presence of rural and mountain areas and the current low level of packaging consumption, decide to:

a) attain, no later than 30 June 2001, lower targets than those fixed in paragraphs 1(a) and (c), but shall at least attain 25% for recovery or incineration at waste incineration plants with energy recovery; b) postpone at the same time the attainment of the targets in paragraphs 1(a) and c) to a later deadline which shall not, however, be later than 31 December 2005; c) postpone the attainment of the targets referred to in paragraphs 1(b), (d) and (e) until a date of their own choice which shall not be later than 31 December 2011.

A further reference to this criterion can be found in the preamble of the Water Framework Directive.[233]

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[230] Directive 2000/60 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1; Resolution of 7 October 1997, OJ 1997 C 321.

[231] OJ 1988 L 336/1. The directive is repealed from 27 November 2002 by Directive 2001/80 on the limitation of emissions of certain pollutants into the air from large combustion plants, OJ 2001 L 309/1.

[232] As amended by Directive 2004/12 on packaging and packaging waste, OJ 2004 L 47/26.

[233] Directive 2000/60 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1.

Apart from giving certain Member States the power to derogate from European standards, the element of economic and social development can also be translated in terms of financial support by the EC for those Member States, which find it difficult to meet the standards required by a directive.

An example of this is the Habitats Directive 92/43.[234] Article 8 provides for a system of co-financing where measures to protect priority natural habitats and priority species would result in excessive financial burdens for some Member States.

Another example is provided by Article 175(5) EC. If the Council adopts an environmental measure based on Article 175(1) EC, which involves disproportionately high costs for the public authorities of a Member State, the Council can lay down appropriate provisions in the form of temporary derogations and/or financial support from the Community's Cohesion Fund (Article 161 EC).[235]

[234] OJ 1992 L 206/7.

[235] For a more detailed discussion of the phenomenon of the Community's environmental aid, see Chapter 7, section 7.4.

mentation by decentral authorities according to which the central government is ultimately responsible.[24]

Finally, there is Article 10 EC, by which the Member States are required to facilitate the achievement of the EU's tasks. In order to fulfil this task properly the Commission must be fully informed of the measures adopted by Member States for the purpose of implementing decisions of the EU institutions. The practical significance of this became apparent in the Court's judgment in the *Campania* case.[25] Under the Waste Directives, Member States must draw up a report on the measures taken to implement their obligations in respect of waste disposal and send it to the Commission. The Commission had asked the Italian Government for information concerning the quantities produced, the methods employed and the importation of waste into the region of Campania. The Italian Government maintained that it was not obliged to furnish the information requested, because this went beyond the obligation to produce the reports. The Court rejected this argument and held that Italy had failed to meet its obligations under Article 10 EC:

> 'In so far as it concerned the disposal of waste covered by the directive on waste and the directive on toxic and dangerous waste and the competent authority for disposal operations, that request for information came within the scope of the Commission's power to supervision. The inaction on the part of the Italian Government, which thus prevented the Commission from obtaining an accurate picture of conditions in Campania, must be treated as a refusal to cooperate with that institution.'

The Court added that the Italian Government was in any case obliged to explain its position further. This case could be taken to imply an obligation on the Member States to provide information to the Commission, even where there are no explicit provisions, where the information relates to matters within the scope of application of a directive and the information would enable the Commission to exercise its task of monitoring compliance with the directive.[26]

3 Environmental Impact Assessment

Environmental impact assessment was first introduced by the US National Environmental Policy Act 1969.[27] It is a procedural instrument that implements the prevention principle by requiring an assessment of the

[24] See Chapter 4, section 2.8, e.g. Case C-87/02 *Commission* v. *Italy* (*Lotto Zero*) [2004] ECR I-5975, para. 38.

[25] Case C-33/90 *Commission* v. *Italy (Campania)* [1991] ECR I-5987.

[26] The Court seems to have confirmed this in Case C-285/96 *Commission* v. *Italy* [1998] ECR I-5935.

[27] 42 USC 4321-4347.

environmental effects of certain decisions in advance.[28] In the EU environmental assessment is required for certain projects and plans. For *projects* the legal framework consists of the Environmental Impact Assessment (EIA) Directive.[29] Environmental assessment for *plans* and *programmes* is governed by the Strategic Environmental Assessment (SEA) Directive.[30] Below, first the EIA Directive will be discussed

3.1 The Scope of the EIA Directive

Article 2(1) of the EIA Directive is one of the central provisions and requires that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent[31] and an assessment with regard to their effects. Article 2(1) of the directive results in a very wide scope, that is limited in a number of ways. Article 1(1) states that the directive shall apply to public and private projects which are likely to have significant effects on the environment. For the purposes of the directive, 'project' means the execution of construction works or of other installations or schemes, or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. Article 1(4) allows for the Member States to decide that 'projects serving national defence purposes' are outside the scope of the EIA Directive.[32] In the *Bozen* case the Court ruled:

> 'That provision thus excludes from the Directive's scope and, therefore, from the assessment procedure for which it provides, projects intended to safeguard national defence. Such an exclusion introduces an exception to the general rule laid down by the Directive that environmental effects are to be assessed in advance and it must accordingly be interpreted restrictively. Only projects which mainly serve national defence purposes may therefore be excluded from the assessment obligation.
>
> It follows that the Directive covers projects, such as that at issue in the main proceedings which, as the file shows, has the principal objective of restructuring

[28] See on the subject in general Holder (2004) and Moreno (2005). See, concerning the EIA Directive, Case C-392/96 *Commission* v. *Ireland* [1999] ECR-5901, para. 62.

[29] Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40, as amended by Directive 97/11, OJ 1997 L 73/5 and Directive 2003/35, OJ 2003 L 156/17.

[30] Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, OJ 2001 L 197/30.

[31] On the definition of this concept see Case C-290/03 *Barker* [2006] ECR I-3949, paras. 39-41.

[32] These decisions must be taken on a case-by-case basis. Moreover, this may only take place if the Member States consider that applying the EIA Directive would adversely affect the national defence purposes. The fact that this exemption has to take place on a case-by-case basis excludes blanket-decisions exempting all national defence projects from the scope.

> an airport in order for it to be capable of commercial use, even though it may also be used for military purposes.'[33]

However, Article 1(5) provides that the directive is not to apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of the directive, including that of supplying information, are achieved through the legislative process. In the *Bozen* case the Court clarified its position.[34] In order to be able to apply the exemption two conditions have to be met. The first requires the details of the project to be adopted by a specific legislative act; under the second, the objectives of the directive, including that of supplying information, must be achieved through the legislative process. With regard to the first condition the Court argued that the legislative act, which grants the developer the right to carry out the project, must be specific and display the same characteristics as the development consent and must lay down the project in detail. It is only by complying with such requirements that the objectives referred to in the second condition can be achieved through the legislative process.

Concerning the temporal scope of the directive there have been a number of cases dealing with the so-called 'pipeline-problem'.[35] This refers to the fact that the projects the EIA Directive refers to can take many years to complete. In the meantime the balance between (economic) progress and environmental protection may have shifted, leading to requests for assessments.[36] As a result there have been questions on the applicability of the EIA Directive to projects that were said to have started before the deadline for implementation of the EIA Directive had passed. The applicability of the EIA Directive hinges on whether or not the application for development consent was lodged before the deadline for implementation, 8 July 1988 for Directive 85/337.

This was ruled in the *Bund Naturschutz* case in response to questions from the *Bayerische Verwaltungsgerichtshof* on the permissibility of national transitional rules, the Court pointed out that:[37]

> 'there is nothing in the directive which could be construed as authorizing the Member States to exempt projects in respect of which the consent procedures were initiated after the deadline of 3 July 1988 from the obligation to carry out

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33 Case C-435/97 *World Wildlife Fund* v. *Autonome Provinz* [1999] ECR I-5613, paras. 65-66.

34 Case C-435/97 *World Wildlife Fund* v. *Autonome Provinz* [1999] ECR I-5613, paras. 55-63. Cf. for some national case law on Article 1(5): the Danish Supreme Court ruling of 2 December 1998 on the building of the Öresund bridge, *Greenpeace* v. *Minister of Traffic*, EfR. 1999.367 H (referred to by Peter Pagh in *YEEL* (2000) at 474-475 and the Dutch *Raad van State* 16 June 1995 [1995] *M&R* 93 on the *Deltawet Grote Rivieren*, legislation containing rules on the repair of river-dykes.

35 See for this terminology Case C-201/02 *Wells* [2004] ECR I-723, para. 48.

36 See, for example, the reverie by Advocate General Mischo in Case C-81/96 *B en W Haarlemmerliede en Spaarnwoude* v. *GS van Noord-Holland* [1998] ECR I-3923, para. 32.

37 Case C-396/92 *Bund Naturschutz* v. *Bayern* [1994] ECR I-3717.

an environmental impact assessment. On the contrary, all the provisions in the directive were formulated on the basis that it was to be transposed into the legal systems of the Member States by 3 July 1988 at the latest.

Accordingly, regardless whether the directive permits a Member State to introduce transitional rules for consent procedures already initiated and in progress before the deadline of 3 July 1988, the directive in any case precludes the introduction in respect of procedures initiated after that date of rules such as those at issue in the main proceedings by a national law, which, in breach of the directive, transposes it belatedly into the domestic legal system. Such an interpretation would result in an extension of the deadline of 3 July 1988 and would be contrary to the obligations under the directive.'[38]

The Court added to that in the *Großkrotzenburg* case that informal contacts between the competent authority and the developer, even relating to the content and proposal to lodge an application for consent for a project, cannot be treated for the purposes of applying the directive as a definite indication of the date on which the procedure was initiated. The date when the application for consent was *formally* lodged constitutes the sole criterion which may be used.[39]

Following the amendment by Directive 97/11, the EIA Directive makes clear that the EIA Directive in its current form will only apply if a request for development consent is submitted after 14 March 1999 (the deadline for implementation of Directive 97/11).[40]

3.2 Projects Subject to an EIA

Even when a project is within the scope of the directive, an assessment is not always required. The directive distinguishes between so-called Annex I projects which are always made subject to an assessment (Article 4(1)) and Annex II projects where the Member States shall determine through a case-by-case examination, and/or thresholds or criteria set by the Member State whether the project shall be made subject to an assessment (Article 4(2)).

When a case-by-case examination is carried out or thresholds or criteria are set, the relevant selection criteria set out in Annex III shall be taken into account. These include both the characteristics of the project (its size, the accumulation with other projects, the use of natural resources, the production of waste, pollution and nuisances, the risk of accidents), its location (the environmental sensitivity of geographical areas likely to be affected) and the characteristics of the potential impact (the extent of the impact, the transfrontier nature, the magnitude and complexity, the probability and the duration, frequency and reversibility of the impact).

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[38] Case C-396/92 *Bund Naturschutz* v. *Bayern* [1994] ECR I-3717. Cf. also Case C-301/95 *Commission* v. *Germany* [1998] ECR I-6135.

[39] Case C-431/92 *Commission* v. *Germany (Großkrotzenburg)* [1995] ECR I-2189.

[40] Directive 97/11, OJ 1997 L 73/5, Article 3(3).

Under the 'old' directive the Court set clear limits on the Member States' powers when setting thresholds. Ruling on Belgian legislation which excluded certain whole classes of projects listed in Annex II from the requirement of an impact assessment, the Court held that the criteria and/or the thresholds mentioned in Article 4(2) were designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement of assessment, not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged as taking place on the territory of a Member State.[41] In the *Kraaijeveld* case the Court confirmed this position and stated it more precisely.[42] The Court acknowledged that Article 4(2) of the directive conferred on Member States a measure of discretion to specify certain types of projects which would be subject to an assessment. However, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely to have significant effects on the environment are to be subject to an impact assessment. The question of whether, in laying down such criteria, the Member State went beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project. It depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State.

In Case C-392/96 the Court ruled against the way Ireland had made use of its discretion to set thresholds. On the setting of 'absolute thresholds' the Court ruled that 'a Member State which established criteria or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the directive'.[43] On the 'cumulative effect' of projects the Court ruled in the same case that the Member States must ensure that the objective of the legislation would not be circumvented by the splitting of projects:

> 'Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive.'[44]

Annex I projects include crude-oil, thermal power stations and other combustion installations, various nuclear installations, integrated works for the initial smelting of cast-iron and steel, installations for the extraction of asbestos, integrated chemical installations, construction of lines for long-distance railway traffic,[45] construction of motorways,[46] inland waterways and ports, waste disposal

[41] Case C-133/94 *Commission* v. *Belgium* [1996] ECR I-2323. Cf. on the question of the interpretation of the concept of classes of projects, Case C-301/95 *Commission* v. *Germany* [1998] ECR I-6135, paras. 38-46.

[42] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

[43] Case C-392/96 *Commission* v. *Ireland* [1999] ECR I-5901, para. 65.

[44] Case C-392/96 *Commission* v. *Ireland* [1999] ECR I-5901, para. 76.

[45] Case C-227/01 *Commission* v. *Spain* (*Valencia-Tarragona railway*) [2004] ECR I-8253, paras. 48-54.

[46] Case C-87/02 *Commission* v. *Italy* (*Lotto Zero*) [2004] ECR I-5975, paras. 41-49.

installations, groundwater abstraction or artificial groundwater recharge schemes, waste water treatment plants, extraction of petroleum and natural gas for commercial purposes, dams, pipelines for the transport of gas, oil or chemicals, installations for the intensive rearing of poultry or pigs,[47] quarries and open-cast mining, construction of overhead electrical power lines, and installations for storage of petroleum, petrochemical, or chemical products. Some of these projects are subject to a threshold. Where the threshold is not exceeded the project will generally be covered by Annex II. Annex II also contains a whole list of projects, ranging from reclamation of land from the sea and installations for the slaughter of animals, tourism and leisure projects[48] such as ski-runs, ski lifts and cable-cars to urban development projects.[49]

Annex II also covers any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (changes or extensions not listed in Annex I).[50] The same applies to projects in Annex I.[51]

The Court's case law already clarified that modifications to projects listed in Annex II are not *a priori* exempted from the directive.[52]

3.3 The EIA Procedure

The directive allows Member States considerable freedom as to the manner in which the assessment should be carried out. Article 5(3) provides that the information to be provided should include at least:

- a description of the project comprising information on the site, design and size of the project;
- a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;
- the data required to identify and assess the main effects which the project

[47] Case C-121/03 *Commission* v. *Spain* (*Pig Farms in Baix Ter*) [2005] ECR I-7569, paras. 86-98.

[48] Case C-117/02 *Commission* v. *Portugal* (*Hotels in the Sintra-Cascais site of Community importance*) [2004] ECR I-5517. This case shows that the mere fact that a project takes place in a national park does not mean that it will have significant effects on the environment, paras. 80-88.

[49] Case C-332/04, *Commission* v. *Spain* (*Cinema in Paterna*) [2006] ECR I-40, paras. 70-88. This case shows that the mere fact that a project is implemented in an urban area is not enough to rule out possible environmental effects, particularly if the cinema is presented to be the second-largest in Europe attracting more than 60,000 people per week. Cf. also the intensity of review to be exercised by national courts the English Court of Appeal 14 February 2003 *Goodman and Hedges* v. *LB Lewisham and Big Yellow Property Co. Ltd.* [2003] EWCA Civ 140.

[50] See for instance Case C-431/92 *Commission* v. *Germany* [1995] ECR I-2189.

[51] Annex I, point 22.

[52] Case C-435/97 *World Wildlife Fund* v. *Autonome Provinz* [1999] ECR I-5613, para. 39: 'the mere fact that the Directive did not expressly refer to modifications to projects included in Annex II, as opposed to modifications to projects included in Annex I, did not justify the conclusion that they were not covered by the Directive'. Cf. also Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, para. 40.

is likely to have on the environment;
- an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;
- a non-technical summary of the information.

Annex IV contains details of the information to be supplied. Besides this the directive lays down rules that have to be complied with before consent for a project is given. Consultation of the public is inherent in the EIA-instrument, and has been reinforced by the amendments to the EIA Directive by Directive 2003/35 on public participation.[53] Member States are required to ensure that any request for development consent and any information in that connection is made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted (Article 6(2)). Even though Article 6(2) is silent on this point, the Court has ruled that Member States may require a reasonable sum for this information.[54] They must also take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent (Article 6(1)).[55] The logical consequence of these provisions is that the results of consultations and the information gathered must be taken into consideration in the development consent procedure (Article 8).

According to Article 2(2) the EIA may be integrated into the existing procedures for consent to projects in the Member States. The question to what extent an *ordinary* environmental authorisation procedure, in other words one that is not a specific EIA procedure, complies with the directive's requirements was addressed by the Court in Case C-431/92.[56] The Court seems to have accepted this as long as all the requirements of the directive have been complied with.[57] The same rationale – one that hinges on the effectiveness of the EIA Directive – can also be seen in the case law on the time of an EIA in a multi-stage procedure. Normally, an EIA should be carried out at the earlier stage, but when

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53 See further section 6.3 below.

54 Case C-216/05 *Commission* v. *Ireland* [2006] ECR I-10787, paras. 42-47, where a fee of €20 or 45 was considered reasonable an not to constitute an obstacle to the participation rights.

55 However, according to Article 6(3) the Member States can determine the details for such information and consultation; cf. Case C-216/05 *Commission* v. *Ireland* [2006] ECR I-10787, paras. 24-28.

56 Case C-431/92 *Commission* v. *Germany* [1995] ECR I-2189.

57 Confirmed in Case C-435/97 *World Wildlife Fund* v. *Autonome Provinz* [1999] ECR I-5613, para. 52 and Case C-278/98 *Linster* [2000] ECR I-6817, paras. 49-58. See for an application at national level of this doctrine the judgment of the Swedish Supreme Administrative Court of 16 June 1999, case nos. 1424-1998, 2397-1998 and 2939-1998, RÅ 1999 ref. 76, regarding the cessation of the right to operate the nuclear power reactor Barsebäck 1.

the actual environmental effects can only be known at the later stage, the EIA should also be conducted at that later stage.[58]

Article 2(3) provides that Member States may, in exceptional cases, exempt a specific project in whole or in part from an EIA. However in that case the Member States shall consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public. They must also provide the Commission with the relevant information prior to granting consent.[59]

In case of projects with transboundary effects, the Convention on Environmental Impact Assessment in a Transboundary Context, the so-called Espoo Convention, signed by the EC on 25 February 1991, is relevant. This convention was implemented at the EU level in the form of changes to Article 7 of the EIA Directive.

Where a Member State is aware that a project is likely to have significant transboundary effects or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, *inter alia:*

- a description of the project, together with any available information on its possible transboundary impact;
- information on the nature of the decision which may be taken;
- and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the EIA procedure.

If a Member State which receives the above information indicates that it intends to participate in the EIA procedure, the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State all information to be given pursuant to Article 6(2). The Member States concerned shall also arrange for the information to be made available pursuant to Article 6(3)(a) and (b). They shall ensure that those authorities and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.

Finally, the Member States concerned shall enter into consultations regarding, *inter alia,* the potential transboundary effects of the project and the

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[58] Case C-201/02 *Wells* [2004] ECR I-723, paras. 42-52 and Case C-508/03 *Commission* v. *UK* [2006] ECR I-3969, paras. 104-106 and Case C-290/03 *Barker* [2006] ECR I-3949, paras. 46-48.

[59] Irish legislation failed to meet these requirements; Case C-392/96 *Commission* v. *Ireland* [1999] ECR I-5901, para. 87. According to the Dutch *Raad van State* 16 June 1995 [1995] *M&R* 93, a failure to notify does not affect the legality of the legislation concerned or permits granted on the basis of it. The Commission has published a guidance document concerning this provision on the D-G environment website http://ec.europa.eu/environment/eia/pdf/eia_art2_3.pdf.

measures envisaged to reduce or eliminate such effects and shall agree on a reasonable time frame for the duration of the consultation period.

National legislation transposing the obligations of Article 7 of the directive must contain explicit provisions requiring the authorities to transmit the information to the other Member States.[60]

When a decision to grant or refuse development consent has been taken,[61] Article 9 of the EIA Directive requires the competent authority to inform the public thereof and to make available to the public the following information:

- the content of the decision and any conditions attached thereto;
- having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process;
- a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

Article 10a was introduced by Directive 2003/35 and requires that the Member States grant access to a judicial review procedure for members of the public concerned.[62]

3.4 The Strategic Environmental Assessment Directive

The SEA Directive implements the idea that the environmental effects of certain actions should be identified in advance at an even earlier stage than the EIA Directive.[63] Where the latter requires an EIA for projects, the former applies to the strategic or planning stage that precedes the action project-stage. The integration of environmental concerns at this stage is generally considered to contribute to sustainability.[64] The initial proposal for the SEA Directive dates from 1996,[65] was amended in 1999[66] and resulted in the SEA Directive in 2001.[67] According to Article 13 the SEA Directive had to be implemented before 21 July 2004.[68] The framework of the SEA Directive closely follows that of the EIA Directive.

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60 Case C-392/96 *Commission* v. *Ireland* [1999] ECR I-5901, para. 94. In view of the judgment of the Court in Case C-186/91 *Commission* v. *Belgium* [1993] ECR I-851, Article 7 contains 'rights for individuals'.

61 Such a decision must be explicitly taken, so-called tacit authorisation according to which a positive decision as deemed to have been taken after the expiry of a certain time-limit is not compatible with the EIA Directive, Case C-230/00 *Commission* v. *Belgium* [2001] ECR-4591.

62 See section 6.3 below and Chapter 5.

63 See for an appraisal of the SEA Directive in the light of the EIA Directive, Sheate (2003).

64 Marsden & De Mulder (2005).

65 COM (1996) 511, OJ 1997 C 128/14.

66 COM (1999) 73, OJ 1999 C 83/13.

67 Directive 2001/42, OJ 2001 L 197/30

68 Several Member States failed to implement the SEA Directive on time: see e.g. infringement Case C-159/06 *Commission* v. *Finland* [2006] ECR I-114.

3.4.1 The Scope of the SEA Directive

The SEA Directive applies to plans and programmes. Article 2(a) defines this as 'plans and programmes, including those co-financed by the EU, as well as any modifications to them, which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions'. This very wide definition is narrowed down by Article 3(8). On the basis of this provision, plans and programmes the sole purpose of which is to serve national defence or civil emergency and financial or budget plans and programmes are excluded from the scope of the directive.[69]

For co-financed plans and programmes Article 13(9) contains an exception for plans and programmes co-financed under the 2000-2006 programming period for the 'old' Cohesion Fund Regulation 1260/1999 and the 2000-2006 and 2000-2007 programming periods for the European Agricultural Fund for Rural Development Regulation 1257/1999.

Contrary to the EIA Directive, the SEA Directive contains provisions as regards its temporal scope. According to Article 13(3) the obligation to conduct a prior environmental assessment applies only to plans and programmes of which the first formal preparatory act is subsequent to the deadline for implementation (21 July 2004). Furthermore, for plans and programmes initiated before 21 July 2004 (i.e. pipeline plans and programmes), the environmental assessment obligation applies if these plans and programmes are finally approved only after 21 July 2005. For the pipeline plans and programmes, the Member States can decide that the environmental assessment obligation does not apply on a case-by-case basis if they consider this 'not feasible'.[70]

3.4.2 Plans and Programmes Subject to SEA

According to Article 3(1) all plans and programmes likely to have significant environmental effects are subject to the environmental assessment obligation. Article 3(2) further specifies this by making an environmental assessment mandatory for two categories of plans and programmes. Firstly those which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337. Secondly the plans and programmes which, in view of the likely effect on

[69] This provision can be compared to Article 1(4) of the EIA Directive which will probably result in a narrow interpretation of this exception, see by analogy: Case C-435/97 *World Wildlife Fund* v. *Autonome Provinz* [1999] ECR I-5613, paras. 65-66.

[70] On the basis of the *Kraaieveld* case law of the Court this provision can probably be invoked in order to ascertain whether or not a Member State has exceeded the limits to its discretion set by Article 13(3).

sites, have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive.[71] These categories of plans and programmes are always subject to the environmental assessment obligation unless they involve only minor modifications or small areas at local level (Article 3(3); *de minimis* exception) and the Member States have determined that they are not likely to have significant environmental effects.

Environmental assessment is optional for all other plans and programmes which set the framework for future development consent of projects, insofar as these are likely to have significant environmental effects. (Article 3(4). Article 3(5) requires the Member States to establish a so-called screening mechanism on the basis of which it will be determined whether or not there is a likelihood of significant environmental effects in case of the *de minimis* exception or in their application of the optional environmental assessment. On doing so the Member States have to use the (non-exhaustive) criteria in Annex II. This situation resembles that with regard to Annex II-projects under the EIA Directive and is thus likely to lead to comparable case law. The first indent of point 1 of Annex II, for example, allows the Member States to set quantitative thresholds, similar to the thresholds allowed under Article 4(2) of the EIA Directive.

3.4.3 The SEA Procedure

The SEA procedure is also comparable to the EIA procedure. Basically, an environmental report that will become part of the plan or programme (Article 2(c)) needs to be completed according to Article 5 in connection with Annex I. This report must be completed during the preparation of the plan or programme (Article 4(1) and is subject to consultation (Article 6(1)). The consultation on the basis of the SEA Directive can be transboundary as well (Article 7).[72] The SEA procedure may be integrated into existing procedures or it may take the form of a special procedure to implement the directive (Article 4(2)). As the usefulness of SEA hinges on the quality of the environmental assessment, Article 12(2) constitutes a major step forward compared to the EIA Directive because it requires the Member States to implement some form of quality control for the environmental reports.

Because the plan or programme subject to SEA may also set the framework for future projects subject to EIA, the SEA Directive contains Article 4(3) dealing with so-called 'tiering' of environmental assessment. This addresses the desire to avoid unnecessary duplication of environmental assessments. During the negotiations leading up to the SEA Directive, an amendment was introduced according to which only one environmental assessment (either an SEA or an EIA) would be required. This was rejected, and Article 11(1) explicitly states that the fact that there has been an SEA for a plan does not rule out the

[71] See further section 17.2 of this chapter.

[72] This implements the Espoo convention and the ECE Protocol on strategic environmental assessment to the Espoo convention (Kiev 2003).

requirement of an EIA for a project implementing that plan. This does, however, highlight the problems arising from a wide definition of plans and programmes in connection with an equally wide definition 'project'.[73] This will probably have to be resolved in the form of an integration or consolidation of the EIA and the SEA Directives.

According to Article 8, the environmental report and results of the (transboundary) consultations have to be taking into account in the preparation of the plan or programme. Indications that SEA is more than just a purely procedural tool[74] can be found in Articles 9 and 10. Article 9 requires the final decision on the plan or programme to be communicated to the authorities, the public concerned and the parties in the (transboundary) consultation. Importantly, it also requires the communication of a statement summarising how the environmental considerations have been integrated, thus presuming a duty to integrate them, rather than a duty to take them into account. Moreover, the decision should also include a monitoring mechanism so that the unforeseen significant environmental effects of the implementation of the plan or programme are identified and remedial action is possible (Article 10). The introduction of a monitoring mechanism is a major step forward compared to the EIA Directive where the introduction of a similar obligation met with strong opposition.[75]

4 The Seveso II Directive

Directive 82/501 on the major-accident hazards of certain industrial activities,[76] better known as the Post-Seveso Directive, provided for measures to protect the public and the environment from the consequences of possible major industrial accidents. The immediate reason for drafting the directive was the dioxin disaster in the Italian town of Seveso. The directive was mainly concerned with the prevention of such accidents.

After a number of amendments the directive has now been replaced by Directive 96/82 on the control of major-accident hazards involving dangerous substances the so-called 'Seveso II Directive'.[77] Directive 96/82 is intended to implement the Convention on the Transboundary Effects of Industrial Accidents.[78]

According to Article 1 the directive aims at the prevention of major accidents which involve dangerous substances, and the limitation of their consequences

[73] See further Sheate (2003) at 345.

[74] Lee (2005) at 171.

[75] Sheate (2003) at 346.

[76] OJ 1982 L 230/1, later amended. See on the interpretation of some of its provisions Case C-190/90 *Commission* v. *Netherlands* [1992] ECR I-3265.

[77] OJ 1997 L 10/13, amended by Directive 2003/105, OJ 2003 L 345/97, in the light of recent industrial accidents.

[78] Decision 98/685 concerning the Convention on the Transboundary Effects of Industrial Accidents, OJ 1998 L 326/1.